#77.400 10/7/76

First Supplement to Memorandum 76-90

Subject: Study 77.400 - Nonprofit Corporations (Regulation of Churches)

Attorney Ralph K. Helge has written to the Commission to express his concern that certain provisions of the proposed Nonprofit Corporation Law (e.g., members' derivative actions, expulsion of members, and members' right to obtain financial information) may, when applied to churches, raise constitutional issues under the First Amendment concerning freedom of religion. He suggests deferring application of the new law to churches until further consideration may be given to the question. See Exhibit XXXX (blue) to Memorandum 76-83.

The U. S. Supreme Court has in a long series of decisions held that the courts cannot adjudicate disputes over church doctrine. For example, in Presbyterian Church in the United States v. Hull Memorial Presbyterian Church, 393 U.S. 440 (1968), two local churches in Georgia withdrew from the general church and sought to have their property declared free of the implied trust for the benefit of the general church on the ground afforded by state law that the general church no longer adhered to its tenets of faith and practice existing at the time of affiliation by the local churches. The Georgia courts decided the issue in favor of the local churches, but the U.S. Supreme Court reversed, holding that the First Amendment prohibits the courts from awarding church property on the basis of the interpretation of church doctrine. For a more extensive analysis of this decision, see Kauper, Church Autonomy and the First Amendment: The Presbyterian Church Case, 1969 Sup. Ct. Rev. 347, attached to this memorandum as Exhibit I.

However, In re Metropolitan Baptist Church of Richmond, Inc., 48 Cal. App.3d 850, 121 Cal. Rptr. 899 (1975), held that the First Amendment does not prohibit judicial application of the cy pres doctrine to require distribution

of church assets on dissolution in accordance with the purpose of the church founders and property donors, although inconsistent with the manner approved by the church membership, since it was not necessary to resolve any controversy over religious doctrine. The court observed:

> "The relevant inquiry must be whether the court can resolve the property dispute on the basis of neutral principles of law which do not involve the resolution by the court of ecclesiastical issues. . . . [A]s long as the court does not have to resolve the doctrinal propriety [of a church's action] inorder to determine who has legal control of the property, there is no unconstitutional intervention by the state in church affairs."
>
> Where civil or property rights are involved the courts of this state have always, evenhandedly, accepted jurisdiction over property disputes, even where ecclesiastical questions may have been indirectly involved.

Accord, Providence Baptist Church v. Superior Court, 40 Cal.2d 55, 251 P.2d 10 (1952)(held, trial court had jurisdiction to determine whether church pastor was properly discharged according to church procedure where issue involved civil and property rights, not ecclesiastical matters); Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, 39 Cal.2d 121, 245 P.2d 481 (1952) (held, trial court had jurisdiction to determine civil and property rights although some ecclesiastical matters were incidentally involved).

The staff concludes that there is no constitutional defect in the proposed Nonprofit Corporation Law which results from applying the law to churches. No doubt there will be cases where a litigant presents a doctrinal dispute to the court for adjudication. Under well established rules, the court must decline to adjudicate. Further codification appears unnecessary.

Respectfully submitted,

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CHURCH AUTONOMY AND THE FIRST AMENDMENT: THE PRESBYTERIAN CHURCH CASE

While other objectives are served by the twin religion clauses of the First Amendment and the separation principle derived by implication from them, one fundamental purpose is to insure the freedom of the state from ecclesiastical control and, in turn, the freedom of the churches from governmental control. The two decisions by the Supreme Court in its 1968–69 Term, resting on these clauses, highlight this purpose. The decision in *Epperson v. Arkansas*,[1] invalidating the Arkansas statute forbidding the teaching of the evolutionary theory in public schools, implements the first aspect of this purpose. Government may not manipulate the public school's teaching program in order to sanction and thereby to establish a particular religious belief. The decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[2] holding that a state court may not constitutionally resolve doctrinal matters in disputes involving the use of church property, gives effect to the complementary aspect of this fundamental purpose.

The *Presbyterian Church Case*, because of its effect as a constitutional repudiation of a doctrine widely followed by state courts

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[1] 393 U.S. 97 (1968).

[2] 393 U.S. 440 (1969) (hereinafter referred to as the *Presbyterian Church Case*).

in resolving ecclesiastical controversies, makes an important and distinctive contribution to the freedom that may be claimed by churches under the First Amendment. In practical terms, it affords federal constitutional protection to the liberty of the churches to define, develop, and apply their doctrines free from intervention by the civil courts.

The case arose as the result of an attempt by two local Presbyterian congregations to withdraw from the Presbyterian Church in the United States, a church which the Court in the very first sentence of its opinion characterized as "a hierarchical general church organization."[3] The members of the two congregations, supported by their ministers and most of the elders, voted to withdraw and to reconstitute the two local churches as an autonomous Presbyterian organization. The grounds for withdrawal were that certain actions and pronouncements of the general church violated that organization's constitution and were departures from the doctrine and practice in force at the time of affiliation. The claimed violations of and departures from doctrine were summarized by the Georgia Supreme Court:[4]

> . . ."ordaining of women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms, as originally adopted by the general church, and causing all members to remain in the National Council of Churches of Christ and willingly accept its leadership which advocated named practices, such as subverting of parental authority, civil disobedience and intermeddling in civil affairs"; also "that the general church has . . . made pronouncements in matters involving international issues such as the Vietnam conflict and has disseminated publications denying the Holy Trinity and violating the moral and ethical standards of the faith."

[3] *Id.* at 441. "Petitioner, Presbyterian Church in the United States, is an association of local Presbyterian churches, governed by a hierarchical structure of tribunals which consists of, in ascending order, (1) the Church Session, composed of the elders of the local church; (2) the Presbytery, composed of several churches in a geographical area; (3) the Synod, generally composed of all Presbyteries within a State; and (4) the General Assembly, the highest governing body." *Id.* at 441–42.

[4] *Id.* at 442 n. 1.

After attempts at conciliation failed, the administrative commission appointed by the general church acknowledged the withdrawal of the local leadership and took over the local church property on behalf of the general church until new local leadership could be appointed. Without making an effort to appeal the commissioners' action to higher church tribunals—the Synod of Georgia or the General Assembly—the churches filed suits in the state trial court to enjoin the general church from trespassing on the disputed property, title to which was in the local churches. The general church moved to dismiss the actions and cross-claimed for injunctive relief in its own behalf on the ground that civil courts were without power to determine whether the general church had departed from its tenets of faith and practice. Denying the motion to dismiss, the trial court submitted the question to the jury on the theory that Georgia law implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches. The jury was instructed to determine whether the actions of the general church "amount to a fundamental or substantial abandonment of the original tenets and doctrines of the [general church], so that the new tenets and doctrines are utterly variant from the purposes for which the [general church] was founded."[5] The jury returned a verdict for the local churches and the trial court thereupon declared that the implied trust had terminated and enjoined the general church from interfering with the use of the property in question. The Supreme Court of Georgia affirmed,[6] and the United States Supreme Court granted certiorari to consider questions raised under the First Amendment.

I. The Implied Trust and Departure-from-Doctrine Standard

Before I turn to the Supreme Court's opinion and its disposition of the case, a brief review of the implied trust rule applied by the Georgia courts is in order.

According to this rule, property contributed to a religious body by its members over the years is impressed with a trust in favor of

[5] *Id.* at 4 4.

[6] 224 Ga. 61 (1968).

the fundamental doctrines and usages of the organization at the time the contributions were made, and in a dispute concerning the control of this property, centering on claims of substantial departure from these fundamental doctrines and usages, civil courts will award the control to the group faithful to this trust.[7]

This rule is usually attributed to Lord Eldon's opinion in *Attorney General v. Pearson*[8] decided in 1817. It was built on the foundation of the charitable trust doctrine which had recognized that an express trust for a religious purpose would enjoy the protection that had come to be accorded to charitable trusts generally.[9] But to assert that contributions and gifts to a church—not expressly earmarked as a trust or designated for specific purposes and not made dependent upon observance of specific conditions—created an implied trust in favor of established doctrines and usages was a considerable extension of the charitable trust idea. Indeed, the whole notion of a trust rather than a gift in a case like this is a legal fiction. Moreover, it required a determination of ecclesiastical matters by a civil court. The development and application of this rule in English law was understandable, however, since the inquiry into fundamental doctrine required by this standard was not incompatible with a legal system that featured an established church subject to parliamentary control.

The English rule was not at the outset generally accepted in the New England states, since it was not compatible with the congregational polity and the freedom of a majority of a congregation to determine its doctrine and denominational affiliation. Indeed, reflecting a distrust of hierarchical structure, state constitutional pro-

[7] ". . . it is the duty of the court to decide in favour of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, as also in favour of the government of the church in operation, with which it was connected at the time the trust was declared." App v. Lutheran Congregation, 6 Pa. 201, 210 (1847).

[8] 3 Mer. 353, 36 Eng. Rep. 135 (Ch. 1817). See also Lord Eldon's earlier opinion in Craigdallie v. Aikman, 1 Dow. 1, 3 Eng. Rep. 601 (H.L. 1813).

[9] ". . . if any persons seeking the benefit of a trust for charitable purposes should incline to the adoption of a different system from that which was intended by the original donors and founders; and if others of those who are interested think proper to adhere to the original system, the leaning of the Court must be to support those adhering to the original system, and not to sacrifice the original system to any change of sentiment in the persons seeking alteration, however commendable that proposed alteration may be." 36 Eng. Rep. at 157.

visions assured local control of congregational affairs.[10] The implied trust rule did, however, gain wide acceptance in other parts of the country and it is fair to say that it has generally been adopted as part of the American common law.[11]

In this country the implied trust rule, applied in connection with the departure-from-doctrine standard, has generally been supported on the ground that it assured the stability and integrity of churches as institutional bodies by preventing a majority of a congregation from diverting church property—the result of accumulations of gifts made in good-faith reliance on and furtherance of its particular doctrines and practices—for use in support of fundamentally different doctrines and practices.[12] So viewed it could also be regarded as a means of protecting religious liberty by assuring judicial protection of the religious uses for which property was given.[13]

10 See Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1149 *et seq.* (1962). The general reluctance of early courts to apply Lord Eldon's rule is best expressed in the following passage from Baptist Church v. Witherell, 3 Paige 296, 304 (N.Y. Ch. 1832): "Neither am I prepared to say that it would be right, or expedient, to adopt the principle of Lord Eldon here, where all religions are not only tolerated, but are entitled to equal protection by the principles of the constitution. Upon Lord Eldon's principle, a society of infidels, who had erected a temple to the goddess of Reason, could not, upon the conversion of nine tenths of the society to Christianity, be permitted to hear the word of life in that place where infidelity and error had once been taught."

11 For discussions of the history and application of the fundamental-doctrine trust rule, see ZOLLMAN, AMERICAN CHURCH LAW (1933); STRONG, RELATIONS OF CIVIL LAW TO CHURCH POLITY, DISCIPLINE, AND PROPERTY (1875); Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419 (1964); Duesenberg, *Jurisdiction of Civil Courts over Religious Issues*, 20 OHIO ST. L. J. 508 (1959); Stringfellow, *Law, Polity, and the Reunion of the Church: The Emerging Conflict between Law and Theology in America*, 20 OHIO ST. L. J. 412 (1959); Patton, *Civil Courts and the Churches*, 45 AM. L. REG. N.S. 391 (1906); Note, note 10 *supra*; Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L. J. 1113 (1965); Comment, *Constitutional Law—Freedom of Religion—Judicial Intervention in Disputes within Independent Church Bodies*, 54 MICH. L. REV. 102 (1955).

12 See Casad, note 11 *supra*, at 452 *et seq.*

13 "The guarantee of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves. The law of intellectual and spiritual life is not the higher law, but must yield to the law of the land." Schnorr's Appeal, 67 Pa. 138, 147 (1870).

The power of a civil court to pass on the question whether a religious body is making substantial departures from the fundamental doctrines necessarily requires the court to identify and appraise both the fundamental doctrines and the substantiality of the alleged departures in order to decide which group in a divided congregation is entitled to control the property.[14] Thus a civil court becomes the judge of religious doctrine. Moreover, by freezing the doctrine and usages on an implied trust basis, the civil courts by their decisions were placed in a position of obstructing further development of doctrinal positions or even of challenging new applications of established doctrine.[15] Obviously, the application of the implied trust rule in connection with the departure-from-doctrine standard constituted a considerable intrusion by an organ of government into ecclesiastical affairs.

Such an intrusion in ecclesiastical affairs seemed all the more anomalous in a country which was increasingly committed to the separation of church and state. At an early date, American courts had developed the common-law doctrine that, like the other organs of government, they had no jurisdiction over purely ecclesiastical matters.[16] These were to be decided according to the internal law of the church and according to the procedures established by the church and the organs it had set up for resolution of internal disputes. In following this general rule the courts were influenced in part by the general doctrines respecting internal affairs of voluntary associations, which rested largely on a contractual theory,[17]

14 See Kniskern v. Lutheran Churches, 1 Sandf. 439 (N.Y. Ch. 1844), for an example of the detailed scrutiny to which this procedure can lead.

15 See ZOLLMAN, note 11 *supra*, at 238 *et seq.*

16 "I regret that suits relating to ecclesiastical affairs have become common in our courts, and that undefined and mistaken views have been entertained, in relation to the powers of the civil and ecclesiastical tribunals. I think it necessary to repeat, what other Judges have thought it necessary to say, that the civil tribunal possesses no authority whatever to determine on ecclesiastical matters—on a question of heresy, or as to what is orthodox, or unorthodox, in matters of belief. So the ecclesiastical tribunals have no authority, as recognized by the law, to entertain any civil question, or in any manner effect a disposition of property by the decisions of their judicatories." Wilson v. Presbyterian Church of John's Island, 2 Rich. Eq. 192, 198 (S.C. 1846). See also German Reformed Church v. Commonwealth *ex rel.* Siebert, 3 Pa. 282 (1846).

17 See Fuller, *Note on Chase v. Cheney*, 10 AM. L. REG. N.S. 313 (1871); Redfield, *Note on Gartin v. Penick*, 9 AM. L. REG. N.S. 220 (1870).

in part by their reluctance to intervene in areas of doctrinal dispute where they felt they had no competence,[18] and in part by deference to constitutional ideas respecting the freedom of the churches from governmental control.[19]

But while the civil courts denied their jurisdiction to resolve purely ecclesiastical disputes, they asserted jurisdiction to resolve questions respecting the control and use of property—matters appropriate for determination by the civil courts—where in the case of a schism or controversy competing groups were attempting to control the use of the congregation's property.[20] By thus acquiring jurisdiction over the property issue, the civil courts could not avoid facing in some measure doctrinal disputes which were the sources of the schism.[21] It was in this context then that the courts invoked the implied trust doctrine and awarded the control of the property to the group found to be loyal to the fundamental doctrines to which the church was committed.

The application of the departure-from-doctrine standard could not be considered, however, without regard to the question of church polity. Polity refers to the general governmental structure of a church and the organs of authority defined by its own organic

18 ". . . civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their [ecclesiastical tribunals] jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve their religion or good morals." German Reformed Church v. Siebert, 3 Pa. at 291.

19 "Freedom of religious profession and worship can not be maintained if the civil courts trench upon the domain of the church, construe its canons and rules, dictate its discipline and regulate its trials. The larger portion of the Christian world has always recognized the truth of the declaration, 'A church without discipline must become, if not already, a church without religion.' It is as much a delusion to confer religious liberty without the right to make and enforce rules and canons, as to create government with no power to punish offenders." Chase v. Cheney, 58 Ill. 509, 537 (1871).

20 The source of the distinction is uncertain, but it seems to have received explicit recognition as early as 1846. Wilson v. Presbyterian Church of John's Island, 2 Rich. Eq. 192 (S.C. 1846). It has been said that a refusal to hear cases concerning property rights in which churches are involved would come close to being "a denial of equal protection as well as . . . a violation of first amendment religious rights." Casad, note 11 *supra*, at 432.

21 See Kniskern v. Lutheran Churches, 1 Sandf. 439 (N.Y. Ch. 1844); Lutheran Free Church v. Lutheran Free Church, 141 N.W.2d 827 (Minn. 1966); Ashman v. Studebaker, 115 Ind. App. 73 (1944); Cantrell v. Anderson, 390 S.W.2d 176 (Ky. 1965); Hale v. Everett, 53 N.H. 9 (1868); Mt. Zion Baptist Church v. Whitmore, 83 Iowa 138 (1891).

law.[22] Two broad types of church polity are recognized by the courts: (1) the hierarchical and (2) the congregational. In the hierarchical type of church the local congregation is an organic part of a larger church body and is subject to its laws, procedures, and organs according to an ascending order of authority. It does not enjoy local autonomy. Its doctrine is defined by that of the parent body and its property, while peculiarly a matter of local enjoyment, is held for uses consistent with the doctrines and practices of the denominational parent church. A further distinction may be made between two types of polities within the general hierarchical group of churches, namely, (*a*) the episcopal polity and (*b*) synodical or associational polity. In churches with the episcopal polity, of which the Roman Catholic and Episcopal churches are good examples, authority is vested at various defined levels in ecclesiastical officers, and the general system may be described as authoritarian in character. In churches with a synodical or associational polity, authority is delegated to elected organs exercising power at various levels and culminating at the top in an elected representative body which constitutes the highest organ of authority. This polity has a democratic base. The Presbyterian Church affords the best example of the synodical polity.

The congregational polity, by contrast to the hierarchical, features local congregational autonomy as its central characteristic. It is premised on the idea that the local congregation is the highest authority in all matters of doctrine and usage. Indeed, congregationalism is in itself a fundamental principle of these churches.[23] The Congregational Church and the Baptist Church are prime examples of churches with a congregational polity. It does not follow that a church with a congregational polity may not be affiliated with a national church body or denomination in order to achieve some purposes in common with other congregations of a like na-

22 For a general discussion of church polity and its implications, see SCHAVER, THE POLITY OF THE CHURCHES (1947).

23 "Congregational polity acknowledges no ulterior jurisdiction over the local church and refuses to subject the decisions of the local church to the governing authority of a broader assembly. Any association of its churches is refused authority to overrule the power of its local constituents. This polity holds that the presence of Christ by his Spirit, as an authoritative influence, manifests itself principally in the conviction and utterance of the individual believer and that the influence of the believer therefore cannot easily go outside the local church. Authority accordingly is accorded only to the local church." *Id.* at 43–44.

ture. What is important is that it is free to join or to withdraw from such a body, is not subject to any ecclesiastical law or authority of a larger body, and is free to act according to the will of a majority of its members, subject only to the rules and limitations prescribed by the internal law of its own constitution and bylaws.[24]

The usefulness to courts of the distinction between hierarchical and congregational polities in resolving church property issues by reference to the implied trust doctrine is readily apparent. The hierarchical church is less vulnerable to judicial intrusion by virtue of the fact that it has its own general law, procedure, and organs for the authoritative resolution of internal disputes.[25] Moreover, it gives some assurance of the continued institutional stability that may be described as the end object of the implied trust doctrine.[26] On the other hand, in the case of a church with a congregational polity, with the result that the local congregation is autonomous and subject to majority rule, the danger of manipulation by a shifting and impermanent temporal majority so as to cause a deviation from established doctrine and usage is greater and consequently invites greater judicial surveillance.[27]

[24] Not all courts have adhered to the notion that a traditionally independent church may freely withdraw from a voluntary association of churches with similar beliefs. These decisions seem hard to justify in light of the asserted independence of such congregations. See Whipple v. Fehsenfeld, 173 Kan. 427 (1952); Western North Carolina Conference v. Tally, 229 N.C. 1 (1948); Sorrenson v. Logan, 32 Ill. App.2d 294 (1954); Reid v. Johnston, 241 N.C. 201 (1954); Huber v. Thorn, 189 Kan. 631 (1962); Church of God v. Finney, 344 Ill. App. 598 (1951).

[25] "The courts, often with legislative sanction, leave controversies within the Roman Catholic Church to be settled by its tribunals in accordance with canon law. . . . Members of this church, especially those who enter its priesthood, are fully aware of the wide control which a bishop exercises over property and churches in his diocese, and almost all of them would regard any judicial restraint upon his powers as entirely inconsistent with the underlying principles of their religion." Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1025 (1930). The same holds true in varying degrees for other hierarchical churches.

[26] The "idea of an implied contract—or 'implied trust' as it came to be called—was clearly a fiction, the true *ratio decidendi* being that doctrinal continuity is the essential characteristic of a church, so that doctrinal innovation works a trust diversion." Note, 75 HARV. L. REV. at 1147.

[27] "Unlike law courts or even ecclesiastical tribunals within associated churches, there is a relatively rapid turnover of membership within churches. Members come and go as they move into and out of the geographical area the church serves. Moreover, the number of members is never fixed as it is in the case of judicial or hierarchical tribunals. It can go up or down as new members are added or removed from the rolls of the church. Accordingly, the 'majority' of a congregational church is necessarily a very ephemeral concept; the group of individuals which comprises the congregation varies over relatively short periods of time as to both identity and number of individuals." Casad, note 11 *supra*, at 446.

In general, even before *Watson v. Jones*,[28] the courts tended to observe a distinction between churches, based on the nature of their polity, in applying the implied trust rule. In the case of congregations that were part of a hierarchical church, courts were inclined to resolve the property questions according to the determination made in accordance with the procedures and by the authoritative organs established by the church.[29] The congregational polity churches, on the other hand, presented a greater problem for the courts, and it was in disputes involving churches of this type that the implied trust rule was frequently invoked and applied, although as previously noted it did not at the outset meet general acceptance in the eastern states where the law exhibited a basic predilection in favor of local congregational rule. Faced with the necessity to decide the issue of property in a dispute turning on doctrinal matters, the courts had the choice of saying that the majority will of the local congregation was the ultimate authority[30] or of intervening to award the property to the faithful minority if the court found that the majority was attempting to commit the congregation to a doctrine or practice found to constitute a fundamental departure.[31] The net result was that the hierarchical church enjoyed a greater immunity from judicial intervention in its affairs than the independent congregation. Ironically, the congregationalists, rejecting ecclesiastical authority and law as a matter of principle, found themselves in greater peril of intrusion into their affairs by an organ of civil government.[32]

[28] 13 Wall. 679 (1872). See text *infra*, at notes 33–59.

[29] American Primitive Society v. Pilling, 24 N.J. Law 653 (1855); First Constitutional Presbyterian Church v. The Congregational Society, 23 Iowa 567 (1867); Roshi's Appeal, 69 Pa. 463 (1871); Schnorr's Appeal, 67 Pa. 138 (1870); State *ex rel.* Watson v. Ferris, 45 Mo. 183 (1869); Sutter v. Trustees of the First Reformed Dutch Church, 42 Pa. 503 (1862); McBride v. Porter, 17 Iowa 203 (1864).

[30] Shannon v. Frost, 42 Ky. 253 (1842).

[31] App v. Lutheran Congregation, 6 Pa. 201 (1847); Hale v. Everett, 53 N.H. 9 (1868); Brunnenmeyer v. Buhre, 32 Ill. 183 (1863).

[32] See Note, 75 HARV. L. REV. at 1157 *et seq.*

II. Watson v. Jones and Its Impact

This was the state of affairs when, in 1872, the Supreme Court handed down its famous decision in *Watson v. Jones*.[33] The case was one facet of extended litigation in several courts involving the control of the property of Presbyterian congregations, where schism had occurred over the slavery issue. This particular case, involving a dispute over control of the Walnut Street Presbyterian Church of Louisville, Kentucky, came before the federal courts as a diversity case at a time when federal courts were still applying a federal common law on the basis of *Swift v. Tyson*.[34] The split in the congregation resulted from a declaration of the General Assembly of the Presbyterian Church, to which the Louisville congregation belonged, that persons who had aided the "rebellion" or who believed that slavery was a divine institution "should be required to repent and forsake these sins before they could be received" as members in a Presbyterian Church.[35] Division and schism resulted from this declaration. In an effort to resolve the controversy the General Assembly, the highest organ of the Presbyterian Church, declared the loyal faction to be the "true" Walnut Street Church. When the division persisted, the loyal group sought injunctive relief to assure its control over congregational property. The opposition group's argument was that the General Assembly's declaration respecting the slavery issue had exceeded its authority, since the constitution of the Presbyterian Church prohibited it from "meddling in civil affairs," and that in turn the Assembly's power to "decide controversies" and to "suppress schismatical disputes" was not exercised within the limits of its constitutional authority. The Supreme Court, with two Justices dissenting on jurisdictional grounds, affirmed the action of the lower court in sustaining the loyal faction and granting it injunctive relief.[36]

[33] 13 Wall. 679 (1872). [34] 16 Pet. 1 (1842). [35] 13 Wall. at 691.

[36] The Supreme Court acted after the Supreme Court of Kentucky had decided the issue in favor of the nonloyal faction. Watson v. Avery, 66 Ky. 332 (1868). The loyal faction began the suit anew in the federal courts using diversity of citizenship to gain jurisdiction. The Court was sharply criticized for accepting the suit in this fashion. See Zollman, note 11 *supra*, at 285; Redfield, *Note on Watson v. Jones*, 11 Am. L. Rec. N.S. 452 (1872), as well as the dissents of Justices Clifford and Davis.

As is true of many notable Supreme Court opinions, Justice Miller's opinion covered a large field and many of the statements contained in it were dicta which have acquired prestige with the passage of time. In the most important part of his opinion he asserted three categories of cases in which courts are asked to resolve disputes over church property:

1. Cases where the religious institution, according to the express terms of the instrument whereby it receives the property, is "devoted to the teaching, support or spread of some specific form of religious doctrine or belief."[37]

2. Cases where the property is held by a church of congregational or independent polity which "owes no fealty or obligation to any higher authority."[38]

3. Cases where the ecclesiastical body holding the property is "a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization."[39] Here the Court was speaking of the hierarchical polity and made no attempt to distinguish further between episcopal and synodical types.

As for cases falling into the first class, Justice Miller said that the ordinary principles of charitable uses would apply and that neither the majority of the congregation in an independent church nor the higher authority in the hierarchical church could direct the property to uses to which it was not dedicated.[40]

In the second type, where properties have been acquired by an independent or congregational church, and no specific tenet is attached to it, "where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles

[37] 13 Wall. at 722. [38] *Ibid.* [39] *Ibid.*

[40] "In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require. And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use." *Id.* at 723.

which govern voluntary associations.[41] Here the internal law of the congregation is determinative. If its own rule is that majority vote determines the manner of using the property, this determination must be accepted as final by the individual members and by the courts:[42]

> This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truths.

Turning then to the third class of case—the one actually involved in *Watson v. Jones*—where the congregation is a member of a church with a hierarchical polity, the Court said:[43]

> In this class of cases we think the rule of action which should govern the civil courts, founded in the broad and sound view of the relations of church and state under our system of laws, . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding on them in their application to the case before them.

Since the Presbyterian Church was found to fall into the third category,[44] the Court held that the action of the General Assembly of the Presbyterian Church in designating the loyal faction of the Walnut Street Presbyterian Church as the true church was determinative of the case before the Court and it affirmed the decree enjoining the dissidents from interference with use of the property.

What was most significant about the opinion was its repudiation of the departure-from-doctrine standard and the correlative implied trust rule. In the case of a church with a congregational polity, its internal law governs and ordinarily this means majority rule.

[41] *Id.* at 725.

[42] *Ibid.*

[43] *Id.* at 727.

[44] See note 3 *supra.*

In the hierarchical church, the question is resolved by the authoritative organs of the church in accordance with its established law. If the opinion is taken literally, then neither the action of a majority in a congregational church nor that of an authoritative tribunal in a hierarchical church can be examined and condemned by a civil court on the ground that it results in a substantial departure from fundamental doctrines.[45] The courts will not interpose to insure institutional stability and integrity other than to inquire as to the determination by the organ vested with authority to make the decisive determination.

Watson was decided on the basis of federal common law in a diversity case. The Court's repudiation of the departure-from-doctrine standard appeared to rest primarily on the Court's application of principles derived from the law of voluntary associations[46] and its feeling that courts lack competence to define and interpret fundamental religious doctrines or to identify departures therefrom.[47] But as Mr. Justice Brennan later pointed out in the *Presbyterian Church Case*, the following language that he quoted from the *Watson* opinion also had a "clear constitutional ring":[48]

> 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. . . . All who unite themselves to such a body [the general church] do so with an implied consent to

[45] See TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 133 *et seq.* (1948); Casad, note 11 *supra*, at 435 *et seq.*

[46] "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or contract, are equally under the protection of the law, and the actions of their members subject to its restraints." 13 Wall. at 714.

[47] "Each of these large and influential bodies . . . has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usages and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own." *Id.* at 729.

[48] 393 U.S. at 446, quoting 13 Wall. at 728-29. (Bracketed material inserted by Brennan, J.)

> [its] 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 anyone aggrieved by one of their decisions could appeal to the secular courts and have them [*sic*] reversed. It is of the essence of 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.

Implicit in this language is the idea that the constitutional freedom of the churches includes an immunity to intervention by civil courts to pass on questions of religious doctrine, a domain reserved to the churches.

Justice Miller in writing the *Watson* opinion painted with a broad brush. Not only did the opinion mark a complete rejection of the departure-from-doctrine standard as a basis for judicial intervention through use of the implied trust fiction. It seemed to go all the way in rejecting any judicial examination of the determination by the appropriate authority, however determined and whether applied to a congregational or a hierarchical church. The Court did not distinguish between substantive and procedural matters. Did the case mean that courts could not inquire into questions of jurisdiction, procedure, and fundamental fairness when asked to accept at face value the determination of the ecclesiastical issue by the organ claiming authority to make the determination? On its face the opinion seemed to require such thoroughgoing judicial abstention.

That the Court's sweeping language in *Watson* should not be so literally construed was made clear shortly after *Watson* was decided. At the following Term the Court in *Bouldin v. Alexander*[49] held that the trustees of land given in trust for a Baptist church in the city of Washington could not be removed from their trusteeship by a minority of the church society or meeting without warning, without charges and trial, and in direct contravention of the church rules. The Court said it could inquire whether an attempted act of expulsion of members was the act of the church. "In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church. An expulsion of the majority by a minority is a void act."[50]

[49] 15 Wall. 131 (1827).

[50] *Id.* at 140.

The opinion in *Bouldin* was written by Justice Strong speaking for a unanimous Court that included Justice Miller. While the case affirmed majority rule in a church with a congregational polity, what was important was the Court's willingness to inquire into the legal authority of the group that had presumed to act for the congregation. Apparently the *Watson* case, not even mentioned in the opinion, was not regarded as relevant. Even more striking was the opinion of Federal Circuit Judge Taft, in *Brundage v. Deardorf*,[51] where he reviewed at length the validity of the adoption of a new constitution by the Brethren Church. Here the case turned on procedural regularity measured by the law of the church. Taft said that nothing in *Watson* required acquiescence in what he termed "an open and avowed defiance of the original compact, and an express violation of it."[52]

Watson stated a rule of federal common law applicable in diversity cases. As such it was not binding on the state courts. It did, however, exercise considerable influence on the state courts, particularly in its treatment of the question of church polity and in the propriety of judicial application of the departure-from-doctrine standard in the case of disputes involving hierarchical churches.[53] The effect of *Watson* was to confirm and strengthen the autonomy of a hierarchical church. It was a different story, however, with congregational churches. Many state courts were not convinced that they should abstain from applying the departure-from-doctrine standard in churches with a congregational polity, where a rule of abstention would permit a temporary majority to impair the insti-

[51] 55 Fed. 839 (C.C. N.D. Ohio 1893).

[52] "Even if the supreme judicatory has the right to construe the limitations of its own power, and the civil courts may not interfere with such a construction, and must take it as conclusive, we do not understand the supreme court, in Watson v. Jones, to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts. Certainly, the effect of Watson v. Jones cannot be extended beyond the principle that a bona fide decision of the fundamental law of the church must be recognized as conclusive by the civil courts. Clearly, it was not the intention of the court to recognize as legitimate the revolutionary action of a majority of a supreme judicatory, in fraud of the rights of a minority seeking to maintain the integrity of the original compact." *Id.* at 847–48.

[53] See Note, note 10 *supra*.

tutional stability and continuity of the congregation.[54] They continued to use the implied trust rule and apply the departure-from-doctrine standard in disputes over property, where it was found that the majority was attempting a "fundamental" or radical deviation from established doctrine and usage.[55] Indeed, the *Watson* opinion itself suggested an opening for inquiry into radical or basic departure when it said that no trust would be implied "for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth."[56] The phrase "in some respect" plausibly left open a judicial inquiry whether a majority was engaging in a fundamental departure from established doctrine and usage and could furnish a justification for the continued but discrete application of the implied trust rule. Apparently not all the Justices who participated in the *Watson* case were satisfied that it left no further room for the departure-from-doctrine standard in its application to congregational type churches. Justice Strong, in lectures on church law at the Union Theological Seminary during the winter of 1874–75, assumed the continued vitality of the implied trust rule as a matter of common law and attached great importance to it.[57]

The Supreme Court had no further occasion to deal with a problem of this kind until 1929, when it reviewed and affirmed a decision of the Philippine Supreme Court which had dismissed a complaint challenging the refusal of the Roman Catholic archbishop of Manila to appoint petitioner as a chaplain on the ground that he did not satisfy the qualifications established by canon law for that

[54] See Note, note 11 *supra*, 74 YALE L.J. at 1118 *et seq.*; sources cited note 45 *supra*.

[55] ". . . in cases of this kind the alleged deviation from the tenets or true standard of faith of the religious denomination ought to be so palpable and unequivocal as to enable the court, from an examination of the historical and doctrinal practices of the church, to say, that in respect of the doctrine in question there has been an essential change and departure therefrom. . . . In other words, before the court will be justified in holding the trust to have been perverted or misused, it must clearly appear that such a change or departure has taken place in the fundamental doctrine that it cannot be said to be the same, or that the denomination, as it existed before the change, is not, in all essential particulars and purposes, identical with that existing afterwards." Kuns v. Robertson, 154 Ill. 394, 415 (1895).

[56] 13 Wall. at 725.

[57] STRONG, note 11 *supra*.

office.[58] Respecting the role of a civil court in the case of a dispute over an ecclesiastical matter, the Court, speaking through Mr. Justice Brandeis, said:[59]

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

This case clearly fitted the rules governing hierarchical churches. In no church is the locus of authority more clearly defined than in the Roman Catholic Church. Several points in Justice Brandeis' opinion deserve brief attention. He rested the case for judicial abstention on familiar grounds of civil law. The parties had "by contract or otherwise" made the decision of the proper tribunal conclusive on matters purely ecclesiastical. Perhaps more significant was the proviso "In the absence of fraud, collusion or arbitrariness. . . ." This language did not appear in *Watson*. It could well be construed as limiting the breadth of the *Watson* opinion and sanctioning judicial review for the limited purpose of inquiring into questions of jurisdiction, procedural regularity, and perhaps fundamental unfairness.

III. THE PRESBYTERIAN CHURCH CASE

It was apparent that state courts that continued to follow the departure-from-doctrine standard as a matter of state common law had no intention of abandoning it unless forced to do so by some higher authority. This development was foreshadowed when the Supreme Court, by its interpretation of the Fourteenth Amendment made the free exercise and establishment clauses of the First Amendment applicable to the states.[60] Insofar as the application of the departure-from-doctrine concept in conjunction with the implied trust concept raised questions of undue intrusion by the civil courts into ecclesiastical matters, thereby interfering with the freedom of religious bodies to order their own affairs, the door was now open for invoking the limitations under the First and Four-

[58] Gonzalez v. Archbishop, 280 U.S. 1 (1929).

[59] *Id.* at 16.

[60] Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Board of Education, 330 U.S. 1 (1947).

teenth Amendments. Astute attorneys were quick to seize the opening. *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*[61] grew out of a dispute between the Moscow-based general Russian Orthodox Church and the Russian Orthodox churches located in North America over an appointment to St. Nicholas Cathedral in New York City. The Court declared unconstitutional a New York statute that recognized the autonomy and authority of the North American churches which had declared their independence from the general church. The New York courts sustained the validity of the statute and held that the North American Church's appointed hierarchy had the right to use the cathedral. This legislative intrusion into the government and control of the church was held by the Supreme Court to constitute an interference with the free exercise of religion guaranteed by the First Amendment. The Court now began the process of converting the common-law doctrine of *Watson v. Jones* into a constitutional limitation:[62]

> The opinion [in *Watson v. Jones*] radiates . . . a spirit of freedom for religious organizations, and independence from secular control or manipulations—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference. . . .
>
> By fiat [the statute] displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.

When later the New York courts attempted to achieve the same result, without the aid of the statute that had been held invalid, the Court in the *Kreshik* case[63] reached the same result.

Kedroff and *Kreshik* went far on the road to constitutional status

[61] 344 U.S. 94 (1952).

[62] *Id.* at 116, 119. For critical analyses of *Kedroff*, see Duesenberg, note 11 *supra*; Note, note 11 *supra*, 74 YALE L.J. 1113.

[63] Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of North America, 363 U.S. 190 (1960).

for the *Watson* doctrine that organs of civil government should not intrude into the determination of ecclesiastical affairs when deciding a controversy over the control of church property. But these two cases had dealt with a peculiar question—although a very vital one—of ecclesiastical authority. The Court by its decision put its weight behind the traditional established authority. No question was raised about deviation from fundamental doctrine. The implied trust rule was not at issue. *Kedroff* and *Kreshik* dealt with a question of underlying importance in *Watson:* where does ecclesiastical authority reside? But the problem in *Watson* grew out of a congregational schism and did not directly involve the question of control of the central church.

Notwithstanding these limitations, *Kedroff* and *Kreshik* pointed to erosion of the common-law implied trust rule as used to sanction the departure-from-doctrine standard. Commentators also were suggesting that the rule could not withstand constitutional scrutiny.[64] But state courts continued to follow and apply the rule.[65]

It was against this background that the Georgia Supreme Court decided the *Presbyterian Church Case.* Finding that the Presbyterian Church–U.S.A. had made substantial departures from established Presbyterian doctrine and usage, the court declared that the implied trust of the local congregational property in favor of the general body had terminated and it awarded custody of the property to the members and ministers who withdrew from the general church.[66]

[64] See PFEFFER, CHURCH, STATE AND FREEDOM (1967); Casad, note 11 *supra;* Duesenberg, note 11 *supra;* Note, note 10 *supra;* Note, note 11 *supra*, 74 YALE L.J. 1113.

See also Northside Bible Church v. Goodson, 387 F.2d 534, 538 (5th Cir. 1967), where the court held unconstitutional an Alabama statute that authorized a 65 percent majority of a local congregation to sever its connection with a parent church and to retain possession and ownership of its local church property free and clear of any trust in favor of the parent church whenever the local group determined that a change of social policies had occurred within the parent church. The court said that the statute "brazenly intrudes upon the very basic and traditional practice of the Methodist Church, and supersedes the processes available within the church structure for the settlement of disputes."

[65] See Cantrell v. Anderson, 390 S.W.2d 176 (Ky. 1965); Holiman v. Dovers, 236 Ark. 211, 236 Ark. 460 (1963); Vogler v. Primitive Baptist Church, 415 S.W.2d 72 (Ky. 1967); Davis v. Scher, 356 Mich. 291 (1959); Huber v. Thorn, 189 Kan. 631, (1962).

[66] The Georgia Supreme Court found that the "General Assembly's declaration that foreordination was no longer necessary for Reformed theology was contrary

The case bears many resemblances to *Watson v. Jones*. The Presbyterian Church—a hierarchical (in this case synodical or associational) church—was again involved. Courts had not generally applied the implied trust rule in cases involving churches of this type. Moreover, just as in *Watson*, where the schism arose over the general church's declaration on the slavery issue, so here the principal source of schism was over the declaration of the national church respecting social issues. The dispute turned on the interpretation and application of the church's doctrine and in a broad sense the dispute was a sociopolitical one. The Georgia Supreme Court could have reached a contrary decision either by finding that the implied trust doctrine was not applicable to hierarchical churches or that in this case there was no substantial departure from fundamental doctrine and usages or that the fundamental doctrine rule was no longer valid.

The Supreme Court's reversal of the Georgia decision marks the demise on constitutional grounds of the departure-from-doctrine rule. In reaching this result the Court dwelt on *Watson*, *Gonzalez*, *Kedroff*, and *Kreshik*. Indeed, the Court said that *Kedroff* had converted "the principle of *Watson* as qualified by *Gonzalez* into a constitutional rule."[67] While recognizing that the state has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution, the Court said:[68]

> [T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . The Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrines.

to one of the basic tenets which has made Presbyterianism significantly different from other denominations. The General Assembly's endorsement of civil disobedience, which would allow a citizen to decide whether or not he will obey the law, is a radical venture into civil affairs. It is absolute defiance of law and order, and is the road to anarchy. Also, the General Assembly's recommendation as to what steps should be taken to secure peace in Vietnam is an entry into diplomatic and military matters beyond the church's function as delineated by its Westminster Confession of Faith and Book of Church Order." 224 Ga. at 77.

In view of the action taken by the Georgia Supreme Court on the remand of the case, see note 71 *infra*, it is important to note that any claim by the Presbyterian Church in the United States with respect to the use of the property owned by the local congregation rested on an implied trust theory.

[67] 393 U.S. at 447.

[68] *Id.* at 449.

As pointed out by the Court, the application by the Georgia court of the departure-from-doctrine standard required two determinations:[69] (1) what the tenets of faith and practice of the Presbyterian Church were at the time of the local congregation's affiliation and (2) whether the general church departed substantially from prior doctrine:[70]

> Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

To emphasize its point the Court said that since the Georgia courts on remand may undertake to determine whether the petitioner (the general church) is entitled to relief on its cross-claims, the Court found it appropriate to remark that the departure-from-doctrine element of Georgia's implied trust theory "can play *no* role in any future judicial proceedings."[71] The Court then made

[69] "This determination has two parts. The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found." *Id.* at 450.

[70] *Ibid.*

[71] *Ibid.* On remand of the case the Supreme Court of Georgia again affirmed the judgment of the trial court in favor of the local congregations. Presbyterian Church in the United States v. Eastern Heights Presbyterian Church; Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 225 Ga. 259 (1969). Finding that the departure-from-doctrine standard declared unconstitutional by the United States Supreme Court was an essential element of the common-law rule whereby an implied trust resulted in favor of the general

the interesting point that even if the general church in reaching this decision purported to apply the state-fashioned departure-from-doctrine standard, this would not be subject to review by a civil court, since the "First Amendment forbids a state from employing religious organizations as an arm of the civil judiciary to perform the function of interpreting and applying state standards."[72]

What then does the *Presbyterian Church Case* contribute to the body of doctrine respecting the intervention of civil courts in ecclesiastical disputes?

1. It is constitutionally appropriate for civil courts to take jurisdiction of and decide cases that raise questions of control of church property, even though the dispute over control arises from a controversy over ecclesiastical matters.

2. In deciding these cases, the courts are constitutionally prohibited from employing the departure-from-doctrine element of the implied trust rule as a standard for deciding which faction in the congregation or church is entitled to the use and control of the property. This limitation appears to apply regardless of the nature of the church polity. Although the *Presbyterian Church Case* involved a hierarchical church, the Court's adoption of *Watson* as constitutional principle, the rationale of its decision with its emphasis on the freedom of the churches, and the explicit ban on any future use of the departure-from-doctrine standard, all leave no doubt that the Court did not mean to make distinctions turning on the nature of the church polity.[73]

Presbyterian church body, the court held that since a part of the rule had been stricken, the remainder fell with it and that the property in question was therefore no longer subject to an implied trust. Since it was clear that the local congregations held legal title to the property, the court affirmed the original judgment in their favor.

Claiming that the action of the Georgia Supreme Court on the remand in refusing further to apply an implied trust rule in this situation violates the First and Fourteenth Amendments, the Presbyterian Church in the United States has now applied to the United States Supreme Court for review of this action on a writ of certiorari. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 38 U.S. LAW WEEK 3092 (1969).

[72] *Id.* at 451.

[73] The question whether a civil court can apply the departure-from-doctrine standard in the case of an express trust remains an open issue. Mr. Justice Harlan, in his short concurring opinion, assumed that its use was permissible in this situation. He stated that he did not read the Court's opinion "to go further to hold that the Fourteenth Amendment forbids civilian courts from enforcing a deed or will which

3. Since the civil courts will continue to decide cases growing out of church disputes where control of property is at issue, the effect of the *Presbyterian Church Case* is to require courts to focus their attention on the locus of authority in the determination of ecclesiastical issues. Where does the power reside in the church structure for passing on the issue and what line of authority must be pursued? Here the distinction made in *Watson* between the congregational and hierarchical polities becomes important. According to *Watson* in the case of the independent or congregational churches, the issue of authority is determined by the usual rules applicable to voluntary associations.[74] The internal rules of the organization are determinative and if they prescribe rule by the majority of the congregation, this becomes the controlling authority subject to any limitations found in its constitution and bylaws. Presumably, then, if a majority of a congregation wish to employ a minister of a different faith or affiliate with a church body with entirely different tenets and practices, a minority loyal to the established tenets and usages of the congregation can no longer invoke a civil court's intervention to support its control of the property.

In the case of a hierarchical church, the authority for determination of the ecclesiastical issue is prescribed by the law of the general church body and binding determinations are made by its ecclesiastical organs in accordance with this law.

The application of this distinction to some well-known church bodies presents no problems. The Roman Catholic, Episcopal, and Presbyterian churches, for instance, are readily identified as hierarchical in the legal sense. The Congregational and Baptist churches are just as easily classified as congregational in their polity. Others are not so easily classified, as evident from the problems courts have faced in attempting to classify the polity of the Lutheran churches in the United States. Clearly hierarchical in the European countries of their origin, the Lutheran churches when established in this country showed a strong bent toward congregational autonomy despite synodical or denominational affiliation. This has led to disagreement between courts on the characterization of the Lutheran

expressly and clearly lays down conditions limiting a religious organization's use of the property which is granted. . . . In such a case, the church should not be permitted to keep the property simply because church authorities have determined that the doctrinal innovation is justified by the faith's basic principles." *Id.* at 452.

[74] See *supra* note 46.

polity.[75] The varying results reached respecting the legal characterization of the polity highlights the important point, sometimes obscured by attention to the constitutional issues raised by the departure-from-doctrine standard, that civil courts in identifying a church's polity for legal purposes are necessarily at the same time passing on an important ecclesiastical question respecting the nature of the church and its authority. Whether a court's determination of polity is founded on common knowledge, expert testimony, or the court's own examination of historical, documentary, and theological sources, it is resolving a legal issue by reference to a standard that requires a judicial interpretation of ecclesiastical sources.

Even if the issue of polity is readily determined, the sources and organs of authority may not be so readily ascertained. In the case of the congregational type of polity, the assumption is that the usual rules respecting voluntary associations apply and that the question becomes one of examining the constitution and bylaws to which members are presumed to subscribe. In many and probably most instances this may not present difficulties. But an examination of cases arising from disputes within an independent congregation reveals instances where congregations have no authoritative source documents, such as charters, constitutions, or bylaws.[76] Where does authority reside here? Perhaps a court will find some controlling usage such as rule by a majority of members of the congregation or by a body of elected trustees or elders, or, as in some cases, it may simply resolve the question by its own rule that the majority

[75] For example, in the context of the same factual dispute the United Lutheran Church in America was first found to be synodical in character by a federal district court, Evangelical Lutheran Synod v. First English Lutheran Church, 47 F. Supp. 954 (W.D. Okla. 1942), and then, after the district court was reversed on jurisdictional grounds by the court of appeals, 135 F.2d 701 (10th Cir. 1943), was found to be congregational in polity by the Oklahoma Supreme Court. First English Lutheran Church v. Bloch, 195 Okla. 579 (1945).

Compare Dressen v. Brameier, 56 Iowa 756 (1881); Duessel v. Proch, 78 Conn. 343 (1905); Fadness v. Braunborg, 73 Wis. 257 (1889); Gudmundson v. Thingvalla Lutheran Church, 29 N.D. 291 (1914); Mertz v. Schaeffer, 271 S.W.2d 238 (St. Louis Ct. App. 1954); and Rock Dell Norwegian Lutheran Congregation v. Mommsen, 174 Minn. 207 (1928), all of which found the Lutheran Church to be congregational in polity, *with* First Evangelical Lutheran Church v. Dysinger, 120 Cal. App. 132 (1931); Harmon v. Dreher, 1 Speers Eq. (S.C. 1843); Wehmer v. Fokenga, 57 Neb. 510 (1899), all of which found the church to be hierarchical.

[76] See, *e.g.*, Evans v. Criss, 39 Misc.2d 314 (N.Y. Sup. Ct. N.Y.Co. 1963); Golden v. Brooks, 276 S.W.2d 670 (Ky. 1955); Sapp v. Callaway, 208 Ga. 805 (1952).

governs, thus judicially creating a polity for the congregation by reference to well-accepted democratic principles.

4. In a part of its opinion in the *Presbyterian Church Case*, the Court indicated that though actions by authoritative religious organs may not be impugned on doctrinal grounds, courts may make a limited or marginal inquiry to determine the legality of these actions. As previously observed, the opinion in *Watson* taken on its face left no room for any kind of review of the ecclesiastical organ's determination. The eminent and leading authority on American church law, Carl Zollman, sharply criticized this aspect of the judicial abstention rule formulated in *Watson*.[77] In his view this would lead to judicial acquiescence in arbitrary and unprincipled action and abuse of power. Should not a civil court have authority to inquire into the question of jurisdiction of a church organ and the regularity of its actions? Should the question be examined by a court whether a church tribunal followed the procedures prescribed by its own internal law?[78] In the case where affairs of a congregation are determined by a majority of its members, should a civil court inquire whether the meeting was properly called and notice given and whether only properly qualified members took part in the meeting?[79]

[77] ". . . a refusal by the courts in a proper case to construe the constitution, canons or rules of the church and revise its trials and the proceedings of its governing bodies, instead of preserving religious liberty, destroys it *pro tanto*. If a person who connects himself with a religious association is to be placed completely at its mercy irrespective of the agreement which he has made with it, the conception of religious liberty as applied to such a case becomes a farce, a delusion, and a snare. Such a conception opens the doors wide for the most odious form of religious tyranny." ZOLLMAN, *supra* note 11, at 237–38; see also *id.* at 281 *et seq.*

[78] Justice Strong, who voted in the majority in *Watson v. Jones*, was not sure of the answer to this question. He stated that "this question is at present a pending one in the country, and opinions differ respecting it." STRONG, note 11 *supra*, at 42. He noted the arguments pro and con, but was careful to conclude that he did not "wish to be understood as expressing any fixed opinion on the subject." *Id.* at 44.

[79] Comparatively little has been written on this subject. Many commentators agree with the following statement written in 1871: "Non-established churches are merely voluntary associations founded on contract. Their constitutions, canons, rules and regulations are the stipulations between the parties. Tribunals may be established by agreement, for the enforcement of discipline, but they are limited by the terms of such agreement and must proceed as therein specified, and substantially in accordance with the law of the land and the principles of justice. They have no 'jurisdiction,' properly speaking, for that implies the existence of a power conferred by the state and vested in functionaries sanctioned for that purpose by the state, but that which for convenience may be so termed, entirely dependent

Courts generally have experienced no difficulty in reviewing actions of membership organizations to see whether they conformed to the organization's internal law.[80] To apply this same degree of review to determination by ecclesiastical organs is simply an application of the neutral principles to which Mr. Justice Brennan referred in the *Presbyterian Church Case*.[81] The truth is that courts, notwithstanding *Watson*, have reviewed actions by ecclesiastical authority to determine legality.[82] This has not been peculiar to state courts. In the *Bouldin* case the Supreme Court reviewed the validity of what purported to be the action of a church, and in the much cited case of *Brundage v. Deardorf*, the federal court scrutinized at length the validity of procedures employed in amending a national church body's constitution.[83]

upon the contract, and which never precludes the fullest investigation by the civil courts in a proper case, arising upon the action of such voluntary tribunals, and the administration of such relief as upon the facts appears appropriate and necessary." Fuller, note 17 *supra*, at 314.

[80] See Chafee, note 25 *supra*; Comment, *Developments in the Law—Judicial Control of Private Associations*, 76 HARV. L. REV. 983 (1963). For discussions respecting labor unions, see Summers, *Union Schism in Perspective: Flexible Doctrine, Double Standards, and Projected Answers*, 45 VA. L. REV. 261 (1959); Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

[81] "It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." 393 U.S. at 449.

[82] Some courts will grant review of any ecclesiastical proceeding despite the character of the interest involved: Taylor v. Jackson, 273 Fed. 345 (App. D.C. 1921); Jones v. State, 28 Neb. 495 (1890); Hendryx v. People's United Church, 42 Wash. 336 (1906); Kaminski v. Hoynak, 373 Pa. 194 (1954); Russian-Serbian Holy Trinity Orthodox Church v. Kulik, 279 N.W. 364 (Minn. 1938); Sims v. Greene, 76 F. Supp. 669 (E.D. Pa. 1947).

Others grant review of procedural regularity only when a property interest is at stake: Fussel v. Hail, 233 Ill. 73 (1908); Ramsey v. Hicks, 174 Ind. 428, 434 (1910); State *ex rel.* Johnson v. Tulane Ave. Baptist Church, 144 So. 639 (La. App. 1932); Shaw v. Harvey, 7 N.E.2d 515 (Ind. App. 1937); Jenkins v. New Shiloh Baptist Church, 189 Md. 518 (1948).

Still others deny review altogether despite the character of the interest: Van Vliet v. Vander Naald, 290 Mich. 365 (1939); *but see* Komarynski v. Popovich, 232 Mich. 88 (1925).

[83] See text *supra*, at notes 51 and 52. For later cases where federal courts undertook a careful review of the procedural regularity of actions taken by church bodies, see Taylor v. Jackson, 273 Fed. 345 (App. D.C. 1921); Sims v. Greene, 76 F. Supp. 669 (E.D. Pa. 7).

In *Gonzalez* Justice Brandeis said that the decisions of proper church tribunals on matters purely ecclesiastical are accepted in litigation before the civil courts "[i]n the absence of fraud, collusion or arbitrariness."[84] This limiting phrase now assumes new importance. The Court in the *Presbyterian Church Case* said that in *Kedroff* the Court had converted the principle of *Watson* "as qualified by *Gonzalez*" into a constitutional rule.[85] But Mr. Justice Brennan went on to say that the *Gonzalez* exception permits only the narrowest kind of review. It was unnecessary for the Court to elaborate upon these terms, but clearly they leave open an important avenue for collateral judicial review of an ecclesiastical determination. "Arbitrariness" as a standard for review is an indeterminate and flexible term. Much can be poured into it. It is not stretching the limiting phrase of *Gonzalez* to suggest that it permits an inquiry into jurisdiction, regularity of procedure, and basic fairness of the ecclesiastical proceeding and determination. Indeed, the Court's reference in a footnote[86] to the *Bouldin* and *Brundage* cases as instances of the marginal review of ecclesiastical determination offers persuasive evidence that the *Gonzalez* exception will be construed to authorize review of questions going to legality in the strict sense. This suggests a parallel to judicial review of administrative tribunals. In any event it may safely be predicted that future litigation will furnish a rich glossary on "fraud, collusion, or arbitrariness."

What does the *Presbyterian Church Case* contribute to the general body of ideas developed in the interpretation of the establishment and free exercise clauses of the First Amendment? Intervention by a civil court in an ecclesiastical dispute presents a genuine question of church-state relations where it is particularly meaningful to speak of the separation of church and state whether viewed as a principle derived from the twin religion clauses of the First Amendment[87] or as an instrumentality doctrine serving the cause of religious liberty.[88]

It is worth noting that while the Court in the *Presbyterian Church Case* speaks of values protected by the First Amendment, at no

[84] 280 U.S. at 16. [85] 393 U.S. at 447. [86] 393 U.S. at 447 n. 6.

[87] See Everson v. Board of Education, 330 U.S. 1, 14–15 (1947); Zorach v. Clauson, 343 U.S. 306, 312 (1952).

[88] See Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953).

point in the opinion is it categorically stated that the judicial application of the departure-from-doctrine standard violates either the establishment or the free exercise limitations or both. Indeed, if First Amendment values are the criteria, it may be argued that the decision upholds a general freedom of association distilled from the First Amendment freedoms and that the holding applies equally to prohibit state interference with the internal affairs of any voluntary nonprofit association that serves a charitable purpose. The law respecting voluntary membership associations generally has been developed on the basis of contract, property, and trust law.[89] The general tendency in recent years has been to enlarge judicial review of the action of private membership organizations in the interest of assuring fair treatment of members. In affirming the jurisdiction of civil courts to review religious disputes in order to settle property issues and in saying that courts in applying neutral principles do not thereby establish a religion, the Supreme Court appears to be treating churches like any other voluntary association.[90] Such an interpretation of the case fits into Professor Kurland's thesis that the purpose of the twin religion clauses of the First Amendment is to eliminate the religious factor as a basis for legislative classification.[91] But the underlying substance of the *Presbyterian Church Case* opinion clearly reflects reliance on the religion clauses of the First Amendment and strongly suggests that in the Court's view voluntary religious associations are constitutionally distinguishable from other types of voluntary associations. The Court relied heavily on *Watson*, which contained strong overtones of religious liberty, and on *Kedroff*, which, in converting *Watson* into a constitutional rule, clearly rested on the free exercise clause. A reading of the total opinion seems to make clear, therefore, that when the Court spoke of "First Amendment values," it was referring to values protected by the free exercise and establishment clauses. It is, however, interesting that the Court did not explicitly ground the decision on the free exercise clause as appears warranted by its reliance on *Kedroff*. The ambiguous reference to First Amendment values suggests reliance on both the free exercise and establishment clauses. This is a situation where the two clauses work to the same end.

[89] See sources cited in note 17 *supra*.

[90] See note 81 *supra*.

[91] See KURLAND, RELIGION AND THE LAW (1962).

Application of the departure-from-doctrine standard interferes with the freedom of churches to interpret and develop their doctrines; it also requires courts to put the imprimatur of their authority behind a particular set of religious doctrines, thereby raising an establishment issue. Moreover, according to Mr. Justice Black's famous dictum in *Everson*, any interference by organs of government in the affairs of the churches violates the establishment limitation.[92]

The *Presbyterian Church Case* reinforces *Kedroff* on the general proposition that the freedom of religion secured by the First Amendment extends to the churches in their institutional and corporate capacity. By far the greater number of free exercise cases have involved claims of violation of individual freedom, and it is possible that the free exercise clause has its greatest significance in application to individual claims. But the churches as institutions may also stake out some very elementary and basic claims to freedom under the First Amendment. Certainly any notion that the First Amendment freedoms can be invoked only by natural persons has long since become obsolete.

The Court's action in utilizing the First Amendment to condemn the application of a state common-law doctrine that threatened inhibition of free development of religious doctrine by implicating secular organs in matters of purely ecclesiastical concern should not obscure the complexity of the issues involved and the problem faced by the Court in choosing between competing interests. Probably the principal reason why state courts have applied the departure-from-doctrine standard is to protect the expectations of those who have helped to build up congregations by their contributions and other efforts. The departure-from-doctrine standard therefore helped to promote the free exercise of religion. The Court in the *Presbyterian Church Case* made a choice between competing claims to freedom. Moreover, while the Court's decision purported to rest on a constitutionally required abstention of civil organs of government from the determination of ecclesiastical affairs, complete abstention is impossible as long as civil courts undertake to review in any way ecclesiastical determinations that touch on civil rights. When a court intervenes to determine property rights, its decision

[92] "Neither a state nor the Federal Government, can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." 330 U.S. at 16.

necessarily gives support to one faction or another, and it uses the force of governmental authority to support and establish the victorious faction. By the same token the courts cannot be strictly neutral in reaching decisions on these matters.

The Court's language in the *Presbyterian Church Case* is categorical. Civil courts may not interpret religious doctrine in resolving church property disputes. The Court did not presume to weigh the interests served by the departure-from-doctrine standard against the constitutional difficulties resulting from this intrusion of the civil government upon the autonomy of the churches. But balancing is implicit in the resolution of the problem faced by the Court. It is fair to interpret the decision to mean that the legitimate interests served by the application of this standard are not sufficiently important to justify a state-created limitation on the freedom of an ecclesiastical body to be master in its own house in accordance with its established polity.

In conclusion, a word may be said on the practical implications of the *Presbyterian Church Case*. The ground rules for judicial intervention in religious disputes are now being nationalized and the application of these rules will be subject to supervision by the Supreme Court. Churches of both types of polities now may assert a federal constitutional liberty to define and develop their doctrines and to determine their affiliations with other church bodies, free from the hazards of litigation in the civil courts over the departure-from-doctrine issue. Freedom of affiliation is particularly important in this day of the ecumenical movement. The Supreme Court by its recent decision has facilitated the freedom of the churches to further this movement.[93] Parishioners and ministers dissatisfied with the policies adopted and actions taken by churches at the national level and congregations at the local level, where such actions are taken in accordance with the organization's own internal law, may of course withdraw, but in doing so they forfeit their claim to use of the church property.[94]

[93] For discussion of the problem prior to the *Presbyterian Church Case*, see the articles by Casad and Stringfellow, note 11 *supra;* also Note, 1967 Wis. L. Rev. 497.

[94] This conclusion assumes that the local congregational property is subject to a trust in favor of the national church body. If a state court may now constitutionally withdraw the entire benefit of the common-law implied trust doctrine in this situation, any interest of the national church body in the use of the property will have to rest ei[illegible] on statutory authority or on the express terms of a deed or trust instrument or of the constitutions of the local congregation or the national church body. See note 71 *supra* respecting the action taken on remand by the Supreme Court of Georgia in the *Presbyterian Church Case*.

A second practical effect of the *Presbyterian Church Case* is that it elevates a religious body's organic law—charter, constitution, and bylaws—to a new level of importance. Values served by the departure-from-doctrine standard, in terms of institutional stability and the expectations of donors, can be achieved by formulations explicitly set forth in the organization's basic documents. Similarly, a church organization, whatever its polity, is in the best position to maintain its autonomy as against the risk of judicial intervention by spelling out in its organic law the locus of authority, the procedure to be followed, and the limitations to be observed.[95] A well-defined organic law—whether or not called ecclesiastical law—is the best assurance of both stability and autonomy. This lesson, emerging from the *Presbyterian Church Case*, should not go unheeded by American churches.

[95] See in this connection the following statement from the *Presbyterian Church Case:* "States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." 393 U.S. at 449.