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# Constitutional Law: Judicial Intervention in Church Property Disputes

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Ohio,[33] Illinois,[34] Oregon,[35] Minnesota,[36] Colorado,[37] and Missouri[38] have denied it. On an analogous issue, if not facts, a federal district court recently took the more conservative approach,[39] while at the same time the Internal Revenue Service took the liberal position.[40]

Examination of the cases from the other states which have granted the exemption indicates that Wisconsin has gone further than the others, with the possible exceptions of Florida, where the exemption was provided by legislative enactment, and Delaware, which seems to allow a property tax exemption for all organizations not organized for profit (in Wisconsin, all Chapter 181 corporations). In the California, Kansas, Montana, and Pennsylvania cases the homes either took some residents who did not pay their full share or their operation showed no overall profit, or both, but Wisconsin has granted the exemption where there is no element of almsgiving at all and the revenues from the residents exceed the operating expenses.

If the Wisconsin legislature did not intend that all non-profit homes for the aged meeting the requirements of Chapter 181 should be exempt from property taxation, some additional guidelines will have to be set forth to determine which homes are benevolent and which are not. Further, if the legislature does feel the *Milwaukee Protestant Home for the Aged* decision is too broad an interpretation, there still remains the problem of whether it can effectively establish definite guidelines requiring a more conservative approach. The job will not be easy.

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**Constitutional Law—Judicial Intervention in Church Property Disputes:** Every year a number[1] of church property disputes come before the civil courts. These controversies arise from schisms, political quarrels within churches, unions or mergers between churches, appointment of clergy, and expulsion of members. Although courts have tradi-

[33] Philadelphia Home Fund v. Board of Tax Appeals, 5 Ohio St. 2d 135, 214 N.E.2d 431 (1966); *see also* Crestview of Ohio, Inc. v. Donahue, 14 Ohio St. 2d 121, 236 N.E.2d 668 (1968).

[34] Methodist Old Peoples Home v. Korzen, 39, Ill. 2d 149, 233 N.E.2d 537 (1968).

[35] Friendsview Manor v. State Tax Comm'n, 247 Ore. 94, 420 P.2d 77 (1966), *aff'd on rehearing*, 247 Ore. 94, 427 P.2d 417 (1967); Oregon Methodist Home v. Horn, 226 Ore. 298, 360 P.2d 293 (1961).

[36] *See* Madonna Towers v. Commissioner of Taxation, 167 N.W.2d 712 (Minn. 1969), which quoted from Wisconsin's dissenting opinion.

[37] United Presbyterian Ass'n v. Board of County Comm'rs, 448 P.2d 967 (Colo. 1968).

[38] Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365 (Mo. 1969).

[39] Bank of Carthage v. United States, 304 F. Supp. 77 (W.D. Mo. 1969) (a federal estate tax exemption was denied to a trust fund claimed to be for "charitable purposes" when the fund was used to maintain a cemetery which provided no free lots).

[40] *See* Rev. Rul. 69-545, 1969 INT. REV. BULL. No. 1969-44, at 10, where the same issue as in the nursing home cases is decided in favor of the tax exemption.

[1] About 10 cases per year from federal courts and the highest state courts appear in the digests.

tionally disavowed jurisdiction over purely ecclesiastical affairs, when the ultimate issue of the intrachurch dispute involves the use of property the courts have always assumed jurisdiction in the interest of peaceable possession. The problem of resolving church disputes has been compounded by the diversity of internal structures among religious groups. Such structures generally can be classified into three categories: congregational, presbyterial, and episcopal.[2] In the congregational form, each local congregation is self-governing. Among the major denominations of this form are the Baptist, the Quaker, the Church of Christ, and some of the Lutheran churches. The presbyterial demoninations are governed by bodies of laymen and ministers in an ascending succession of authority: a presbytery over the local churches, a synod over the presbytery, and a general assembly over all. The principal denominations so organized include the Presbyterian, the Reformed Church in America, the Evangelical and Reformed Church, and some of the Lutheran churches. In the episcopal form the power resides in the clerical hierarchy, usually the bishops. The Roman Catholic, the Eastern Orthodox and the Protestant Episcopal churches are in this category.

The dispute in the recent case of *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*[3] arose when two Georgia Presbyterian churches withdrew from the hierarchical general church organization after the General Assembly of the United Presbyterian Church made certain pronouncements on various issues, including disobedience, international affairs, and the ordination of women. The ministers of the two churches renounced the general church's authority over them. In response, the general church, through the Savannah Presbytery, established an Administrative Commission to seek a conciliation. Because it was unable to reach any agreement with the dissident churches, the Commission proceeded to take over the local churches' property on behalf of the general church. The local churchmen made no effort to appeal the Commission's action to a higher church tribunal, but instead filed suit in the Superior Court of Chatham County to enjoin the general church from trespassing on the property, record title to which was in the local churches. The cases were consolidated for trial and submitted to a jury on the theory that Georgia law implies a trust of local church property for the benefit of the general church as long as the general church adheres to the tenets of faith existing at the time of affiliation by the local churches.[4]

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[2] One study classifies 99 groups having congregational polity, 52 having presbyterial, and 79 having episcopal. W. SPERRY, RELIGION IN AMERICA 283-84 (1946).

[3] 393 U.S. 440 (1969).

[4] GA. CODE ANN. § 22-5506 (1969); Presbyterian Church v. Eastern Heights Presbyterian Church [and Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church], 224 Ga. 61, 159 S.E.2d 690 (1968).

The implied trust theory on which the case was submitted to the jury had its origins in two English decisions rendered by Lord Chancellor Eldon: *Craigdallie v. Aikman*,[5] and *Attorney General ex rel. Mander v. Pearson*.[6] The first case concerned a chapel purchased by a congregation when it seceded from the established Church of Scotland in 1737. A later dispute arose between a majority faction which wished to adhere to the rulings of the judicatory of the secession church and a minority faction which claimed that the secession church had approved a doctrine inconsistent with the original principles of the secession, and yet another sect was formed. Then the question arose as to which of the two groups the chapel belonged. Lord Eldon suggested that the court look to the original principles of the secession and award the use of the property to the group which adhered to those principles, whether or not the group constituted a majority of the congregation. Four years later, in *Pearson*, a minister and a trustee, professing Trinitarianism, sought to enjoin the majority of trustees of a meetinghouse from interfering with the use of the meetinghouse by their retention of a Unitarian minister. Because the dispute was among the trustees in whose name the property was held, Lord Eldon determined that church property was held in trust for the propagation of a particular doctrine, and that it was the duty of the court, whenever disputes arose over who was entitled to the use and possession of church property, to award the property to the faction which adhered to the original tenets of faith. It was the Chancellor's opinion that doctrinal continuity is the essential characteristic of a church and that doctrinal innovation is tantamount to a division of an implied contract which bound the members to adhere to the original tenets of faith.

Although this principle had inherent weaknesses, it became the law in England. The difficulty a court would have in attempting to interpret theological doctrine does not seem to have been contemplated by Lord Eldon. Soon, however, courts found it necessary to distinguish between fundamental (or substantial) deviations from the original tenets which had resulted in a diversion of the implied trust, and those immaterial deviations which could not be held to be such a diversion. For nearly one hundred years courts blandly attempted to apply Lord Eldon's principle of the implied trust to disputes over church property. Finally, in 1904, in *General Assembly of Free Church of Scotland v. Overtoun*,[7] the House of Lords attempted to apply the trust doctrine in awarding 800 churches, three universities, and more than one million pounds of invested funds to a small group of Scotish congregations who claimed that the Free Church had departed from past principles when it merged

[5] 3 Eng. Rep. 601 (H.L. 1813).
[6] 36 Eng. Rep. 135 (Ch. 1817).
[7] [1904] A. C. 515 (Scot.).

with the United Presbyterian Church in 1900. This decision was later reversed by an act of Parliament because of its obvious impracticality.

The implied trust doctrine was never universally adopted in the United States. It received its greatest acceptance in the mid-Atlantic, southern, and midwestern states. In New England, from colonial times on, the pervading preference for congregational self-government cleared the way for early acceptance of the concept of majority determination. When Episcopal groups severed relations with the Church of England following the American Revolution, it was not considered a breach of trust. Later, in Massachusetts, when large numbers of congregations abandoned their beliefs in the Trinity in favor of Unitarianism, the courts held that religious societies were at liberty to change their denomination by virtue of a provision in the Massachsetts state constitution that guaranteed the right of the majority to select its ministers.[8] At the same time that New England was approving a majority determination, judges in other parts of the country were enforcing a rule which closely resembled the English implied trust theory.[9]

Until the 1871 United States Supreme Court decision in *Watson v. Jones*,[10] little federal precedent existed because church disputes were heard in federal courts only on grounds of diversity. No federal question was thought to exist. The facts giving rise to the controversy in the *Watson* case and the facts of the *Hull Memorial Church* case are quite similar, although there is an important difference in that the general church was not a party in *Watson*. In *Watson*, the membership of the Walnut Street Presbyterian Church in Louisville, Kentucky, had divided over the slavery question. A strong minority of the congregation supported slavery, while the majority did not. The General Assembly of the Presbyterian Church had previously adopted an anti-slavery position and therefore recognized the anti-slavery group as entitled to the use of the church property. The Kentucky Court of Appeals, however, awarded the property to the pro-slavery minority. Members of the majority who were residents of Indiana brought suit in federal court on diversity grounds. The United States Supreme Court affirmed the decision of the lower court in favor of the anti-slavery faction on the principle that that faction had been recognized by the highest authority of the Church as entitled to the use of the property. Mr. Justice Miller, writing for the Court, attempted to distinguish this case from *Pearson*. He rejected the English theory of an implied trust, setting forth three general propositions he felt were consistent with the American notion of separation of church and state and to which courts could refer when deciding church property cases.

[8] Baker v. Fules, 16 Mass. 488 (1820).
[9] McBride v. Porter, 17 Iowa 203 (1864); Gibson v. Armstrong, 46 Ky. (7 B. Mon.) 481 (1847).
[10] 80 U.S. (13 Wall.) 679 (1871).

His first rule was that the courts will impose a trust relationship only when the deed to the property explicitly sets forth the uses to which and the teachings for which the property is granted.

> [W]here the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief[,]
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> . . . it would . . . be the obvious duty of the court . . . to see that the property so dedicated is not diverted from the trust . . . .[11]

The second rule provided that, in the case of a congregational schism, the right to control the use of the property lay in the numerical majority of the members. This rule, though dictum, was grounded on the same premise as the third rule, *i.e.*, that the use of the church property should be determined by the persons vested with authority under the rules and practices of the particular denomination. *Watson,* however, was decided on the basis of the third rule, or the rule to be applied to churches in the presbyterial category, and Justice Miller in explaining this rule stated:

> [W]here the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete . . . .
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> . . . whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . . .[12]

This sweeping deference to church tribunals with only very limited civil judicial review was gradually modified in succeeding years, beginning with *Bouldin v. Alexander.*[13] *Bouldin* announced that in order for courts to defer to church tribunals it was necessary for the church authorities to follow their own procedural rules. Basic concepts of equity require that any tribunal, civil or religious, adhere to previously announced rules and regulations for the resolution of controversies which come before it.

The impact of *Watson* was further minimized by *Gonzalez v. Archbishop,*[14] where Mr. Justice Brandeis observed:

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[11] *Id.* at 722-23.
[12] *Id.* at 722, 727.
[13] 82 U.S. (15 Wall.) 131 (1872).
[14] 280 U.S. 1 (1929).

> In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.[15]

The court seems to be saying that not only must the church tribunal follow its own procedural rules, but it must not be guilty of making an arbitrary decision if civil courts are expected to give effect to the decision. With only these slight modifications the Supreme Court continued until the *Hull Memorial Church* case to apply the rules of *Watson* and to look to the church tribunals for settlement of religious questions. But the rules enunciated by Mr. Justice Miller introduced a new legal problem: how to decide which body has the authority to make religious determinations when the right is claimed by more than one group.

In most cases which group constitutes the true governing body is probably obvious, but there have been several recent cases where the issue was the identity of the lawful governing body of the American episcopates of churches with supreme authorities in communist-dominated countries. Following the Russian Revolution of 1917, members of the American Separatist Movement in the Russian Orthodox Church declared their autonomy from the mother church in Russia and disputes arose concerning control of the various churches including the use and occupancy of St. Nicholas Cathedral in New York City, the residence of the ruling archbishop. The New York legislature, in an attempt to free the Russian Orthodox churches from atheistic and subversive influences, enacted a statute[16] which gave control of all churches in New York formerly governed by the mother church in Russia to the American Separatist Movement. In *St. Nicholas Cathedral v. Kedroff*,[17] the New York Court of Appeals upheld the statute as constitutional and dispositive of the case. The United States Supreme Court, however, reversed, holding that Benjamin, the bishop appointed by the Russian Church, was entitled to use and possession of the cathedral.[18] The underlying issue was who had the right to appoint the bishop. The Supreme Court decided, without any explanation, that the right resided with the church in Russia. This finding led to the conclusion that the New York Statute was an unconstitutional transfer of control of the property in violation of the First Amendment.

*Kedroff* added a new dimension to the whole question of church property disputes. Mr. Justice Reed, writing for the court, said in referring to the *Watson* opinion:

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[15] *Id.* at 16.
[16] N.Y. RELIG. CORP. LAW art. 5-C, §§ 105-108 (1952).
[17] 302 N.Y. 1, 96 N.E.2d 56 (1950).
[18] Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

> The opinion in *Watson* radiates, however, a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.[19]

Following the *Kedroff* decision, various writers asserted the proposition that Justice Reed's language elevated church property disputes to a constitutional level, while others reasoned that the constitutional view was an over-extension.[20] The First Amendment language of the Court may have been unnecessary, for it would have reached the same conclusion once the court's findings indicated that the Russian Church had never relinquished control over the property. Under *Watson,* the Court was bound to enforce the determination of the church body having control of the property. In any event, *Kedroff* foretold things to come, for the *Hull Memorial Church* case clearly raises the issue to a constitutional level.

In the trial in the Superior Court of Chatham County, Georgia, the two dissident church groups sought to permanently enjoin the Presbyterian Church in the United States and its officers from interfering with the plaintiff's exclusive use and control of the local property in Savannah. The Superior Court submitted to a jury the question of whether the statements of the church's General Assembly on civil rights, civil disobedience, the Vietnam war, and the change in the church constitution making women eligible to hold church office, constituted a substantial abandonment of the original tenets and doctrines of the Presbyterian Church and whether these actions were utterly variant from the original purposes of the church. The jury found in favor of the local churches and the Superior Court then enjoined the Presbyterian Church in the United States from using the local church properties. The general church appealed to the Supreme Court of Georgia and that court affirmed the judgments of the lower court. The church's motion for a rehearing was denied and it applied for a writ of certiorari which the United States Supreme Court granted so it could consider the First Amendment questions raised by the petitioners.

The United States Supreme Court held that although civil courts are the proper forum for resolving property disputes, the First Amendment forbids them from determining ecclesiastical questions in the process. The case was remanded to the Georgia Supreme Court for de-

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[19] *Id.* at 116.

[20] L. PFEFFER, CHURCH, STATE AND FREEDOM 250 (1953); M. DE WOLFE HOWE, THE JUDICIAL STATUS OF CHURCHES, I CONFERENCE PROCEEDINGS, THE INSTITUTE OF CHURCH AND STATE 6 (1958).

termination of the question on "neutral principles of law."[21] The Supreme Court struck down a portion of the implied trust theory, "[T]he departure-from-doctrine element of Georgia's implied trust theory can play no role in any future judicial proceedings."[22] This being the case, the entire theory must fall. The departure-from-doctrine element was an integral part of the implied trust theory at its inception in the early English decisions[23] and has continued to be an essential factor wherever the theory has been applied. It seems clear, however, that the theory can no longer be the basis for settlement of church property disputes because its application necessitates constitutionally prohibited inquiry into church doctrine and faith.

What then are the criteria of ownership courts should use in the settlement of such disputes? Unfortunately, the Supreme Court did not elaborate as to the meaning of "neutral principles of law." It may be supposed that the reference is to the property laws of the particular jurisdiction in which the forum is located. Does this mean that whichever group holds legal title will prevail in disputes between factions within a denomination, even one with a presbyterial hierarchy? The Georgia Supreme Court's decision on remand seems to so indicate. Without any discussion of equitable principles or equitable trusts, or any reference to the *Watson* principles, the Georgia court awarded the property in dispute to the local churches. But the United States Supreme Court's decision did not disturb the principles of *Watson.* Theoretically then, the ruling of the Church Commission, subject to appeal to the Church's higher tribunal, ought to be determinative. Upon remand, the Supreme Court of Georgia assumed that when Georgia adopted the

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[21] 393 U.S. at 450.

[22] *Id.* at 445.

[23] The Maryland and Virginia Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc., — U.S. — (1970). In a per curiam decision the Supreme Court affirmed a Maryland court's resolution of a church property dispute in which the latter court had awarded the property to a secessionist congregation. The Maryland court had relied upon provisions of state statutory law governing property held by religious corporations, upon the deeds conveying the property to the local church, and upon provisions in the constitution of the General Eldership for its decision. The Supreme Court affirmed the decision with one statement:

> Since, however, the Maryland Court's resolution of the dispute involved no inquiry into religious doctrine . . . the appeal is dismissed for want of a substantial federal question.

The majority did not choose to elaborate any further as to the meaning of "neutral principles of law", but three concurring Justices suggest that a state may adopt any one of various approaches so long as it involves no consideration of doctrinal matters. Thus the States may adopt the approach of *Watson v. Jones* and enforce the property decisions made within a church by a majority of its members in a congregational polity, or the decision of a church tribunal in a presbyterial polity. But there is nothing in the concurring opinion to suggest that a state must adopt the *Watson* formula. Indeed, the opinion provides two other acceptable approaches. Justice Brennan, with whom Justices Douglas and Marshall concurred, cites "neutral principles of law" or the passage of special statutes governing church property arrangements as two alternatives to the application of the *Watson* doctrine.

implied trust theory it did so with the departure-from-doctrine element as a condition. Without the departure-from-doctrine condition, the implied trust theory cannot be applied since there is no other basis for a trust in favor of the general church. The Court then determined that the local churches had legal title by virtue of the original deeds naming them as grantees. The general church never put any funds into either of the churches. On this basis, the judgments of the trial court were affirmed. It seems logical to suppose that the Presbyterian Church in the United States might again seek a hearing in the United States Supreme Court on the grounds that the *Watson* rule for Presbyterial polities has been violated. That rule, simply stated, is that civil courts will accept as conclusive the determinations made by the highest church authorities to which the question has been taken. The general church, through the Commission established by the Savannah Presbytery, has ruled that the property belongs to the general church. Nevertheless, the local church holds legal title and continues in possession under authority of the Georgia Supreme Court's affirmation on remand of the judgments of the trial court. Perhaps the "neutral principles" applied were too neutral, and we will have to await a further clarification from the United States Supreme Court before it can be known what force and effect is to be given in the future to the 100-year-old-rule of *Watson*.

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