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Constitutional Law--The Judicial Role in Intra-Church Disputes in West Virginia

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CONSTITUTIONAL LAW—THE JUDICIAL ROLE IN INTRA-CHURCH DISPUTES IN WEST VIRGINIA

From 1842 to 1969, the Avery United Methodist Church was a local congregation within the United Methodist Church[1] or one of its predecessor organizations. Over the years the congregation occupied a subordinate position within the U.M.C.—it held itself out to the community as a Methodist church, accepted ministerial appointments made by the general church, and paid dues and assessments to the general church. In 1968, the Avery congregation reaffirmed this position by accepting the written law of the U.M.C.—*The Book of Discipline of the United Methodist Church.*

The relationship between the U.M.C. and the Avery congregation came to an abrupt end in February, 1969. Because of dissatisfaction with the theology and government of the general church, the Avery congregation voted unanimously to withdraw from the U.M.C. The newly independent church, known as Avery Chapel, continued to occupy, use, and claim ownership of all of the local church property.[2] Its claim to ownership was based on the fact that the property had been acquired solely by gifts and contributions from local church members and their predecessors without any assistance from the general church.

In support of its claim, the general church relied on the written ecclesiastical law of the U.M.C.—*The Book of Discipline*—which provides that the title to all property of a local church shall be held in trust for the U.M.C. The U.M.C. brought suit in the Circuit Court of Monongalia County to prevent the Avery church congregation from retaining its property after the separation. The court

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[1]Hereinafter referred to as U.M.C.

[2]This property included real estate acquired by four separate conveyances. The deeds were executed and recorded according to W. VA. CODE § 35-1-1 to 13 (1931). In all four deeds, the property was conveyed to named trustees of the church and their successors in office. One deed included additional language imposing limitations and conditions on the use of the property:

> This conveyance is made to the aforesaid Trustees . . . in trust, that said premises shall be used, kept and maintained as a place of divine worship or residence of the Methodist ministery [*sic*] and members of the Methodist Church; subject to the disciplinary usage and ministerial appointments of said church as from time to time is authorized and declared by the General Conference and the Annual Conference within whose bounds the said premises are situated.

Brady v. Reiner, 198 S.E.2d. 812, 822 (W. Va. 1973).

applied church law and ruled in favor of the general church and the trustee of the Avery congregation appealed. *Held*, affirmed. In the absence of an express trust to the contrary, the beneficial ownership of church property is controlled by the usages, customs, discipline, and ecclesiastical law of the general church. *Brady v. Reiner,* 198 S.E.2d 812 (W. Va. 1973).

The *Brady* decision appears to work a substantial hardship on the small congregation of Avery Chapel. Its members and their ancestors contributed their time, labor, and property to the acquisition and improvement of this community church. Yet the general church, which had never aided the Avery congregation financially, was allowed to appropriate all the property to its own use. The individual members probably did not anticipate that their membership in the U.M.C. gave the general church such control. It is equally improbable that the lay members had a thorough understanding of the intricacies of the ecclesiastical law on which the general church predicated its authority. Nevertheless, the law of the general church was held binding on them.

The *Brady* court acknowledged that the local church's position was emotionally persuasive.[3] Legally, however, the court felt obligated to enforce the U.M.C.'s decision to dispossess the Avery congregation. Justice Haden, delivering the court's opinion, reasoned that "When one joins a church and contributes of his time and property to the improvement of the church, he does so with the recognition that, as a condition of membership, he submits himself to the doctrine and rule of the church."[4] Regardless of any actual understanding of such a condition, consent is implied from the fact of membership alone. Therefore, the court cannot interfere with intra-church questions decided in accordance with church law. Although the implied-consent-to-be governed doctrine is consistent with legal theory on implied contracts, there is an obvious inequity involved. This view, in effect, permits one of the parties in a civil suit to decide the disputed issue.[5]

In such a case, however, the task facing the court is more complex than a mere balancing of equities. The final decision of the court must be compatible with a tradition of separation of church and state in addition to the dual constitutional guarantees

[3]*Id.*

[4]*Id.* at 844.

[5]Casad, *Church Property Litigation: A Comment on the Hull Church Case,* 27 WASH. & LEE L. REV. 44 (1970).

of freedom of religion and non-establishment of religion by the state.[6] In order to accomplish this objective, the court must separate questions of religious belief and practice that are within the exclusive province of the church from those questions which fall within the jurisdiction of the civil courts. A dispute over title to property is a legal matter that civil courts are competent to resolve. However, when a religious society is involved in such a suit, the civil courts face the dilemma of how to settle the property question equitably without interfering with religious doctrine.

Since most church affairs revolve around matters of doctrine, it is difficult for the civil courts to avoid interference.[7] To do so, the *Brady* court used a strictly organizational approach, adopting a policy of enforcing the conclusions of those bodies or groups within the established church structure that have the authority to make property determinations. The U.M.C., for instance, is organized into a series of conferences or representative assemblies. Each conference has jurisdiction over all the activities of the local churches in a given area.

For example, the West Virginia Conference has jurisdiction within the State of West Virginia with the exception of Berkley, Jefferson, and Morgan Counties. The conferences, in turn, are ultimately responsible to the General Conference, the highest church authority. Thus, from an organizational standpoint, the decisions of the General Conference and the West Virginia Annual Conference are conclusive with regard to the use and ownership of Avery Chapel's property. Accordingly, in *Brady*, the West Virginia court enforced the decision of these governing bodies. The court's non-intervention policy leaves all questions of equity, as well as those of religious doctrine, to the discretion of the organized church.

The court's approach marks a departure, in part, from prior West Virginia case law.[8] Two earlier cases, *Woodrum v. Burton*[9]

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[6]U.S. CONST. amend. I.

[7]Church doctrine includes the form of church polity or government, the ecclesiastical law regarding property, and the discipline, customs, and usages of a church, written or unwritten. 198 S.E.2d. at 815.

[8]The *Brady* court did rely on a very early West Virginia case for support. Venable v. Coffman, 2 W. Va. 310 (1867), involved an attempt by trustees and members of a local congregation at Lewisburg to separate the local church and its property from the Methodist Episcopal Church of the United States. The local congregation wanted to join a group of churches that had earlier separated from the general church to form the Methodist Episcopal Church South. The deed to the property, however, contained language limiting the holding of the property "for the

and *Canterbury v. Canterbury*,[10] held that a showing of a "vital and substantial departure from fundamental beliefs"[11] was necessary in order for the court to enjoin one faction of the church from the use of church property. *Brady* overruled both of these cases to the extent that they permitted the civil court to make determinations regarding church doctrine. *Woodrum* and *Canterbury* reflected the influence of English case law. Their approach, which *Brady* rejected, was quite similar to Lord Eldon's Rule, the "implied trust—departure from doctrine" rule.[12] Under this rule, the law impressed property contributed to a church with a trust in favor of the fundamental doctrines and usages of the church at the time of the contribution. In the event of a dispute over property within the church, the courts were to award the property to the faction remaining faithful to the original trust. This rule forced the courts to become entangled in abstruse theological questions. Even so, this was acceptable in England where the policy of state involvement in religious matters was institutionalized by the Church of England's relationship with the state.

Although Lord Eldon's doctrine came to the United States as part of the English common law, it was flatly rejected by the United States Supreme Court. In 1871, *Watson v. Jones*[13] held that a review of religious doctrine by a civil court interfered with the religious freedom of all church members. Furthermore, such a determination was deemed incompatible with the tradition of separation of church and state that is fundamental to the American system.

Watson involved a property dispute much like the one in *Brady*. In protest over the general church's anti-slavery stand, a

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use of ministers and members of the Methodist Episcopal Church of the United States of America . . . ." On this basis the court decided that the property belonged to the original church organization, rather than the local congregation:

> They have power to join whatever church they please, however it may be in disregard of the rules and constitution of the church to which they may have formerly belonged, but they cannot by so doing affect the rights of others, nor divert the use of property held in trust for a particular and specified purpose, to another and different purpose, or use.

Id. at 324. This decision was later followed by Kreglo v. Fulk, 3 W. Va. 74 (1868).

[9]88 W. Va. 322, 107 S.E. 102 (1921).

[10]143 W. Va. 165, 100 S.E.2d. 565 (1957).

[11]*Id.* at 180, 100 S.E.2d. at 574.

[12]Attorney-General v. Pearson, 36 Eng. Rep. 135 (Ch. 1817); Craigdallie v. Aikman, 3 Eng. Rep. 601 (H.L. 1813).

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

faction of the congregation of the Walnut Street Presbyterian Church of Louisville renounced the authority of the Presbyterian Church. Those members who remained loyal to the general church brought legal action to remove the dissenters from the local church premises. Viewing the anti-slavery stand of the general church as a breach of church doctrine, the Kentucky court held in favor of the dissenters.[14] On appeal, the Supreme Court rejected the State court's attempt to substitute its own interpretation of church law for that of the proper tribunal within the church hierarchy.[15]

The majority opinion in *Brady* classified intra-church property disputes into three categories. The first of these includes situations in which the church organization is hierarchial, as in the Presbyterian and United Methodist churches. In such cases, the local church is subordinate to the general church and subject to its laws, procedures and government. The second category involves churches with congregational polities in which the local church congregation is wholly autonomous and independent. The final category includes cases in which the deed, will, or other granting instrument contains an express trust that conditions or limits control of the property in some manner.[16]

In accordance with a general policy of non-interference in religious matters, the *Watson* court held that in a case falling within the first two categories the civil court should enforce the decision of the ultimate authority within the church organization.[17] Thus, in a hierarchical church, the court would enforce the conclusion of the highest decision-making body of that church, while in a congregational-type church the majority of the congregation or a designated local body would constitute the ultimate authority. In the event of an express trust, on the other hand, the court should not enforce a determination of the church's highest authority if inconsistent with the uses or dispositions expressly outlined in the

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[14]Watson v. Avery, 2 Bush. 363 (Ky. 1868).

[15]The language in *Watson* is very similar to that in *Brady:*

> [W]henever 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, in their application to the case before them.

80 U.S. (13 Wall.) at 727.

[16]The 1949 deed in the Brady case provides an example of an express trust situation. The pertinent sections of this deed are set out in note 1 *supra.*

[17]80 U.S. (13 Wall.) at 725, 727.

granting instrument. Instead, the court should enforce the trust according to the terms expressly set forth in the instrument.[18]

The opinion in *Watson* was a landmark in the area of intra-church disputes.[19] It was, however, modified by a later Supreme Court decision, *Gonzalez v. Archbishop of Manila*.[20] Whereas *Watson* held that church adjudications of intra-church disputes were conclusive, *Gonzalez* provided for limited review of such decisions in instances of "fraud, collusion, and arbitrariness."[21] In all other respects *Gonzalez* confirmed the position taken by *Watson*.

Although both *Gonzalez* and *Watson* were closely tied to the issue of religious liberty, neither case was framed in constitutional terms.[22] Not until its 1952 decision in *Kedroff v. St. Nicholas Cathedral* did the Supreme Court evoke a constitutional justification for its earlier decisions.[23] *Kedroff* considered a New York stat-

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[18]*Id.* at 723.

[19]*Watson* set the tone for other federal decisions dealing with intra-church disputes: Eldership of the Churches of God v. Church of God, 396 U.S. 367 (1970); Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Everson v. Board of Educ., 330 U.S. 1 (1947) (constitutional argument); Cantwell v. Connecticut, 310 U.S. 296 (1940); Gonzalez v. Archbishop of Manila, 280 U.S. 1 (1929) (modified common law rule).

[20]280 U.S. 1 (1929).

[21]*Id.* at 16.

[22]However, the *Watson* Court based its reasoning on the right of individuals to free religious belief:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of essence to these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

80 U.S. (13 Wall.) at 728-29.

[23]344 U.S. 94 (1952). Two earlier cases laid the groundwork for Kedroff. Everson

ute which provided for the separation of the American branch of the Russian Orthodox Church and its properties from the control of the church hierarchy in Russia. The Court ruled that such intervention in ecclesiastical affairs by the state was a violation of the first and fourteenth amendments.[24] This decision elevated the non-intervention principle of *Watson* to the status of a constitutional limitation.[25]

Later Supreme Court cases have acknowledged alternatives to the *Watson* rule. *Eldership of the Churches of God v. Church of God*[26] suggests two possibilities. One alternative is for the state legislature to design a special statute governing the ownership of church property "that precludes state interference."[27] In order for such a statute to avoid state interference, it must provide for resolution of property disputes without inquiry into doctrine and without the establishment by the court of one form of church government over another. These are essentially the constitutional limitations within which a court must operate. This alternative, however, has the advantage of providing a guide for attorneys who are writing a deed or will for the conveyance of property to a church. Following the statutory guide, the attorney may be able to word the conveyance to avoid litigation and carry out the donor's intent.

Another alternative is the application of "neutral principles of law" by the court.[28] This approach was originally presented in *Presbyterian Church v. Hull Memorial Presbyterian Church*[29] but

v. Board of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 396 (1940). In these cases, the United States Supreme Court made the free exercise of religion and establishment clauses of the first amendment applicable to the states under the fourteenth amendment to the Federal Constitution.

[24]*Id.* at 119.

[25]Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960), involved basically the same fact situation as *Kedroff*. In *Kreshik*, the Supreme Court placed the same limitations on the judiciary as *Kedroff* did on the legislature. Such a limitation, however, did not necessarily prohibit all state interference in the doctrine and affairs of the church. *Kreshik* presents a good example of this point. Although the Court used the *Watson* approach, it was still forced to determine whether the highest judiciary in Russia or that of the American branch of the Russian Orthodox Church was the ultimate judiciary. In awarding the church property to the group recognized by the Russian hierarchy, the court actually resolved a doctrinal issue. When a schism occurs at the highest levels of church government, as in *Kreshik*, the *Watson* rule is not as effective in attaining its non-intervention objective.

[26]396 U.S. 367 (1970).

[27]*Id.* at 370.

[28]*Id.*

[29]393 U.S. 440 (1969).

was never explained. The *Church of God* case clarified the meaning of "neutral principles," at least in dicta. Justice Brennan suggested that the "formal title" doctrine was as constitutional as the rule in *Watson*. Under this alternate doctrine the "civil court can determine ownership by studying deeds, reverter clauses, and general state corporation laws."[30] This language suggests that "neutral principles of law" may refer to a given state's property law. If so, the possibility of the application of principles such as laches, adverse possession, and estoppel to church property cases arises. In some factual situations, application of these principles and general property law may bring more equitable results. On the other hand, these neutral principles are not sensitive to religious needs and beliefs. Therefore, results in cases applying these principles may be no more equitable than those under the *Watson* rule. Moreover, *Watson* has stood the test of time. Numerous decisions have found its rule constitutionally acceptable, but the Supreme Court has not specifically ruled on the two alternatives.[31]

In essence, *Brady v. Reiner* is a reiteration of the older and constitutionally tested *Watson* rule. It differs in only two respects from the federal decision. One apparent difference is that *Brady* acknowledges the right of civil courts to review church decisions. This review power, as originally presented in *Gonzalez v. Archbishop of Manila*, was limited to review of church decisions reached through "fraud, collusion, and arbitrariness."[32] While no further explanation of this limitation was made in *Gonzalez*, the language in *Brady* was more explicit. The court specifically stated that all church decisions will be enforced "so long as the church

[30]396 U.S. at 370.

[31]The *Church of God* case involved a statute vesting control of property of all churches, regardless of polity, in the trustees elected by voting members of the local congregation. The Supreme Court dismissed this case for want of a substantial federal question, since the dispute involved no inquiry into religious beliefs and customs. Thus, the Court did not specifically rule on the constitutionality of this type of statue. In *Kedroff*, the Court ruled the pertinent statute unconstitutional. This, presumably, was because it was not drawn carefully enough. 344 U.S. at 119. Certiorari was denied in the appeal of the Georgia court's second decision in Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440 (1969). The Georgia court again affirmed a decision for the local church, but this time the sole basis for their decision was legal title. A denial of certiorari cannot be interpreted as either agreement or disagreement with the legal title approach. For a further discussion of the second *Hull* case and the *Church of God* case, see Casad, *supra* note 5, at 66.

[32]280 U.S. at 16.

involved follows its own rules."[33] In effect, the language in *Brady* seems to limit the power of judicial review to those extreme cases in which a church completely disregards its laws.

Another, more significant, difference between *Watson* and *Brady* is that the latter involved a special statute that regulated church ownership of property.[34] The West Virginia Constitution provides that churches shall not be incorporated and that the legislature must enact statutes to provide a method by which these unincorporated societies may secure title to property.[35] The legislature passed a statute in accordance with the constitutional provision,[36] specifying a method by which churches may hold property through appointed trustees. In respect to disputed property claims, this method incorporates the law as stated in *Watson*.[37] Although the statute vests control of church property in the local parish, congregation, or branch of the church to which it was conveyed,[38]

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[33]198 S.E.2d. at 844.

[34]This statutory approach was suggested in the *Presbyterian Church* and *Church of God* cases. For a further discussion of this approach, see the text accompanying notes 26 and 27 *supra*.

[35]W. VA. CONST. art. VI, § 47 provides:

> No charter of incorporation shall be granted to any church or religious denomination. Provisions may be made by general laws for securing the title to church property, and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church, or religious denomination.

[36]W. VA. CODE ANN. § 35-1-1 to 13 (1966).

[37]*Id.* § 12 provides:

> When any individual church, parish, congregation, or local branch of any religious sect, society, or denomination, has become extinct, or has dissolved, or has ceased to occupy and use its property for its religious and charitable purposes, or its property may be regarded as abandoned, a suit in chancery may be instituted in the county where the property of such individual church, parish, congregation, or local branch is situated . . . and the court shall hear the matter and make such disposition of the property, or proceeds thereof, as is allowable under the terms of the conveyance, dedication, devise, gift or bequest of such property, and will be in accordance with the laws of such church, religious sect, society or denomination. The printed acts or laws of such church, religious sect, society or denomination, issued by its authority, embodied in book or pamphlet form, shall be taken and regarded as the law and acts of such church, religious sect, society or denomination.

[38]*Id.* § 1 provides that a conveyance of property to a church:

> shall be construed to give the local parish, congregation or branch of such church, religious sect, society or denomination, to which any such land or property has been or shall be so conveyed, devised or dedicated, the control thereof, unless from the intent expressed in the conveyance,

this control is apparently not equivalent to ownership.[39] The ultimate control, as in *Watson*, is left with "authorities which, under the rules or usages of such church . . . have charge of the administration of the temporalities thereof."[40] Moreover, the statute looks to the law of the church for the methods of appointment and removal of trustees,[41] even providing for an exception in the case of an express trust in the deed.[42]

Using the text in *Hull*, the *Brady* court found the above statute to be "a neutral and acceptable vehicle for the application of church ecclesiastical law to property disputes involving churches . . . ."[43] This view is not surprising, given the similarity between the method of resolving property disputes outlined in the statute and that outlined in *Watson*. The only noticeable variation between the statute and the *Watson* rule is the establishment of an objective method of determining what constitutes church law. The West Virginia statute defines church law as the "printed acts or laws of such church . . . issued by its authority, embodied in book or pamphlet form . . . ."[44] Church law, as so defined, may be admitted as evidence in a property dispute. By designating the authoritative church law in this way, the West Virginia statute clarifies the limits of church discretion.

These statutory provisions and the West Virginia constitutional provision for religious freedom and non-establishment provide a solid foundation of State law for *Brady v. Reiner*. In particular, the *Brady* court acknowledged this section of the constitution as influential.[45] The court considered the West Virginia provision

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grant, will, gift or dedication, some other or larger body be given such control.

[39]Carskadon v. Torreyson, 17 W. Va. 43 (1880).

[40]W. VA. CODE ANN. § 35-1-4 (1966).

[41]The West Virginia statute covering church property ownership provides for the removal and replacement of trustees by the body within the church which appointed them originally. *Id.* §§ 5, 7.

[42]*Id.* §§ 1, 4, 12.

[43]198 S.E.2d. at 839.

[44]W. VA. CODE ANN. § 35-1-12 (1966).

[45]W. VA. CONST. art. III, § 15 provides:

No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be enforced, restrained, molested or burthened in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess, and by argument, to maintain in their opinions in matters of religion; and the same shall, in no wise, affect, diminish or enlarge their civil capacities; and the legislature shall not prescribe any religious test

for religious freedom and non-establishment to be even stricter than the corresponding provision in the Federal Constitution.[46] This view may at least partially explain the stringent limitation on judicial review in *Brady*. It certainly gives the *Brady* non-intervention holding a strong foundation both in State and federal law.

Even so, there are some questions left unanswered by *Brady*. Perhaps the most obvious is the absence of a provision for cases in which the polity or organization of the church is undetermined. The *Watson* rule is designed to be applied to churches whose organization is clearly either hierarchical or congregational. In churches with hybrid polities, there is no method of deciding which body within the church has ultimate authority. For example, the organization of the United Lutheran Church exhibits elements of both the hierarchical and congregational organizations and cannot be clearly identified as either.[47] While *Brady* is clear as to the limits of judicial power in such situations, it goes no further. It simply states that the civil courts can "identify the polity and locus of authority of a church body only where such are known and settled by ecclesiastical law or discipline."[48] The court's position of non-intervention in the internal affairs of the church offers the only clue as to how West Virginia courts may handle such situations. Given this policy, it seems reasonable to assume that, if there is no clear answer to the problem in the written church law, the court will simply enforce the deed according to its terms. This approach would be similar to the "neutral principles of law" approach set forth in *Hull*.

The West Virginia courts may also encounter practical and

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whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves, or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministry, but it shall be left free for every person to select his religious instructor, and to make for his support, such private contract as he shall please.

[46]The *Brady* court relied on State v. Everly, 150 W. Va. 423, 146 S.E.2d. 705 (1966), in reaching this conclusion.

[47]Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142 (1962). The same problem might arise in a situation where churches with different polities have merged. An example of this would be the 1957 merger of the Congregational Christian and Evangelical and Reformed Churches to form the United Church of Christ. Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 431 (1964).

[48]198 S.E.2d. at 815.

theoretical problems in cases involving democratically governed churches. The controlling majority in a congregational-type church is likely to be a rapidly fluctuating and easily manipulated group. There is also little chance that the lay members of the congregation will have a thorough knowledge of church law. For these reasons, the court may have difficulty in determining which faction within the congregation holds a majority position. Once it has accomplished this task, the court may have an even more difficult problem. Under the *Watson* rule, the majority decision of the members of a congregational church controls, regardless of the religious issues involved. Therefore, the majority can retain control of church property even if it changes the denominational stand of the church or decides to merge with another church of an entirely different denomination.[49]

In such cases, the "consent-to-be-governed doctrine" and the non-establishment argument used to justify the *Brady* rule are substantially weakened. An assumption that an individual consents to a complete denominational change when he becomes a member of a church is unreasonable. More importantly, when a member donates his time and money to a church, it is reasonable to assume that he does so in reliance on at least a minimum degree of denominational stability. Logically, then, it does not follow that "implied-consent-to-be-governed" is consent to allow the congregational majority to change entirely the denominational stand of the church. Such an assumption would stretch the consent implied by membership in a church to unrealistic proportions.[50]

There is also some question as to whether a strict application of *Brady* under such circumstances violates the first amendment's establishment clause. If a majority of church members change the denomination or organization of their religious group, they, in effect, form another church. The dissenting minority, on the other hand, retains its former organization and beliefs. Therefore, it can be argued that when the court awards church property to that majority, it aids in the establishment of one church or form of church to the detriment of another.[51] No federal cases have ruled

[49]Casad, *supra* note 5, at 44.

[50]*Id.*

[51]The dissent in *Brady* was based on similar reasoning. Justice Carrigan found the majority decision in violation of W. VA. CONST. art. III, § 15:

> The Avery Chapel is in the position of being told by the national body of the United Methodist Church—believe as we say you should believe, or we will take all of your property. Thus, the local congregations

on this point. In fact, the decisions of the Supreme Court have all dealt with hierarchically organized churches.[52] Two West Virginia cases, *Woodrum v. Burton*[53] and *Canterbury v. Canterbury*,[54] did deal with the congregationally organized Baptist Church. Although the rulings in these cases were found partially unconstitutional in *Brady*, they shed some light on the issue. *Woodrum* distinguished the two different types of church polities. The dicta in this case implied that the rule used should be tailored to the type of church government. It suggested that law similar to that in *Watson* and *Brady* applies in the case of a hierarchical church. In a congregational polity, the court held that a different approach, including consideration of both majority opinion and church doctrine, would be used.[55]

The constitutionality of such an approach is highly suspect, but it does suggest that the court recognized the essential differences between the two types of church polities. It also suggests that the *Watson* rule may need to be modified when applied to independent congregational churches. One possible modification would be to qualify majority control in cases of denominational or organizational change by the majority. Under this qualification, the minority group remaining loyal to the original organization could retain the property. This solution, of course, is objectionable to the extent that it entails interference in religious doctrine. At most, it would be applicable only in cases of total denominational or, more specifically, organizational change. This alteration would be basically

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> are forced to subscribe to beliefs and doctrines which may not coincide with theirs, under penalty of forfeiting all they have accumulated for their church over a period of years.

198 S.E.2d at 845 (dissenting opinion).

[52]Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1954); Gonzalez v. Archbishop of Manila, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

[53]88 W. Va. 322, 107 S.E. 102 (1921).

[54]143 W. Va. 165, 100 S.E.2d. 565 (1957).

[55]88 W. Va. at 333, 107 S.E. at 106. *Woodrum* clearly indicated that in churches where there are organs with jurisdiction over the determination of internal disagreements, the civil courts will not interfere "except when the solution is grossly unjust or the decision fraudulently is obtained." This stand sounds distinctly like the *Watson* approach. *Woodrum*, however, took a different position with respect to a congregational church organization. In this type of organization, there is no judicial body except the congregation. Thus, the court would enforce the majority decision in regard to property with a single exception in the case of a substantial departure from fundamental doctrine.

consistent with the language in *Brady v. Reiner*, since *Brady* permits judicial review in instances where the determinations of the church are not consistent with church law.

Despite the problems involved, the decision in *Brady* is definitive. It clearly complies with constitutional limitations and is sufficiently precise to eliminate the need for litigation under most circumstances.[56] The only way for a donor of property to a church to insure avoidance of an outcome like that in *Brady* is through the use of an express trust in the granting instrument. In this manner the property will pass according to the deed rather than the rule of the church. A donor conveying property to the trustees of the Avery Methodist Church, for example, could specify that the property be held for a specific use or for the benefit of a particular body or group within the church. One of the deeds considered in *Brady* involved an express trust of this sort. The trust conditioned property ownership on the disciplinary use of the General Conference and the West Virginia Annual Conference. Consistently with the *Watson* holding, *Brady* ruled that this parcel of property would pass according to the terms provided in the deed.[57] Although there was no evidence of an express trust of personal property in *Brady*, the West Virginia court further stated that the same rule should apply for such gifts.[58] This method of avoiding church control is not foolproof, however. Care must be taken to word the trust to remove any need for interpretation of doctrinal issues by the court. A conveyance for the teaching and spread of a particular doctrine, therefore, would be unenforceable, since a civil court does not have jurisdiction to determine which group actually teaches the stated belief.

In this respect, as in all others, *Brady* stands for noninterference by the civil courts in matters of church doctrine. There is, however, another unarticulated principle behind *Brady* and its federal counterparts. This principle is that the law is primarily concerned with protecting the stability of religious institutions regardless of what equities or alterations in doctrine or usage may be involved.[59] Institutionalized religion, as well as religious free-

[56]The *Brady* court concluded that "the thrust of this decision almost completely closes the doors of civil courts in this State to those who would complain of a church-adjudicated ruling to their detriment. We intend it to be thus." 198 S.E.2d. at 844.

[57]*Id.* at 822. The pertinent provisions of this deed are set forth in note 2 *supra.*

[58]*Id.* at 843.

[59]Casad, *supra* note 5, at 67.

dom, is apparently protected by the Constitution. Although the *Brady* court made no determinations regarding religious doctrine, its decision exemplifies this lack of neutrality. The court favored the organized church in that it left the authority over all internal church disputes to the church's discretion. This type of support for established religious institutions is deeply entrenched in federal case law. In some cases, it may result in apparent inequities. The virtue of favoring the religious status quo, however, is that such treatment leads to a workable resolution of disputes.

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