



CHURCHES IN COURT: THE LEGAL STATUS OF RELIGIOUS ORGANIZATIONS IN CIVIL LAWSUITS

MARCH 2011

American religious institutions have been at the center of many legal controversies in recent years. The Roman Catholic Church, for instance, has been fighting a very public and contentious legal battle over whether it can be held accountable for employing priests who sexually abuse minors. The Episcopal Church also has been caught up in a series of legal disputes, most of them over the ownership of church property.

These and related lawsuits raise complex constitutional questions that have been troubling American courts for more than a century: Do the First Amendment's religion clauses – which guarantee religious liberty and prohibit all laws “respecting the establishment of religion” – bestow a unique legal status on religious organizations that puts some of their decisions and actions beyond the reach of civil laws? To put it another way, are legal disputes involving churches and other religious institutions constitutionally different from those involving their secular counterparts, and if so, how?¹

These questions have been raised in four different types of court cases – property disputes, employment of clergy, treatment or discipline of members, and misconduct by employees of religious organizations.

The first type of case involves property disputes within a religious organization. These conflicts often arise after an internal disagreement within a denomination prompts a congregation or congregations to split from the larger religious organization, leading to lawsuits over who owns church property, financial

¹ Throughout this report, the term “churches” refers to churches, synagogues, temples, mosques and other houses of worship. Religious institutions include churches as well as other types of religious organizations that are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code.

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assets and even the name of the group. In recent years, a number of these cases have involved disputes over moral or social issues, such as whether to sanction same-sex marriages or accept openly gay and lesbian members of the clergy.

In the late 19th century, the U.S. Supreme Court ruled that courts may resolve these types of property disputes by deferring to the religious body's hierarchy or leadership, or, when appropriate, to a majority of the congregation (see page 5).² But more than a century later, in 1979, the Supreme Court clarified this approach by holding that, in some circumstances, the First Amendment allows a court to apply the same legal principles to a church property dispute as it

² This is known as the "deference to hierarchy" approach because it requires courts to resolve internal church disputes by deferring to the rulings of the church's highest authority on the matter.

would apply to a similar lawsuit involving a secular group.³ The ongoing lawsuits involving divisions within the Episcopal Church over homosexuality provide a good example of how courts might reach different decisions depending on which of these approaches they decide to apply. On the one hand, if a court were to adjudicate such a dispute by deferring to church hierarchy, it would respect the decisions that had been made by the national and regional Episcopal Church bodies in determining which congregational faction is entitled to possession of church property. But if the court were to apply ordinary legal principles to the case, its decision would depend on the unique circumstances of each congregation, including the language of legal documents governing the property in question, such as the deed of title or the congregation's articles of incorporation.

A second type of case also involves disputes within a religious organization, but instead of property, these cases relate specifically to the employment of clergy. Federal and state laws generally prohibit employers from discriminating against their employees on various bases, including race and gender. But many courts have found that the First Amendment exempts religious organizations from these anti-discrimination laws when they make employment decisions about their own clergy. For instance, the Roman Catholic Church is free to employ only men as priests. But the strength and extent of this exemption – known as the "ministerial exception" – is still uncertain because the U.S. Supreme Court has never expressly ruled on it, and lower courts often divide on exactly how to apply the doctrine. This uncertainty could soon end, however, as the high court has agreed to hear a ministerial exception case in the fall of 2011.

³ This is known as the "neutral principles" approach because it permits courts to apply ordinary legal principles independent of the religious organization's beliefs and internal structure.

A third type of case involves religious organizations' treatment of their members. This category includes a wide range of situations, such as lawsuits challenging a minister's or congregation's public chastisement of a current member. Courts have often held that the First Amendment allows civil authorities to resolve such disputes as long as the legal issues are not thoroughly entangled with core matters of religious doctrine. For example, courts may not review whether a particular member of a religious organization should have been excommunicated, but courts may determine whether the administrative body that took the action actually had the authority to do so under the religious group's own rules.

The government must not regulate religious entities in any way that would require a judge or other government official to ... rule on theological matters.

A fourth type of case involves legal actions against a religious entity for the wrongdoing of one of its employees or a person otherwise affiliated with the institution. These cases often involve common legal actions, such as a lawsuit stemming from an automobile accident caused by a church employee. But these lawsuits also can involve very controversial issues, such as the criminal and civil cases that have been filed against dioceses and other entities within the Catholic Church for the actions of priests who have sexually abused minors. Courts generally have resolved such cases by applying the same principles of civil and criminal law to religious entities that they would apply to similar secular organizations.

Although the four types of cases raise different legal issues, court rulings on all these matters have been consistent regarding one important principle: The government must not regulate religious entities in any way that would require a judge or other government official to interpret religious doctrine or rule on theological matters. At times, this "hands-off" principle might require courts to treat religious organizations differently from their secular counterparts. For example, a court can easily rely on contract and corporate law to resolve a dispute between a secular company and one of its subsidiaries. However, it is more difficult to use these same legal precepts to resolve a dispute between the national denomination of a church and a local congregation in a fight over the qualifications for ordained ministry, such as whether noncelibate gays and lesbians may serve as ministers.

While the existence of the hands-off principle is well accepted, its precise constitutional source is not. Some courts have found that its source is the First Amendment's Free Exercise Clause, which guarantees religious liberty. Other courts have located the principle in the First Amendment's other religion clause, the Establishment Clause, which prohibits the government from promoting religion.⁴ Finally, some scholars and courts contend that the source of the hands-off approach is found in both religion clauses. But whatever its precise constitutional source, the hands-off principle is deeply entrenched in the nation's constitutional tradition and is likely to continue to limit the government's authority to regulate religious entities.

⁴ For background, see the following reports by the Pew Forum: *A Fluid Boundary: The Free Exercise Clause and the Legislative and Executive Branches* (October 2008), <http://pewforum.org/Church-State-Law/A-Fluid-Boundary-The-Free-Exercise-Clause-and-the-Legislative-and-Executive-Branches.aspx>; and *A Delicate Balance: The Free Exercise Clause and the Supreme Court* (October 2007), <http://pewforum.org/Church-State-Law/A-Delicate-Balance-The-Free-Exercise-Clause-and-the-Supreme-Court.aspx>.

INTERNAL PROPERTY DISPUTES

Church property disputes often arise when a disagreement – either among members of a congregation or between a congregation and its national denomination – leads to a legal battle for control of the congregation’s property. This can include not only the house of worship itself but also financial assets and even the right to use the church’s name.

A recent example is the ongoing property disputes within the Episcopal Church triggered by conflicts over the issue of homosexuality (see sidebar on page 10). But key church property rulings date back to the mid-19th century, when several denominations split over slavery. At that time, many U.S. state courts looked to English legal precedents for guidance in resolving matters of contract or property law. In cases involving church property disputes, 19th-century American judges specifically looked to two English court decisions: *Craigdallie v. Aikman* (1813) and *Attorney General v. Pearson* (1817). These rulings had adopted what is known as the doctrine of “implied trust” to govern conflicts over ownership of church property. A trust is a legal arrangement under which ownership of property is designated for the benefit of specific people or uses; an implied trust is one that arises by unwritten rather than written agreement. As applied to churches, English courts declared that property was held in trust for the faction that was most faithful to the denomination’s traditional doctrine.

Some U.S. state courts also adopted what became known as the “English rule,” at least in part because of the significant tumult that was

SUPREME COURT CASE

WATSON v. JONES (1871)

MAJORITY:

MILLER

NELSON

SWAYNE

FIELD

STRONG

BRADLEY

MINORITY:

CLIFFORD

DAVIS

(Chase did not participate in the decision.)

occurring in the U.S. during the 19th century over issues such as temperance, women’s rights and slavery. Divisions over such issues sometimes led to congregational splits. In such cases, the English rule typically protected the interests of long-time members of a congregation (who had likely financed the purchase or building of the church property) from subsequent innovations in doctrine or worship, even if those changes were ultimately embraced by a majority of the congregation.

The U.S. Supreme Court first considered the constitutionality of the English rule in 1871, in *Watson v. Jones*. The *Watson* case arose after a Presbyterian congregation in Kentucky split into two groups after a disagreement over the morality of slavery. Each group claimed to be the rightful owner of church property. Church members who opposed slavery argued that they were entitled to the property because the national church, the Presbyterian Church in the United States of America (PCUSA), had officially condemned the practice and required all congregational leaders to declare slavery – and the Confederacy’s secession – to be sinful. The leaders of the anti-slavery faction also had been formally recognized by the national denomination as the legitimate governing body of the congregation. However, the pro-slavery members of the church argued that the property was rightfully theirs, on the grounds

that the national denomination had abandoned settled Presbyterian doctrine when it voted to oppose slavery. Furthermore, the pro-slavery faction claimed that the congregation had earlier withdrawn from the PCUSA and joined a rival body, the Presbyterian Church of the Confederate States. (After the civil war, the breakaway church changed its name to the Presbyterian Church in the United States, or PCUS.⁵)

In determining whether to award the congregation's property to the anti-slavery or pro-slavery members, the U.S. Supreme Court said that it first had to settle on which legal standard to apply in the case. The court noted that for it to apply the English rule, it would have to decide whether authentic Presbyterian doctrine condemned or condoned slavery and insurrection. Alluding to the Establishment Clause, the court rejected the English rule, noting that American "law knows no heresy and is committed to the support of no dogma, the establishment of no sect." In other words, the court said, secular courts lack the authority or competence to determine what is or is not heresy or to decide other religious questions.

After deciding not to apply the English rule in this case, the Supreme Court considered which legal standard to use in its place. What could the court consult, if not Presbyterian doctrine, to determine whether the pro-slavery or anti-slavery factions in the Presbyterian congregation should get the property? The high court decided that there were three permissible ways to answer that question.

First, the court could consider any valid legal document (such as a deed or a will) that expressly mandated the use of the property for the promo-

⁵ The PCUS remained primarily a Southern denomination until 1983, when it reunited with the United Presbyterian Church in the United States, the PCUSA's successor, to form the Presbyterian Church (USA).

tion of a particular religious doctrine. The high court explained that when there is such a document, courts need not interpret which doctrine is central to the religious organization. Instead, courts may simply enforce the document's terms as spelled out in the legally binding agreement. For example, the high court noted, if a deed clearly stipulates that a congregation may use its property only for the purpose of spreading the doctrine of the Holy Trinity, a court would have the power to deny the property to a group seeking to use it to spread Unitarian doctrine. Such a ruling would not require the court to interpret Unitarianism, the Supreme Court said, it would only need to recognize that Unitarianism is not Trinitarianism.⁶

But often there is no legal document expressly and unambiguously imposing doctrinal conditions on the ownership or use of a church's property. In such cases, the high court said, the principal factor in resolving these disputes should be whether the denomination in question has a hierarchical structure. If a congregation was part of a hierarchical denomination, the Supreme Court stated, courts should defer to the denomination's decision about which faction of the congregation is entitled to the property.

Finally, the high court stated, if there is no unambiguous governing legal document and if the denomination does not have a hierarchical structure, a court should treat the religious organization as it would any other voluntary association. This approach would allow the dispute to be resolved by a majority vote of the congregation's members, or according to any other procedure agreed to by a majority of the congregation.

⁶ Most Christian denominations teach that God exists in three persons – Father, Son and Holy Spirit – and that each is separate and, at the same time, one. Unitarianism holds that there is one manifestation of God (God the Father), not three.

After outlining these three options, the Supreme Court turned to the case at hand. In the *Watson* case, the first alternative was not available, because there was no legally binding document restricting use of the congregation’s property to the promotion of a particular religious doctrine. The court then asked whether the congregation was part of a denomination that has a hierarchical structure. In this case, the court found that the congregation was a member of the PCUSA, which the court decided was hierarchical in structure. Congregations in the PCUSA were subject to the governance of the general assembly of that body. The court therefore looked to the PCUSA’s resolution of the dispute at issue. In this case, the general assembly had required congregational leaders to take an oath denouncing slavery and secession; the pro-slavery leaders had refused to take such an oath, and, as a result, church authorities had disqualified them from leading the congregation. Consequently, the Supreme Court concluded, the anti-slavery leaders who had been recognized by church authorities deserved control of the congregation’s property.

For almost a hundred years, the U.S. Supreme Court did not alter the standard it set in *Watson v. Jones*. Then, between 1969 and 1979, the high court decided two important church property cases that upheld the *Watson* ruling but modified it in several important respects. The first of these cases was *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969). Just as the *Watson* case had involved the most pressing social issue of its time, slavery, the *Blue Hull Memorial* case centered around some of the biggest issues of the 1960s, including women’s liberation, civil rights for African-Americans and the war in Vietnam. The case arose after two Georgia congregations withdrew from what had previously been the more conservative of the large Presbyterian

SUPREME COURT CASE

PRESBYTERIAN CHURCH IN THE UNITED STATES V. MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH (1969)

MAJORITY:	DOUGLAS	FORTAS
BRENNAN	HARLAN	MARSHALL
WARREN	STEWART	
BLACK	WHITE	

denominations – the Southern-based Presbyterian Church in the United States (PCUS). The congregations made the move after the PCUS, in the mid-1960s, authorized the ordination of women as ministers and officially expressed support for the civil rights movement and for the Supreme Court’s 1962 ruling banning prayer in public schools.

After the two Georgia congregations voted to leave the PCUS, a tribunal of the national church ruled that their property should be held by the denomination until a new ministry, subordinate to the PCUS, could be developed at the two sites. The congregations filed suit, claiming that they were entitled to the property under Georgia law, which continued to use the English rule to settle church property disputes. Under the English rule, the congregations argued, the PCUS had forfeited its claim to the property because its liberal policies represented a substantial departure from traditional Presbyterian doctrine. A Georgia trial court and the state’s Supreme Court agreed with the local congregations and awarded them the property.

The PCUS appealed to the U.S. Supreme Court, arguing that the Georgia courts’ use of the English rule violated the First Amendment by allowing courts to decide questions of religious doctrine. The high court agreed to hear the case and, in a

unanimous 1969 decision, held that the English rule’s “departure from doctrine” standard was unconstitutional.

In striking down the English rule, the court reaffirmed its ruling in *Watson v. Jones*. But the court’s majority opinion, drafted by Justice William Brennan, also modified the *Watson* ruling in a subtle but important way. Brennan explained that the ruling in *Watson*, which originally had been adopted as a rule that would apply only in federal courts, was also binding on state courts. In this case, the constitutional principle established in *Watson* forbids courts from making legal decisions by interpreting religious doctrine. Brennan said the Georgia courts had violated this principle by applying the English rule, which required the state’s courts to determine whether the local congregations or the PCUS were more faithful to traditional Presbyterian doctrine. The U.S. Supreme Court returned the case to the Georgia courts with instructions to resolve the dispute without using the English rule and by the methods spelled out in *Watson*.

When the case returned to Georgia, the state’s Supreme Court ruled that the local congregations had title to the property even if the English rule did not apply. The Georgia court examined the legal deeds to the property and the congregations’ governing documents and determined that none of the relevant legal documents recognized the PCUS’ ownership claim. The PCUS appealed again to the U.S. Supreme Court, arguing that the Georgia courts were required to defer to the denomination’s judgment about ownership of the property, but the high court declined to hear the new appeal.

Ten years later, the legal issues raised by this second appeal returned to the Supreme Court in *Jones v. Wolf* (1979), another case involving a

Georgia congregation seeking to withdraw from the PCUS. The case arose when a majority of the members of the Vineville Presbyterian Church of Macon voted to break away from the national church. Once again, the majority of congregants decided to leave because of what they perceived as the national church’s increasing liberalism.

SUPREME COURT CASE

JONES v. WOLF (1979)

MAJORITY:	MINORITY:
BLACKMUN	POWELL
BRENNAN	BURGER
MARSHALL	STEWART
REHNQUIST	WHITE
STEVENS	

Shortly after the majority faction decided to break away, a PCUS commission ruled that the still-loyal minority faction was entitled to ownership of the church’s property. The minority faction then filed a civil lawsuit against the majority faction to retain the congregation’s property. This lawsuit went all the way to the Georgia Supreme Court, which ruled for the majority of the congregation (the breakaway faction). First, the Georgia Supreme Court said, the church’s deeds expressly conveyed the property to the congregation and not to the national church. Second, the national denomination’s Book of Church Order – which outlines the structure for Presbyterian Church governance – did not contain any language limiting a local congregation’s use and control of its church property.

The PCUS appealed that decision to the U.S. Supreme Court, arguing that under the high court’s decisions in *Watson* and *Blue Hull Memorial*, the Georgia courts were required to defer to the decisions of a hierarchical body.

Because the PCUS commission had determined that the minority faction was the “true” congregation, they argued, the First Amendment precluded civil courts from reaching a different conclusion. By a 5-4 vote, the U.S. Supreme Court ruled that courts are not required to defer to church hierarchy in resolving disputes over church property. Writing for the narrow majority, Justice Harry Blackmun reasoned that, in cases where legal documents do not clearly determine control of disputed property, the First Amendment permits states to take any approach to resolving such disputes that they choose, as long as the method chosen does not require courts to decide questions of religious doctrine, and hence violate the rule laid down in *Watson*.

[Justice Blackmun reasoned that,] in cases where the documents are ambiguous, courts are free to choose among a variety of available options, as long as they do not need to interpret religious doctrine.

The decision in *Jones v. Wolf* thus affirms two basic principles articulated in *Watson* – courts must defer to unambiguous directions in relevant legal documents, and courts may not decide religious questions. But in disputes where documents do not clearly identify who should control the property, lower courts are not required to classify the religious body as hierarchical or congregational, and, if the former, to defer to the decisions of the hierarchical body. Instead, Blackmun wrote, in cases where the documents are ambiguous,

courts are free to choose among a variety of available options, as long as they do not need to interpret religious doctrine.

In such cases, state courts may choose to look entirely to the structure of church governance and defer to decisions made by hierarchical authority or, where appropriate, to votes taken within the congregation. Alternatively, courts may ignore such structures of authority entirely and resolve the dispute by looking exclusively to “neutral principles of law.” In other words, a court may examine any materials that it would normally examine in cases involving a similar dispute in a secular organization. These would include deeds of title, trust documents, articles of incorporation, congregational or denominational constitutions, or any other legal documents that can be interpreted by secular authorities.

Writing for the four dissenting justices, Justice Lewis Powell said that Blackmun’s majority opinion was likely to invite extensive intrusion by civil courts into religious disputes and thus bring about the same threats to religious liberty posed by the English rule that the Supreme Court had held unconstitutional in *Watson* and *Blue Hull Memorial*. Indeed, Powell declared, since church rules are invariably framed in explicitly religious terms, courts will either be forced to ignore the internal rules of a denomination because of their religious content or risk misconstruing the rules by interpreting them in a secular light. The better approach, Powell explained, is for courts to defer to a decision by the church’s highest authority if such a hierarchical structure exists, as it did in the PCUS.

Although the five-justice majority in *Jones v. Wolf* concluded that the Georgia courts did not violate the constitution by refusing to defer to the PCUS, the high court nonetheless returned the case to

the Georgia Supreme Court with instructions to clarify the state courts' methods for resolving such disputes. Specifically, the U.S. Supreme Court said it could not determine whether the Georgia courts had awarded the property to the majority faction under the principle of majority rule or had instead based the decision on an inappropriate examination of religious doctrine.

The Georgia Supreme Court ruled that the decision was based on a presumption of majority rule, applicable to all disputes within voluntary associations. The court went on to state that this presumption may be overcome by a clear statement, expressly detailed in the governing documents of the organization, establishing a different mechanism for resolving such disputes. Because the Vineville Presbyterian Church's governing documents did not provide any other mechanism, the Georgia court concluded, the presumption of majority rule applied.

Since *Jones v. Wolf*, the U.S. Supreme Court has not decided another church property case, so this opinion provides the most recent high court ruling on the issue. In the more than 30 years since the *Jones v. Wolf* ruling, most state supreme courts have adopted the "neutral principles" approach rather than the "deference to hierarchy" approach in resolving church property disputes.⁷ Although the two approaches seem quite different, they often overlap because national denominations now know that, to prevail under the neutral principles approach, they need to ensure that a congregation's deed or governing documents expressly reflect the national denomination's claim over the property. If these legal documents clearly provide for the national denomination's control, then a court will likely rule for the national denomination, regardless of the approach it applies.

But when the property documents are not clear, the two approaches can result in significantly different outcomes, with the deference to hierarchy approach favoring the national denomination and the neutral principles approach not clearly favoring either side.

The differences between the two approaches are illustrated in the most recent wave of church property disputes, particularly those involving the Episcopal Church, USA (ECUSA). After the national organization ordained an openly gay bishop in 2003, some local congregations that opposed the ordination voted to break away from the national church, leading to lawsuits over whether ECUSA or the local congregation owned each congregation's property. In courts that follow the deference to hierarchy approach, ECUSA has prevailed. But the results have been more mixed in courts that follow the neutral principles approach. For example, in 2009, the South Carolina Supreme Court decided such a lawsuit in favor of the local congregation, while the state supreme courts of Colorado and California have awarded the disputed property to ECUSA. (See sidebar on page 10.)

Regardless of the approach applied, however, the underlying constitutional concern in these cases is always the same: The First Amendment prevents courts from resolving church property disputes in any way that would require a judge or other government official to interpret religious doctrine or rule on theological matters. This principle also guides how courts decide disputes between members of the clergy and their employers.

⁷ See footnotes on page 2 for definitions of these approaches.

PROPERTY DISPUTES IN THE EPISCOPAL CHURCH

For more than 30 years, the Episcopal Church has been fighting in courts to enforce its claim over properties held by breakaway congregations and dioceses. The church has faced litigation in at least 20 states, as dozens of congregations have sought to withdraw from the church over doctrinal differences.

The Episcopal Church is by no means the only U.S. religious denomination facing these kinds of disputes. Other Protestant churches, including a number of Presbyterian and Methodist denominations, also are involved in similar litigation with breakaway congregations (see page 4).

The disputes within the Episcopal Church have become more intense in recent years, especially since the national church approved the election of an openly gay bishop, Gene Robinson of New Hampshire, in 2003. Since then, numerous congregations and four dioceses have broken with the national church. Many of these have sought to join other, more conservative, church bodies within the worldwide Anglican Communion, of which the Episcopal Church is a part.

Judicial decisions in these property cases reflect the diversity of legal approaches endorsed by the U.S. Supreme Court. Some states continue to use the standard set in *Watson v. Jones* (1871), which requires courts to determine whether the church has a hierarchical structure and, if so, to follow the decision of the highest ecclesiastical body about which faction of the congregation is entitled to the property. This standard heavily favors the national church since courts have determined that the Episcopal Church is indeed hierarchical. In *Episcopal Diocese of Massachusetts v. Devine* (2003), for example, a state appellate court in Massachusetts applied the *Watson* standard and upheld the

claim of the national church and the Diocese of Massachusetts to the property of a congregation that sought to withdraw from the denomination. When the congregation moved to disaffiliate from the Episcopal Church, the diocese placed the congregation under its direct control and claimed ownership of the congregation's assets. The court enforced the diocese's actions, finding that they reflected the legally binding decisions of a hierarchical church body.

A majority of states, however, follow what is known as the "neutral principles" approach, which was approved by the Supreme Court in *Jones v. Wolf* (1979). In this ruling, the Supreme Court said courts could apply the same legal principles to church property disputes as they would apply to a similar lawsuit involving a secular group.

In states that follow this approach, litigation over Episcopal Church property has been much more complicated, and the outcome has been less predictable. The key question in these jurisdictions tends to be the legal significance of a rule adopted by the Episcopal Church's General Convention in 1979, just weeks after the Supreme Court's decision in *Jones v. Wolf*. The 1979 rule states that the property of each local congregation is held in trust for the national church and the congregation's diocese but that it is under the congregation's control as long as the congregation remains a part of the national church. In its ruling in *Jones*, the high court had indicated that lower courts could give weight to such language in church constitutions when resolving property disputes.

But *Jones v. Wolf* did not address or answer one crucial question: May a national denomination, such as the Episcopal Church, unilaterally impose

PROPERTY DISPUTES IN THE EPISCOPAL CHURCH (CONT.)

a trust arrangement on property that it does not own? Ordinarily, restrictions on property may be imposed only with the consent of those who hold legal title to the property. In *All Saints Parish Waccamaw v. Episcopal Church* (2009), the South Carolina Supreme Court decided that the local congregation did not hold its property in trust for the national Episcopal Church or the diocese. The court traced the ownership of the congregation's property back to the 18th century and determined that title was held in the name of the congregation alone. The court then held that the rule adopted by the Episcopal General Convention in 1979 did not impose a trust arrangement on the property because the congregation never expressly agreed to be bound by its terms. The withdrawing congregation thus secured clear title to its property.

Most state courts, however, have reached the opposite conclusion, determining that the 1979 rule does impose an enforceable trust on behalf of the national church and its dioceses. These courts have taken somewhat different approaches in addressing the problem of congregational consent to the trust provision adopted by the church in 1979. For example, in *Episcopal Diocese of Rochester v. Harnish* (2008), the New York Court of Appeals ruled that even though the breakaway congregation joined the Episcopal Church 30 years before the trust provision was adopted, the congregation was bound by the provision because it had consented to be governed by church law and had failed to object to the rule for more than 20 years.

Other state courts, including the supreme courts of California (2009) and Pennsylvania (2005), also have grappled with the question of whether congregations have consented to

the trust arrangement adopted in 1979. These courts have validated the provision by ruling that the national denomination's trust claim is not a recent development but a historically consistent principle of the Episcopal Church. Under church law dating back to the 19th century, congregations are required to obtain diocesan approval before undertaking significant property transactions such as buying, selling, mortgaging or leasing real estate. The approval process, these courts conclude, shows that the national denomination's claim on congregational property did not arise in 1979. Rather, the 1979 rule reaffirmed a longstanding claim to the property and made it explicit. Using this reasoning, these courts have enforced claims by the Episcopal Church and its dioceses to the property of the breakaway congregations.

Although courts in some states have resolved their Episcopal Church property disputes, the battle continues in other states. Probably the highest profile conflict is in Virginia, where about a dozen congregations have broken away from the national church since 2003. These breakaway churches include some very well-known and historic congregations, including The Falls Church and Truro Church, both of which claim to have provided a spiritual home to George Washington. Currently nine of these churches, including Truro and the Falls Church, are involved in litigation over the fate of church property. If the parties do not settle the claims, trial courts will resolve these cases using "neutral principles of law." Whatever the lower courts decide, however, these cases ultimately are almost certain to be appealed to the state's Supreme Court.

EMPLOYMENT OF CLERGY

Conflicts between clergy and their employers are fairly common within religious organizations, and courts are often called upon to resolve these disputes. The Supreme Court has decided two cases in this area of law that build on its ruling in *Watson v. Jones* and other church property decisions.

In the first of these decisions, *Gonzalez v. Archbishop of Manila* (1929), the Supreme Court ruled that civil courts do not have the authority to determine who is qualified to be a Roman Catholic priest. The high court ruled that such determinations are within the exclusive jurisdiction of religious organizations. In the second ruling, *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976), the Supreme Court held that state courts do not have jurisdiction to determine whether a hierarchical church body acted “arbitrarily” in removing a bishop from office. Citing *Watson* and other decisions, the court held that the First Amendment precludes civil courts from reviewing the substance of such decisions.

Lower courts have interpreted *Gonzalez* and *Milivojevich* – along with the rulings in church property cases – to mean that the First Amendment prohibits courts from adjudicating ministerial employment disputes that bear on a religious organization’s “spiritual functions.” As is the case in property disputes, courts attempting to resolve clergy employment conflicts cannot become entangled in questions that involve the interpretation of religious doctrine. Specifically, courts are not allowed to evaluate the qualifications of clergy. This principle has come to be known as the “ministerial exception,” owing to the fact that it provides an exception to the many federal and state laws

that regulate how organizations may treat their employees.

SUPREME COURT CASE

SERBIAN EASTERN ORTHODOX DIOCESE V. MILIVOJEVICH (1976)

MAJORITY:	WHITE	MINORITY:
BRENNAN	MARSHALL	REHNQUIST
BURGER	BLACKMUN	STEVENS
STEWART	POWELL	

Up to now, the Supreme Court has not expressly ruled on the ministerial exception. On March 28, 2011, however, the high court agreed to hear a case in which the exception is being used by a religious school as a defense in its dismissal of a disabled teacher. The case, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, gives the court an opportunity to rule on the extent and scope of the ministerial exception.

The debate over the ministerial exception actually arose out of a statutory exemption from one particular employment regulation, Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against their employees on the basis of race, color, religion, sex or national origin. Title VII contains language allowing religious institutions to give employment preference to members of their own faith when hiring any type of worker, whether or not that employee performs religious functions. But Title VII does not explicitly allow religious organizations to discriminate on the basis of other protected characteristics, such as race or gender. This omission left unanswered a difficult question: When hiring clergy and other employees who perform primarily religious functions, could religious organizations discriminate not just on the basis of religion but also on the basis of other protected characteristics such as race or gender?

The first significant decision to address this question was *McClure v. Salvation Army* (1972). The case involved a woman, Billie B. McClure, who had been a Salvation Army officer, the Salvation Army's equivalent of an ordained minister. After she complained that male officers were receiving higher salaries and better benefits than female officers, the Salvation Army fired McClure. She then sued the Salvation Army on the grounds that her firing constituted gender discrimination, in violation of Title VII. After a federal trial court ruled for the Salvation Army, McClure appealed to the 5th U.S. Circuit Court of Appeals.

The court explained that the exemption relieves religious employers from liability only when they discriminate on the basis of the employee's religion.

The Salvation Army made two arguments to the appeals court in defense of its decision to fire McClure: (1) that the exemption for religious employers in Title VII allowed them to engage in gender discrimination with respect to the employment of clergy; and (2) that even if the exemption did not allow gender discrimination in such a case, the statutory prohibition on gender discrimination still did not apply to the Salvation Army in this instance because the First Amendment guarantees religious organizations the right to make ministerial employment decisions free from government regulation.

The 5th Circuit rejected the Salvation Army's first claim – that the Title VII exemption for religious employers allowed it to engage in gender dis-

crimination. The court explained that the exemption relieves religious employers from liability only when they discriminate on the basis of the employee's religion. Therefore, the court said, when a religious organization discriminates against an employee on the basis of Title VII's other protected characteristics – race, color, sex and national origin – the law's exemption does not protect the organization from liability.

After rejecting this argument, the 5th Circuit turned its attention to the Salvation Army's second claim – namely that the Free Exercise Clause mandates that religious organizations be free from government regulation when making employment decisions concerning their religious leaders. In considering this argument, the court cited a series of Supreme Court decisions, stretching back to *Watson v. Jones*, holding that the First Amendment prohibits the government from regulating “matters of church government and administration.” Based on these Supreme Court decisions, the 5th Circuit reasoned that traditional anti-discrimination protections, including those contained in Title VII, do not apply to a religious organization's ministerial employment decisions. Therefore, the court concluded, because McClure was the Salvation Army's functional equivalent of an ordained minister, the Salvation Army had the constitutional right to fire her, in spite of the general prohibition on gender discrimination in employment contained in Title VII.

The doctrine announced in *McClure* soon became known as the “ministerial exception.” In the almost 40 years since the *McClure* ruling, nearly all of the nation's federal appeals courts have embraced this exception, and no federal appeals court has ever rejected it. Despite the widespread acceptance of the doctrine, however, courts have offered different constitutional justifications for the ministerial exception. Some courts have reasoned that the ministerial exception arises from the Free Exercise

Clause, which guarantees the freedom of religious organizations to express their faith and, by extension, gives them the freedom to choose those who will be responsible for that expression. Other courts have grounded the exception in the Establishment Clause's ban on excessive entanglement between government and religion. Still others have identified both of the Constitution's religion clauses as the sources of the ministerial exception.

In applying the ministerial exception, courts face a number of difficult questions. One set of questions concerns the range of employees covered by the exception. All courts agree that the exception covers ordained members of the clergy who are performing tasks ordinarily associated with that role. Courts also agree that employees who have exclusively secular functions, such as bookkeeping or maintenance, do not fall within the ministerial exception. Some employees, however, have positions that include both religious and secular duties, or tasks that are not readily categorized as either. For example, a parochial school teacher may lead classes in both mathematics and religion. In such cases, courts typically ask whether the employee is primarily engaged in religious activities. If so, the ministerial exception applies; if not, the exception does not apply.

Another set of questions involves the types of legal claims to which the ministerial exception applies. Courts have uniformly held that claims of age-, gender- and race-based discrimination, such as those brought under Title VII, are subject to the ministerial exception because those claims often require courts to evaluate a clergy member's qualifications for, or performance in, a position. Courts apply the same reasoning to claims by clergy members for overtime compensation and workplace accommodations for disabilities. But courts have allowed clergy to bring other types of claims against their religious employers. For

In applying the ministerial exception, courts face a number of difficult questions.

example, courts have enforced employment contracts when the religious employer has failed to pay promised wages to a member of the clergy. Resolving such a dispute requires courts only to determine the pay specified under the contract and whether the clergy member performed the required work; it does not require courts to interpret religious doctrine.

Courts have also permitted clergy to sue for sexual harassment in the workplace, because assessment of the plaintiff's injury from the harassment typically does not require courts to assess the clergy member's qualifications or job performance. For example, in *Black v. Snyder* (1991), the associate pastor of an Evangelical Lutheran Church of America congregation in Washburn Park, Minn., claimed that she had been sexually harassed by the congregation's senior pastor and dismissed from her position because she complained about the harassment. The Minnesota Court of Appeals ruled that the ministerial exception barred the court from reviewing the congregation's decision to terminate the associate pastor, but it did not bar the court from examining her sexual harassment claim. Adjudication of the sexual harassment claim, the court reasoned, does not require an assessment of the associate pastor's job performance or any other religious issues. Instead, it requires the trial court simply to assess whether the senior pastor engaged in inappropriate conduct or not. (A trial court subsequently determined that the senior pastor had not harassed the associate pastor.)

DISCIPLINE OF RELIGIOUS GROUPS' MEMBERS

A third type of case involves disputes concerning how a religious organization treats its members. This includes a wide range of scenarios, such as a religious group's excommunication of someone in its congregation or disclosure of embarrassing information about that individual. Courts have generally examined these cases in the same way they have examined church property disputes and ministerial employment actions – that is, by following the principle that government officials must never make decisions based on religious doctrine. Indeed, just one year after the U.S. Supreme Court ruled in *Watson v. Jones* (1871) that courts may not resolve church property disputes by interpreting religious doctrine, the high court reaffirmed that stance in *Bouldin v. Alexander*, a significant but rarely cited case involving a conflict over how a church treated several of its members.

The *Bouldin* case arose after several African-Americans formed a Baptist congregation in the District of Columbia in 1857. Led by the Rev. Albert Bouldin, this group quickly grew in number and resources, and eventually purchased a house of worship. Four congregants were named as trustees to hold ownership of the property, and seven other congregants were elected as general trustees to govern the congregation. Just a few years after moving into the new house of worship, however, the congregation divided into two factions, with a small minority of the congregants following Bouldin. Soon after, the faction led by Bouldin voted to replace the four existing trustees and to excommunicate 41 members of the congregation. The new trustees also changed

SUPREME COURT CASE

BOULDIN V. ALEXANDER (1872)

MAJORITY:	FIELD
STRONG	BRADLEY
CHASE	NELSON:
MILLER	CLIFFORD
SWAYNE	DAVIS

the church's door locks so that only Bouldin and his trustees had access to the property. The original trustees sued Bouldin for illegally seizing the property and taking over the board. Bouldin responded that the general trustees had no authority because they had not been properly elected.

The case eventually went to the U.S. Supreme Court, which held in 1872 that Bouldin's faction did not have the legal authority to replace the trustees or to excommunicate the 41 congregants. The high court explained that its ruling was based on what it called "temporalities" – secular legal principles – and not on interpretation of the church's religious doctrines. The court said that civil courts do not have the power to evaluate whether a congregation should have elected or removed particular members but that civil courts do have the power to determine whether such a decision was actually made by the congregation. Because Bouldin's group was the minority faction, the court found that Bouldin's actions did not represent the views of a majority of the congregation and were therefore illegal.

The *Bouldin* case is the only U.S. Supreme Court decision to rule on the validity of a religious organization's disciplinary actions. In fact, most of these cases have been heard in state rather than federal courts because they have usually involved only common torts (such as defamation) or contract claims and have not raised the kinds of

“[E]xcept in cases involving religious doctrine, [the New Jersey Supreme Court] can see no reason for treating religious organizations differently from other nonprofit voluntary associations.”

legal questions that would allow a lawsuit to be brought in federal court.⁸

In hearing these cases, however, state courts generally have followed the principle underlying the Supreme Court’s decision in *Bouldin*: that courts may review a religious organization’s disciplinary actions only if such a ruling would not require them to interpret religious doctrine. For example, in *Baugh v. Thomas* (1970), the New Jersey Supreme Court considered whether it had authority to review a congregation’s vote not to reinstate an expelled member. After the expelled member claimed that the congregation’s vote was invalid because the votes were tabulated incorrectly, the New Jersey Supreme Court held that it could adjudicate the issue because “except in cases involving religious doctrine, we can see no reason for treating religious organizations differently from other nonprofit voluntary associations.”

Similarly, some state courts have applied this principle to cases involving shunning, a practice whereby a church or religious organization punishes a current or former member of the

organization by prohibiting all contact between the broader membership and that individual. Several religious groups, such as the Mennonites and Jehovah’s Witnesses, use such ostracism to encourage the shunned member to repent and to deter others in the group from engaging in the type of behavior that led to the shunning.

Several types of lawsuits can arise from shunning, such as a claim that the religious organization intentionally inflicted emotional distress on the shunned individual. One high-profile shunning case was *Bear v. Reformed Mennonite Church* (1975). It involved a man, Robert Bear, who, after criticizing his Reformed Mennonite Church, was excommunicated and shunned. Bear sought legal remedies for the damage that this shunning allegedly inflicted on his marital and business relationships. The church countered that if a court granted these remedies, it would unconstitutionally burden the church’s religious practice of shunning. The Pennsylvania Supreme Court applied the governing free exercise law at that time, as stated in the U.S. Supreme Court’s decision in *Sherbert v. Verner* (1963). In *Sherbert*, the high court had ruled that when a religious practice comes into conflict with a law, the Free Exercise Clause protects that practice unless the government can show that it has a “compelling interest” in enforcing the law in question. Applying this test, the Pennsylvania Supreme Court concluded that the Free Exercise Clause would protect the church’s practice of shunning unless the shunned member could demonstrate that the state had a compelling interest in preserving his marital and business relationships. The Pennsylvania Supreme Court did not evaluate the state’s interest, however, because there had not been a trial and the court was therefore uncertain whether the church had acted in the way that Bear alleged. So the court sent the case back to the trial court to resolve these factual issues. At trial, Bear lost

⁸ A tort involves a claim of injury brought in civil, as opposed to criminal, court. Common tort claims may involve physical injuries, such as those that arise from auto accidents or defective products, or injuries to reputation from defamation or libel.

the case after the lower court ruled that he was unable to show that the church had intentionally harmed him, thus leaving open the question of whether the state had a compelling interest in a case like this.

Following the Smith ruling, congregations can no longer rely on the compelling interest test to defend practices like shunning.

A decade-and-a-half after *Bear*, the U.S. Supreme Court, in *Employment Division v. Smith* (1990), largely did away with the compelling interest test in free exercise cases, and thereby shifted the balance, in most situations, in favor of the government and its laws rather than the religious practice.⁹ Following the *Smith* ruling, congregations can no longer rely on the compelling interest test to defend practices like shunning. Nonetheless, religious organizations are likely to retain a significant degree of protection for those practices through the principles invoked in church property and ministerial exception cases. Those principles bar courts from resolving questions of religious doctrine, and shunning disputes involve, in significant part, the fundamental issue of who should or should not be considered a member of a religious community.

⁹ In *Employment Division v. Smith*, the Supreme Court upheld the denial of unemployment compensation to two Native American drug rehabilitation counselors who had been dismissed because they had ingested the hallucinogen peyote as part of a religious ritual. For more details, see the Pew Forum report *A Delicate Balance: The Free Exercise Clause and the Supreme Court* (October 2007), <http://pewforum.org/Church-State-Law/A-Delicate-Balance-The-Free-Exercise-Clause-and-the-Supreme-Court.aspx>.

Likewise, courts might use this principle to resolve a similar but distinct type of case, one that arises when a religious organization punishes a member not by shunning the person but by revealing some embarrassing information about the individual. The Oklahoma Supreme Court encountered such a situation in *Guinn v. Church of Christ* (1989), a high-profile case that arose after the elders of a Church of Christ congregation in Collinsville, Okla., sought to punish a member, Marian Guinn, for having a sexual relationship with a man who was not a member of the church. After the elders threatened to tell the congregation about her relationship, she notified the elders of her withdrawal from the church. Claiming that only they could end Guinn's membership in the church, the elders proceeded to advise congregants that they were prohibited from contacting Guinn unless it was for the purpose of encouraging her repentance. The elders also sent announcements of her sexual activities to nearby Church of Christ congregations. Guinn filed a suit against the church in which she alleged that the church's publication of this information caused her emotional stress and invaded her privacy. After Guinn prevailed in her suit, with the jury awarding her \$390,000 in damages, the church appealed to the Oklahoma Supreme Court on the grounds that the jury's award violated the Free Exercise Clause by burdening the church's ability to follow its interpretation of the Gospel calling on Christians to publicize moral transgressions.

In considering the church's constitutional argument, the Oklahoma Supreme Court distinguished between the periods before and after Guinn notified the church of her wish to end her membership. Citing the U.S. Supreme Court's decisions in church property cases, the Oklahoma Supreme Court found that religious organizations have a constitutional right to control their internal affairs as they wish, free from

THE LEGAL STATUS OF RELIGIOUS ORGANIZATIONS IN CIVIL LAWSUITS: SIGNIFICANT SUPREME COURT RULINGS

Watson v. Jones (1871)

In a dispute within a congregation over control of its property, held that federal courts should not become involved in determining which faction is adhering more closely to traditional church doctrine. Instead, the high court found that federal courts should determine whether the congregation has a hierarchical structure. The court also decided that if the congregation does belong to a hierarchical denomination, courts should defer to the denomination's decision about which faction is entitled to the property.

Bouldin v. Alexander (1872)

In disputes involving religious congregations that do not have a hierarchical leadership structure, ruled that civil courts have the power to decide whether a faction that claims authority in the congregation has the legal right to exercise such authority. However, courts may do so only if such a ruling would not require the court to interpret religious doctrine.

Gonzalez v. Archbishop of Manila (1929)

Held that civil courts do not have the authority to determine who is qualified to be a priest. The court ruled that such determinations are within the exclusive jurisdiction of religious organizations.

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church (1969)

Clarified that the U.S. Constitution is the source of the rule (first articulated in *Watson v. Jones*) prohibiting civil courts from deciding religious questions when resolving disputes within religious organizations. This meant that the prohibition applies not only to federal courts but also to state courts.

Serbian Eastern Orthodox Diocese v. Milivojevich (1976)

Established that state courts do not have jurisdiction to determine whether a hierarchical church body acted "arbitrarily" in removing a bishop from office. Citing *Watson* and other decisions, the court held that the First Amendment precludes civil courts from reviewing the substance of such decisions.

Jones v. Wolf (1979)

Expanded the options open to courts in resolving church property disputes. As in the past, courts may still decide such a case by deferring to a denominational hierarchy or a congregational majority. Alternatively, however, a court is free to decide these cases using "neutral principles of law." This means a court may examine any materials that it would examine in cases involving a similar dispute in a secular organization, such as property deeds, articles of incorporation or any other legal documents, as long as the court does not need to interpret religious doctrine in assessing these sources.

government regulation or civil liability. Applying this right to the case at hand, the Oklahoma Supreme Court held that the Church of Christ could not be found liable for any of the actions it took against Guinn before she notified the elders of her withdrawal from the church. Up to this point, the court explained, Guinn's conduct and the church's response to it fell within the church's internal affairs. After her withdrawal,

however, her conduct no longer had any bearing on the church's internal affairs because she was no longer a church member. Indeed, the court declared, the elders' rejection of her withdrawal had no legal significance because the Free Exercise Clause guarantees individuals the right to decide for themselves whether to resign from a religious organization. Therefore, the court concluded, Guinn had the right to pursue legal

action against the church but only for actions that the church took after she notified the elders of her resignation. (As it turned out, the case was never retried because the parties settled out of court.)

Three years later, the Oklahoma Supreme Court clarified this principle in *Hadnot v. Shaw* (1992), a case involving a conflict between a Church of Jesus Christ of Latter-day Saints congregation and Jeanne A. Hadnot, one of its members. When the church heard allegations concerning extramarital sexual activity by Hadnot, the congregation decided to hold a hearing to determine whether to excommunicate her. The church requested that Hadnot attend the hearing, but when she did not appear, the church sent a letter to her home explaining that her membership had been terminated because of her alleged affair. After Hadnot's husband opened and read the letter, Hadnot sued the church, alleging that the disclosure of this information to her husband, as well as to her fellow congregants during the disciplinary hearing, had caused her emotional distress.

Applying the standard enunciated in its *Guinn* decision, the Oklahoma Supreme Court held that the church's disclosure of Hadnot's affair was constitutionally protected because, unlike in the *Guinn* case (which involved the church releasing potentially damaging information after Marion Guinn had left the congregation), this disclosure was part of the church's process of excommunicating Hadnot.

Slightly different from the claims asserted in *Guinn* and *Hadnot* is a legal action for defamation, which involves the disclosure of false information that damages a person's reputation. Such a claim arose in *McNair v. Worldwide Church of God* (1987). The case arose in Pasadena, Calif., and involved a dispute between the Worldwide Church of God and Leona McNair, the ex-wife

[The court] could not treat [McNair v. Worldwide Church of God] like a normal defamation case because threatening religious organizations with liability for defamation might suppress religious speech.

of one of its ministers, Raymond McNair. The minister's divorce had created controversy within the church, which strongly opposes divorce. In an annual meeting of ministers and in a pastoral publication, the director of pastoral administration explained that the McNair divorce was justified under church doctrine because for two years Ms. McNair had refused to maintain a marital relationship with Mr. McNair. Claiming that this was not true, Ms. McNair sued the church for defamation. After the jury ruled in Ms. McNair's favor, the case went to a California intermediate appellate court on the question of whether the director's statements could provide the basis for a defamation action.

The California court began its analysis by explaining that defamation law ordinarily would allow Ms. McNair to recover damages if she simply demonstrated that the director's false statements about her damaged her reputation. But, the court declared, this was not an ordinary defamation case because it involved an official church statement about the meaning of its doctrine. Indeed, the court held, it could not treat this like a normal defamation case because threatening religious organizations with liability for defamation might suppress religious speech.

To determine how it should adjudicate the case, the California court looked to the U.S. Supreme Court's precedents involving defamation cases brought by public officials. In these cases, the U.S. Supreme Court has found that because it is important to a free society that the media and private individuals have some latitude to criticize public officials, the Free Speech Clause of the First Amendment requires a stricter standard when a public official alleges defamation. Under this standard, a public official must not only satisfy the ordinary defamation requirement that the statement in question be false and damaging to an individual's reputation, the official must also demonstrate that the person making the statement either knew the statement was false or was aware of a high probability that it was false.

Based on these free speech precedents, the California court reasoned that the same heightened standard should apply to defamation cases involving a minister's explanation of religious doctrine. Therefore, the court concluded, Ms. McNair could prevail only if she could satisfy the stricter standard – in this case that the director's statement regarding Ms. McNair was false, that it had damaged her reputation and that the director had made the statement knowing it was untrue or likely untrue. The case was then retried, and a jury, using the stricter standard outlined by the appellate court, once again determined that Ms. McNair had been defamed.

Although a defamation case involves constitutionally distinctive issues, the *McNair* decision resembles the other cases involving a religious organization's treatment of its members. In all of these cases, courts tend to employ a highly deferential approach similar to that which governs internal disputes over church property and matters of ministerial employment.

LAWSUITS ARISING FROM MISCONDUCT

The fourth and final type of case arises as a result of actions on the part of a religious organization's employee or agent. (Agent is a legal term that refers to any person who is authorized to act on behalf of another.) In a religious organization this can include many people, such as clergy members, lower-level employees and even volunteers acting on behalf of the organization.

In general, an agent's wrongful act can provide the basis for a civil or criminal legal action, not only against the agent but also against the organization that employs the wrongdoer. The most prominent example of this type of case, at least in recent history, involves allegations that Roman Catholic priests sexually abused minors and the subsequent charges that church leaders covered up these incidents in the interest of protecting the alleged offenders and the church itself.

Courts usually resolve such cases by applying the same legal principles that they would use to address similar claims against secular organizations. For example, if a pastor is engaged in a sexual relationship with a child and the child's parents sue the church for the pastor's sexual misconduct, a court might adjudicate the case in the same way as it would address a similar claim against a psychological counseling firm that employed a therapist who had been accused of abusing a child in counseling.

When such lawsuits threaten to penalize a religious organization because of the way it is governed, however, the First Amendment at times requires courts to treat the religious organization

differently from a secular organization. As a result, the constitutional issues raised in this fourth type of case depend on the specific character of the lawsuit against the religious organization – specifically, whether the legal claim is based on what is known as “vicarious liability,” institutional breach of fiduciary duty or organizational negligence.

VICARIOUS LIABILITY

A vicarious liability claim is a legal action against an employer based entirely on the wrongdoing of one of its employees. To prevail in a vicarious liability action, the injured party must demonstrate that the wrongdoer was an agent of the employer and that the wrongful act arose within the scope of the employee’s job responsibilities. Importantly, a vicarious liability claim does not allege that the employer actually caused the employee’s misconduct. Instead, the doctrine of vicarious liability assumes that the employer should bear the costs resulting from the wrongful act because the wrongdoer committed the act while working on behalf of the employer. For example, if a restaurant employed a driver to deliver meals to customers and the driver was at fault in an auto accident that occurred while making a delivery, the person injured in the accident could file a vicarious liability claim against the restaurant, even if the restaurant did not specifically do anything to cause the accident.

Generally, vicarious liability claims against religious organizations do not raise constitutional problems because these claims rarely require courts to inquire into the organization’s internal affairs. As in the example above, if a pastor was involved in an auto accident while visiting a parishioner, a person injured in the accident could file a vicarious liability claim against the church that employed the pastor. The First Amendment

would allow a court to adjudicate this lawsuit because such a claim would not require the court to inquire into the details of the employment relationship between the church and the pastor.

Vicarious liability claims are rarely successful in cases alleging sexual misconduct by members of the clergy, but this has nothing to do with the special character of religion. Instead, a vicarious liability claim requires the plaintiff to show that the wrongful conduct occurred within the scope of the agent’s duties for the employer, and courts generally hold that sexual misconduct is outside the scope of employment – whether of a pastor or a secular counselor.

INSTITUTIONAL BREACH OF FIDUCIARY DUTY

The second type of lawsuit over an agent’s misconduct involves a claim that (1) a special relationship exists between an organization and some individual; (2) as a result of that relationship, the organization was obligated to act for the benefit of that person; and (3) it failed to do so. For example, an orphanage would have a fiduciary duty to act in the best interests of the children placed in its care.

Most often, a lawsuit based on an institutional breach of fiduciary duty alleges that the institution failed to investigate accusations of an agent’s wrongdoing, to warn people who might be exposed to such wrongdoing, or to take immediate action against the agent or agents known to have committed wrongful acts. For example, a psychological counseling practice generally owes a fiduciary duty to its patients because the patients trust that the practice will protect their interests. So when a therapist breaches that trust by making sexual advances toward a patient,

the patient might sue the counseling practice for breaching its fiduciary duty by not taking appropriate action to ensure that such advances do not occur. Likewise, when a pastor engages in a sexual relationship with a parishioner, the parishioner might claim that the religious organization has breached a fiduciary duty by not taking steps to protect parishioners from sexually predatory clergy.

In a high-profile case on this issue, *Moses v. Diocese of Colorado* (1993), a Colorado woman sued the Episcopal Diocese of Colorado for the emotional and financial injuries she suffered as a result of the manner in which the local bishop handled her extramarital affair with a priest. Specifically, the woman claimed that she had a mental breakdown because the bishop requested that she keep her relationship with the priest a secret and made her feel that she, not the priest, was primarily to blame for the affair. After the trial court jury awarded damages to the woman, the church appealed to the Colorado Supreme Court on the grounds that the judgment violated both religion clauses of the First Amendment. The state's high court upheld the constitutionality of the judgment, ruling that it was appropriate for the lower court to treat the church like a secular organization. In its decision, the state's Supreme Court stated that the claim involved only the secular questions of whether the diocese, acting through the bishop, had assumed fiduciary obligations to the woman and whether the diocese had breached those obligations. The court ruled that the woman's case met both conditions.

ORGANIZATIONAL NEGLIGENCE

The most common type of lawsuit in this category is a claim that a religious organization was negligent in allowing one of its employees to harm another person. This type of claim alleges

that while the religious organization did not directly cause the employee's misconduct, the organization should still be held responsible because it negligently placed the employee in a position to commit the harmful act.

The most constitutionally problematic type of negligence claim against a religious organization is an allegation that the organization was negligent in ordaining the wrongdoer. Courts have generally dismissed negligent ordination claims on the grounds that, to adjudicate such claims, courts would need to evaluate the religious organization's decision to ordain a particular individual – an evaluation that might require the interpretation of religious doctrine or an appraisal of religiously based judgment. Following the reasoning in ministerial exception cases, these courts have concluded that such government interference with ordination decisions is prohibited.

Less constitutionally problematic, and more common, are claims that a religious organization was negligent in hiring, supervising or retaining the wrongdoer. Secular employers are regularly subject to such claims. For example, if a psychological counseling practice hired a therapist even though the practice knew that the individual had a history of sexual misconduct, then the therapist's subsequent sexual advances toward patients could lead to lawsuits against the practice for negligently hiring that person. Likewise, if the practice knew of a therapist's previous sexual misconduct and then did not take steps to monitor the therapist's interaction with patients, then patients could sue the practice for failing to adequately supervise the therapist. Similarly, if the practice continued to employ a therapist who had a pattern of sexual misconduct, patients could sue the practice for retaining the employee.

[Most] courts have ruled that religious organizations may be held liable for negligence – on the same terms as secular employers – in hiring, supervising or retaining clergy who harm others.

Similar scenarios have arisen in religious organizations, as victims of clergy sexual abuse have alleged that the religious organizations were negligent in employing clergy accused of wrongdoing. Court rulings in this area have gone in different directions. Although most judges have concluded that the First Amendment does not limit the extent to which courts may hold churches liable for negligently hiring, supervising or retaining clergy who have committed sexual abuse, a few courts have found that the First Amendment does impose some limits on such liability. For instance, in *Gibson v. Brewer* (1997), the Missouri Supreme Court ruled that a church could not be held liable for negligence in supervising a minister who allegedly committed sexual misconduct. The court based its ruling on the principle that civil courts may not assess the adequacy of a church's oversight of its clergy. At the same time, however, the Missouri court said the church could be held liable for intentional failure to supervise the minister if the church knew of the minister's propensity to commit sexual misconduct and failed to prevent him from doing so. This is a much higher threshold for injured plaintiffs to satisfy when suing churches.

In contrast with the Missouri Supreme Court, most other federal and state courts have ruled that

religious organizations may be held liable for negligence – on the same terms as secular employers – in hiring, supervising or retaining clergy who harm others. These courts have concluded that they may adjudicate such actions, consistent with the “neutral principles” approach adopted by the U.S. Supreme Court in its 1979 ruling in *Jones v. Wolf*, which allowed courts to treat churches the same as secular organizations (see page 8).

A U.S. District Court in North Dakota, for example, used this reasoning in deciding *Enderle v. Trautman* (2001), a case that involved an extramarital affair between an adult female parishioner and a minister during the course of their counseling relationship. The parishioner sued the Olivet Lutheran Church and the Eastern North Dakota Synod for negligently supervising and retaining the minister. Specifically, the parishioner alleged that the church should have supervised the minister more closely, and perhaps fired him, because the church was aware of rumors that the minister had engaged in sexual misconduct with several of his parishioners. The congregation and synod argued that adjudication of the claim would violate the First Amendment because it would require deciding what authority a congregation or hierarchical body should have over a pastor – a matter of internal religious governance and religious doctrine. The court disagreed and held that it could adjudicate the case by applying secular standards to determine whether the congregation and synod actually had the authority to supervise and retain the pastor. At trial, the court determined that the congregation and synod had not been negligent in their supervision of the minister's actions.

In *Fortin v. Roman Catholic Bishop of Portland* (2005), the Maine Supreme Court ruled that a court may consider a plaintiff's claim that the church was negligent in its supervision of a priest

who sexually abused a minor. The court held that the First Amendment does not bar a court from scrutinizing the supervisory relationship between the priest and his bishop.

This issue is still being battled in the courts and will likely not go away any time soon, especially given the continuing sexual abuse cases against a variety of religious organizations, including the Roman Catholic Church. The damage awards and negotiated settlements in these cases involve very significant sums, well into the millions of dollars. Indeed, at least eight Roman Catholic dioceses – those in Davenport, Iowa; Fairbanks, Alaska; Milwaukee, Wis.; Portland, Ore.; San Diego, Calif.; Spokane, Wash.; Tucson, Ariz.; and Wilmington, Del. – have entered bankruptcy reorganization because of the massive liability they face as a result of sexual abuse awards and settlements.

In addition, several plaintiffs in sexual abuse cases have recently filed suits against the Holy See on the grounds that high church officials were complicit in the abuse because they blocked the removal of allegedly abusive priests. The Foreign Sovereign Immunities Act (FSIA) generally precludes lawsuits against foreign governments in U.S. courts. But FSIA contains a number of exceptions to this rule, including a provision that foreign governments may be held liable if their employees commit wrongful acts that cause personal injury. Therefore, the key question in the lawsuits against the Vatican is whether the alleged wrongdoers – in this case, those who selected and supervised the abusive priests – should be regarded as employees of the Holy See.

So far, federal courts have reached different conclusions on the Vatican's claims of sovereign immunity in such cases. For example, in a 2008 lawsuit in federal District Court in Oregon, the

Vatican asked to be dismissed, on the grounds of sovereign immunity, as a defendant in a case involving accusations of sexual misconduct by a priest. The District Court judge denied the request, ruling that the Vatican's assertion of immunity was premature and that the plaintiff should have an opportunity to show that the Vatican's conduct fell within the FSIA exceptions to sovereign immunity. The 9th U.S. Circuit Court of Appeals affirmed the Oregon ruling, and in June 2010 the U.S. Supreme Court declined to hear the Holy See's appeal. The case has now been returned for further proceedings in Oregon, with the Vatican, at least for now, still one of the defendants in the action.

The court held that the First Amendment does not bar a court from scrutinizing the supervisory relationship between the priest and his bishop.

In Texas, however, a federal district court judge ruled in 2006 that the FSIA does give the Vatican immunity in lawsuits involving allegations of sexual misconduct on the part of Catholic clergy. The case in Texas moved forward against officials in the local diocese of the Catholic Church but without the Vatican as a party in the suit.

LOOKING AHEAD

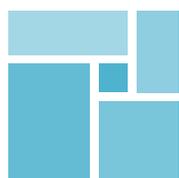
This area of church-state law covers a wide range of legal contexts – including property disputes, employment conflicts and tort actions. But despite their factual differences, all of the cases discussed above raise the issue of how the government should relate to religious communities.

More than 100 years of Supreme Court case law has solidified the constitutional principle that the government may regulate religious institutions but only if in doing so the government does not need to disturb the internal governance of the church or interpret religious doctrine. The precise constitutional source of this principle is contested, with some tracing it to the Free Exercise Clause, others locating it in the Establishment Clause and still others finding the principle in both religion clauses. But regardless of its constitutional source,

the principle is firmly and deeply entrenched in the nation's constitutional tradition.

Even with widespread agreement on this principle, however, much uncertainty remains in this area of the law. This uncertainty is largely a result of reasonable disagreement on how to apply the principle to particular controversies. While some judges seek to ensure that religious organizations maintain robust rights to govern themselves, even if that requires denying remedies to injured individuals, other judges believe it is more important to redress individual wrongs, even if that requires impinging on a religious organization's autonomy. Given these competing goals, courts seem likely to continue to be divided in how they view the appropriate constitutional balance. The Supreme Court is likely to have ample opportunity to clarify this area of the law in coming years.

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