

JURISDICTION OF CIVIL COURTS OVER RELIGIOUS ISSUES

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I

Civil church law is in essence a study of the relationship between competing powers. That is not to say that the competition for sovereignty in realms common to or overlapping both is antagonistic, in a deprecatory way. A fundamental Christian theological position is that the state is a complement to the purposes of the Church,¹ and also that the prosperity of the Church is of positive interest to the state.² Nor is this conception foreign to political thought and jurisprudence, including that which has shaped the American democratic system.³ The word competition is chosen to denote the active interplay between church government and civil government which flows from the indecision existing within and between them as to the proper scope of their respective domains. There is not now nor has there ever been in the two thousand year history of the Christian Church common agreement over where to draw the line. The oft-repeated Biblical guide "Render unto Caesar the things which are Caesar's and unto God the

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¹ The word "church" will be capitalized when referring to the communion of believers, or when used as part of the name of a denomination. Otherwise, lower case is used.

² Many of the orders about which Christian theologians have written depend for their identification on both observable fact and the presuppositions and commands of the decalogue. Express references to obligations toward a state are absent from these ten directives. Nevertheless, there is ample Biblical ground for the proposition that the state is authority as an order to which all are subject. St. Paul remarks in *Romans* 13: 1-3, that all "should be subject to the governing authorities. For there is no authority except from God. . . . For rulers are not a terror to good conduct, but to bad." The use of the terms "good" and "bad" clearly inject a quality ingredient requisite to a "power" being "authority," as does also the referent to which the power owes its status of "authority." In listing certain virtues of civil government by way of his commentary on Psalm 82, Luther wrote "that temporal government, next to the preaching office, is the highest service of [to] God and the most useful office on earth." 13 LUTHER'S WORKS 51 (American ed. 1956). See also AUGUSTINE, *CITY OF GOD* (Mod. Lib. ed. 1950); LUTHER, *CONCERNING GOOD WORKS; AN ADDRESS TO THE CHRISTIAN NOBILITY OF THE GERMAN NATION*; and especially *CONCERNING GOVERNMENT: TO WHAT EXTENT ONE IS OBLIGATED TO OBEY IT*, all of which are available in numerous sources. There are many other references which could be made, not least of which would be those to Aquinas, who is almost the final word from the Roman Catholic point of view, and CALVIN'S *INSTITUTES*, for another Protestant position.

³ Again the citations could be innumerable, though it should be mentioned that western democracy is in large measure a dissent from authoritarian theology.

things which are God's"⁴ is hardly a definitive aid. There is not much precision in this, although when reflected upon with the conditions of the period in which it was uttered in mind, perhaps something of value as a starting point may be acquired. When Jesus Christ spoke these words in Jerusalem, he was speaking to citizens of as brutal a government as dissidents had ever known. And yet the admonishment was to "render unto," denoting obedience and respect and submission.

Even the beginner will soon realize that to dip into the tomes of history and the endless line of decisions in civil and ecclesiastical courts on inter-church-and-state law is to become immediately involved in the study of liberty. Freedom of the state from the church, or the church from the state—the emphasis has shifted from century to century and country to country—is one thing involved. But the drama of that story is second to the fascination of following the development of individual liberty which has been both a catalyst for and a by-product of the conflict between the two great powers. Often the liberties of the individual have been paraded as the chief interest of institutional contenders, but in fact individual liberty was not even thought of. The freedom of the individual to do as he wills is an easy victim of political power, whether exercised by church, by state or by another concentration of power. Nor does history indicate that limited liberty is assured to be better under one authority than under the other, for there is considerable truth in Lord Acton's maxim that power corrupts and absolute power corrupts absolutely. Church politics and the politics of civil government have made strange bedfellows.

Thus it is that I approach this subject of church civil law from the point of view of a government's duty to protect the maximum degree of effective free action by individuals. Along the paths of succeeding pages there will be presented some "rules of law" as lawyers like to refer to court decisions, plus a good deal of speculation about some of them.

II

Religious issues get into the courts in many ways. Reference here is not to the nature of the action, but rather to the types of disputes which involve issues touching on religious beliefs, and which for a resolution require the judgment of the civil judiciary. Two very active areas are the innumerable problems surrounding domestic relations—marriage, dissolution of marriage, and adoption—and involving education. In both fields participants speak highly of religious liberty and the separation of church and state.

"Separation of church and state,"—this is a principle of the highest level abstraction, which means one thing to one person and to another

⁴ *Matthew 22: 21.*

something different. It is at best a title for an idea. It suggests a disposition, or several dispositions which vary in their emphasis on what should fall within the pale of separation and what should not. To some it may even denote the concept that there can in no way be any function of the government which aids a church. But immediately, to be consistent, there must be taken the next step that any governmental actions which are either neutral or repulsive to the interests of a church are equally anathema. Add to this the fact that the community is not at all at one concerning what is a church (and here the word is used in its loosest sense, to mean all religious—indeed, what is that?—⁵ societies) and the further fact that total inaction may be the surest way to “aid,” and it becomes instantly apparent that “total” separation, as black may be distinguished from white, is simply not possible. This would seem so elementary a proposition that it becomes pedantic to set it forth and yet this writer feels excused in making the statement in view of some attitudes, judicial and otherwise, which have been expressed with too much zest.

The entire orbit of church and state conflict is charged with distrust between the contending participants. Much of the apprehension of for example, the non-Roman Catholic who looks only at the political activities of that church is well-founded. History, if it is not made to forget the trespasses of the Roman Church, records periods of action wherein the duties entrusted to it were badly administered. Something of the same may be said with more or less emphasis of almost any organization which has had an extended existence. The core of historical Christianity, entrusted to the charge of the Church, is shared by many denominations of the Christian faith, yet among them there is a high degree of suspicion of the social action of the various other communions. Much of the furor over public aid to parochial education is traceable to an honest conviction that if a parent withdraws his child from the facilities of public education, that is a choice freely exercised which does not take with it the right to enjoy in a private institution the same or any of the services provided at public expense in the public institution, including the generally classed social welfare privileges, such as bus transportation, free milk, medical services, and the like.⁶ But it

⁵ The word “religion” properly includes the concept of living in relation to a higher order, which is not something merely desirable, but which makes demands upon the life being lived. The element of dependence, and consequently, worship, is necessary. For the purposes of being a religious society in our legal system, all of this is not necessary. Ethical groups may qualify as religious societies for a most important purpose, tax benefits. *Fellowship v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394 (1958), noted in 58 COLUM. L. REV. 417 (1958).

⁶ See Konvitz, *Separation of Church and State: The First Amendment*, 14 LAW & CONTEMP. PROB. 44 (1949), which criticizes the argument that since the parochial schools perform many of the same functions of public schools, the state should therefore extend financial support to them.

is suggested that a significant though rarely articulated ingredient of the objection predicates itself on the nature of some parochial education, not so much in that it is administered with a point of view or conviction in mind, but that distortions are created through a consciously or unconsciously incorrect presentation of material. With design or without, mass communication media such as diocesan or church-wide newspapers and nationally run advertisements are employed to present information without even the least effort to maintain a reasonable standard of accuracy. This is a serious ethical irresponsibility, contributing nothing to a much desired and needed cultural rapprochement among our national religious groups.

Leo Pfeffer, from a Jewish perspective and that also of a lawyer, has analyzed the disparity between creeds in terms of competition.⁷ This has its place, but there are limits to the approbation which should be given to competition between religious sects, or for that matter between all groups. Democracy is not merely a system where-in the strongest components may impose their philosophies on others, though to influence the social and political culture would surely be proper. Democracy depends more upon the education of the individual, whose civic responsibility ought not to be lost by assimilation into national groups pretending to act for him in every way, be they religious, professional, labor, or otherwise. It is not the function of the government to determine which religious society is "true"; it must allow all to function. In like fashion, it is not the function of a church to seek laws proscribing certain conduct which in no demonstrable way can be conceived inimical to the interests of the state. In mind as an example are those jurisdictions which prevent their citizens from legally pursuing what to some is a highly intelligent and responsible, and certainly not conclusively un-Christian course of conduct in planning families, not so that marriage is made a legalized infamous association, but rather to the end that the greatest happiness, spiritual and material well-being, and education can be provided.⁸ Organizations which take western political democracy seriously must exercise self-restraint and maintain a distance from those outside their fold charitably to allow them to choose as they will.

Religion is deemed by our culture to be a matter of persuasion. The law cannot compel a citizen's adherence to a religious belief, and must always protect the privilege of infidelity. While this is a position compatible with sectarianism, it is not apparent to the writer why it is not also a distinctly religious position. Does it follow that if God can-

⁷ PFEFFER, CREEDS IN COMPETITION (1958).

⁸ CONN. GEN. STAT. tit. 53-32 (1958): "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

not be avoided, He cannot be refused? The liberal political theory is often criticized for allegedly substituting reason and conscience for God.⁹ Insofar as this might be a theorist's conviction, it embraces a head-on conflict with Christianity. However, if in the pure heavens of theological abstractions everyone is not free to choose his own religion, why must this deny to the community of people constituting a state the right or power to endow the state with religious neutrality? Incipient Christianity depended heavily on a political right to dissent. And is it not the *raison d'être* of Christianity that its God extended to humanity a choice which was exercised, albeit wrongly? A political structure which maximizes the opportunities of free choice is, admittedly, pregnant with certain dangers inimical to the propagation of a given creed. But competition for the souls and minds of men is something which even organized Christianity can ill-afford to be without. History is replete with instances where a relatively unchallenged church lost sight of its divine responsibility and betrayed its Founder even to the extent of commercializing the gift of His grace. Jesus Christ did not coerce or put to death, but was instead crucified for teaching, and while His crucifixion is viewed by Christians as a function of His redemptive work, it and the whole course of His life may incidentally but significantly serve as an example of social conduct in a pluralistic society. The medieval concept that where the laws of the church spoke, its courts as of right should adjudicate is not indispensable to Christian theology, and is quite contrary to all of American democratic culture, and to more and more of English history since the English Reformation brought a desirable halt to centuries of bickering with the pope.¹⁰

III

Religious issues as a generic term includes the types of cases encompassed in the above discussion. Through the years much has been

⁹ E.g., PARSONS, *THE FIRST FREEDOM: CONSIDERATIONS ON CHURCH AND STATE IN THE UNITED STATES* 115 (1948): "[Liberalism] holds as a doctrinal religious dogma that man owes his sole allegiance to his own reason, none to God, unless he choose to give it to Him. This is freedom of conscience in the Liberal tradition. It is freedom from religion, not freedom of religion; it is freedom of conscience as against God. Freedom of religion is freedom of the individual conscience against the state, a very different thing. The very reason why man has freedom of religion against the state is precisely because he has no freedom as against God." Parsons' conclusions are not acceptable as to the whole of western political liberalism.

¹⁰ Space does not permit reviewing the history of ecclesiastical courts. In English history their jurisdiction enjoyed a wide range, including clerical ordination and problems of church polity and ownership, matrimony and related family matters, wills and administration (this involving one's final act), contracts under oath, and all civil and criminal actions against clerics. The best history on the subject is, of course, 1 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1904).

said about them in many places. A narrower pattern of cases is chosen for the bulk of this article, for two reasons. First, little extended comment is available on those selected, at least nothing comparable to the volumes which have appeared on God in the schools, the public purse for private purposes, morals, censorship, and religious issues in domestic relations. Second, a no less important issue of church and state relationships is involved.

The cases for survey are those which have come to the civil courts seeking a solution to a dispute which has arisen within a given denomination, or within the framework of an established congregation. Generally the dispute arises over a claim for church property, though less frequently a simple action for reinstatement of membership,¹¹ for burial rights,¹² or for reinstatement of a pastor¹³ or officer¹⁴ appears.¹⁵

Here, as elsewhere in the law, may be found many generalizations. Countless are the times when courts have said that religious disputes are not within the jurisdiction of civil courts. This sweeping statement gets limited to read that a "purely" ecclesiastical or doctrinal issue is outside the scope of civil court jurisdiction, thereby enabling them to assume a decision-making function over factions whose property squabbles are inextricably interwoven with doctrinal undertones. Or to put it another way, a judge may say that religious disputes which involve property or civil rights are within the scope of his office.

To the observer who has some acquaintance with comparative Christianity, the trite judicial guide that a court will not take jurisdiction of purely ecclesiastical disputes must look amazingly simple. The very question of what is purely a religious issue is one which could be charged with religious involvement or implications. Who is to decide what is solely religious and what is solely or essentially a property dispute? The court, of course, but the contentions of the litigants frame the issues; it is their argumentation, their rationale which wraps the garb of ecclesiastical sanctity around claims involving the interests of the church. Could the courts ever properly accede to the proposition that to quarrel with a church is itself a religious issue to be resolved, therefore, solely by church discipline? And then inexorably apply the decision of the church tribunal? Granted the suggestion is mere speculation, but some

¹¹ Mt. Olive Primitive Baptist Church v. Patrick, 252 Ala. 672, 42 So. 2d 617 (1949).

¹² McQuire v. St. Patrick's Cathedral, 54 Hun. 207, 7 N.Y.Supp. 345 (1889).

¹³ King v. Smith, 106 Kan. 624, 189 Pac. 147 (1920); State ex rel. Hynes v. Holy Roman Apostolic Catholic Church, 183 Mo. App. 190, 170 S.W. 396 (1914).

¹⁴ Mt. Olive Primitive Baptist Church v. Patrick, *supra* note 11.

¹⁵ This article will concentrate on civil jurisdiction over church disputes largely other than those involving merger activities, except as these are deemed necessary for setting forth rules bearing on the narrower scope of this paper. Mergers are discussed elsewhere in this symposium.

may not think it too exaggerated or absurd, seeing something of a kernel for such a result in recent cases.

IV

Before looking at some of the recent litigation, a moment should be spent on examining a venerable old case, ancestral decision to the rationale emanating from courts in church disputes today. In mind is *Watson v. Jones*,¹⁶ which proceeded from the ranks of the Presbyterian churches, whose peace, as the peace of most institutions, was shaken by the events of the Civil War. A flurry of cases came from Presbyterian congregations and formed the nucleus for a considerable contribution to the law of this area. That church's ecclesiastical organization and geographical distribution made a perfect blend for giving vent to some of the ill feelings left in war's wake. Presbyterian congregations numbered well among southern Christian bodies, especially in Missouri and Kentucky, where, by virtue of their border position, mixed opinions flourished.

When the national church, through the General Assembly—highest church organ, defined Christian social responsibility in terms of loyalty to the federal government and repulsion toward slavery, it was like rubbing salt into yet unhealed wounds. A good number of southern or southern-oriented congregations rebelled. Factions split off; majorities and minorities attempted to pull their congregations out of the national body. Case upon case was docketed and heard, among them *Watson v. Jones*. Arising in Kentucky and destined for Washington, that case was the genesis of an arduous, tedious, often faltering line of cases which has constructed a yet unfinished but probably wholesome framework within which religious societies enjoy a more or less unfettered autonomy.

The Louisville Walnut Street congregation of the Presbyterian Church split over the retention of a pastor, occupancy of that office being the immediate focal point at which conflicting social views on slavery were exhibited. A cleavage in the congregation separated those for and against the determination of the General Assembly. Those opposing the action of the assembly joined the Louisville Presbytery in condemning the national body which in turn declared those faithful to it to be the true presbytery. As each faction made efforts to keep out their adversaries, final resolve was sought in the courts. By bringing the action in the name of an Indiana member of the congregation, the jurisdiction of the federal court was called into service, a tactic hopefully calculated to accomplish results more favorable to the national organ.¹⁷

¹⁶ 80 U.S. (13 Wall.) 679 (1871).

¹⁷ In the courts of Kentucky, see *Watson v. Avery*, 65 Ky. (2 Bush) 332 (1867), where the court ruled in favor of the pro-southern faction.

Better results were forthcoming. The nation's highest forum set forth its now famous trichotomy of church dispute cases, which, though not binding on state courts, remained the single most important decision to emerge in nearly a century of this type litigation. According to the Court, disputes were of three types:¹⁸

1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.

In reference to the first, the Court said that "it would seem . . . to be the obvious duty of the court . . . to see that the property so dedicated is not diverted from the trust which is thus attached to its use."¹⁹ Proper organizational succession through elected officers or majority control, as the case may be, was the key criterion in the quest for a solvent to questions of the second grouping. But as to the third, the Court said:²⁰

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority 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 as binding on them, in their application to the case before them.

¹⁸ *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

¹⁹ *Id.* at 723.

²⁰ *Id.* at 727. The Court acknowledged a contrary rule in England, assigning by way of explanation the fact of an established church.

V

Of the overwhelming body of litigation which has arisen from church disputes, that series involving the Russian Orthodox church of Saint Nicholas in New York City stands supreme. With political undertones, with state judicial and state legislative involvement, with a federal Supreme Court pronouncement, with disputes both property and religious, with all of these and more, spanning the years of several decades, it is a veritable showcase of the problems under analysis. It would be well to pause for a full review of that contest.

The facts of this case can get rather unwieldy, but those necessary for a mental picture of the discord may be stated as follows.²¹ A building for the congregation of St. Nicholas of the Russian Orthodox church was constructed in New York City in 1903, with a corporation of the same name holding title. Gifts, both foreign and domestic, and from the mother church in Moscow, were used for its erection. Dedicated to the use of the New York congregation, it achieved the status of a cathedral in 1905 when the See of the Russian Orthodox diocese of North America and the Aleutian Islands was transferred from San Francisco to New York.

Clouds formed over the calm of the maturing congregation's existence when revolutions were also changing scenery in the homeland. Following the collapse of the czarist regime, a great convention of the world-wide Russian Orthodox Church was held during 1917-18. The patriarchate²² was reestablished for the first time since Peter the Great forbade elections to that office and formed in its stead the Most Sacred Governing Synod in 1700. The newly elected Patriarch Tikhon became arch-prelate and head of church administrative affairs. He was the supreme church authority, solely vested with power to convene the church in its great conventions, called sobors.

Kerensky had authorized the 1917-1918 sobor. But his short-lived regime capitulated in the Bolshevik "October Revolution" of the same

²¹ *St. Nicholas Cathedral of the Russian Orthodox Church in North America v. Fedchenkoff*, 192 Misc. 327, 77 N.Y.S.2d 333 (Sup. Ct. 1948), *aff'd sub nom. St. Nicholas Cathedral of the Russian Orthodox Church of North America v. Kedroff*, 276 App. Div. 309, 94 N.Y.S.2d 453 (1950), *rev'd*, 302 N.Y. 1, 96 N.E.2d 56 (1950), *rev'd and remanded*, 344 U.S. 94 (1952), *new trial ordered*, 306 N.Y. 38, 114 N.E.2d 197 (1953), *dismissed sub nom. St. Nicholas Cathedral of the Russian Orthodox Church of North America v. Kreshnik*, 9 Misc. 2d 1069, 166 N.Y.S.2d 245 (1957). The above reports contain variously extended statements of the facts, the best appearing in 302 N.Y. 1, 96 N.E.2d 56 (1950). Briefs were kindly made available to the writer by the general counsel for the Russian Orthodox Church in North America, Mr. Ralph Montgomery Arkush, of the New York bar.

²² The term "patriarch" has no single meaning, even when used in connection with religious organizations. In the Eastern Confession of the Christian Church, he is the head of a given church body, but does not claim any power of doctrinal infallibility, such as has been developed in connection with the Roman Catholic pope, who is patriarch of the Latin rite of that communion.

year. Difficulties mounted. Church property was confiscated, clergy were liquidated and the patriarch was put under house arrest, a condition which continued for several years until he was imprisoned.²³ In November of 1920, Tikhon issued a ukase, or letter of instructions, to diocesan bishops providing in part that "if the highest church administration . . . would for any reason discontinue their church administrative activity," the bishop, either alone or with neighboring dioceses where possible, should "assume full hierarchical power."²⁴

When Patriarch Tikhon's imprisonment took place in 1922, a group of priests declared themselves the supreme authority of the church and summoned a sobor for 1923. This convention became known as the sobor of the "Living" or "Renovated" church, whose uncanonical status was not at all times, nor by all parties admitted, as the ensuing disputes were to sojourn through American courts.

Tikhon's lot at this sobor was by no standards desirable, for execration and villification were heaped upon him. Reviled and denounced as an apostate and traitor, he was unfrocked, and the patriarchate again was dissolved.

Something of the communist control and influence imposed on the Russian Orthodox Church may be inferred from comments in the minutes of the 1923 sobor. The now trite propaganda contrast between capitalist exploiters and the worker proletariat classes was paraded before Christians with the admonishment that passive indifference was sinful. The sobor declared capitalism to be a mortal sin, and its eradication a holy goal.²⁵

The American echoes of this Babylonian captivity of the Russian Church manifested themselves in a severe clash between Russian Orthodox recognition of the Soviet dominated hierarchy and those not taking such a step. The first legal move was made as early as 1918, when a priest,²⁶ John Kedrovsky, of the Russian Orthodox Church sued the

²³ Patriarch Tikhon was released from prison in 1923, but was thereafter confined to a monastery where he died in 1925. 302 N.Y. at 11, n. 3, 96 N.E.2d at 60, n. 3.

²⁴ *Id.* at 7, 96 N.E.2d at 58.

²⁵ The resolution read that the "All-Russian Local Sobor of the Orthodox Church testifies before the face of the Church and all mankind that at present the world has divided itself into two classes: capitalists-exploiters and proletariat, with whose labor and blood the capitalist world is building its welfare.

"In the whole [world] only the Soviet Government of Russia went into battle with that social evil. The Christians cannot be indifferent spectators of that battle. The Sobor declares capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians. In Soviet Authorities the Sobor sees a world's leader for fraternity, equality, and peace of nations. The Sobor stigmatizes the international and national counter-revolution and condemns it with all its religious and moral authority." Brief for Appellee to Supreme Court pp. 12-13.

²⁶ Throughout its briefs, the American church faction referred to Kedrovsky as an "agent."

managing and advisory group of the North American diocese, challenging the claim of Alexander Nemolovsky to the chair of archbishop. A receiver of church property throughout the continent was appointed.²⁷ Kedrovsky buttressed his demands a few years later when he was able to procure from the 1923 sobor documents purporting to consecrate him archbishop of the North American diocese and to excommunicate the new Archbishop, Platon Rojdesvensky. Thus armed, Kedrovsky confidently commenced another action²⁸ in 1924 which for the initial instance clearly set before the New York courts rival claimants to ecclesiastical office and possession of the Cathedral of St. Nicholas. Round one of this encounter went to Platon, as the supreme court ruled that peaceful occupancy for more than three successive years was a defense to an action of ejectment. But the battle was first beginning.

At the time Kedrovsky was pursuing his claims to Russian Orthodox Church property in America, a national convention was called by the American diocese for April 2-4, 1924, in Detroit. The summoning of this convention was precipitated by the announced excommunication of Platon and its ensuing confusion. At this Detroit sobor, the Russian Orthodox Church in America²⁹ was established and administrative independence from the hierarchy in Moscow was declared. The new authorities retained St. Nicholas Cathedral of New York City as its central see. It is the personnel of this Russian Orthodox Church in America who continue until this day a struggle to maintain the right to worship in and occupy the St. Nicholas Cathedral.

Previously it was mentioned that not in all stages of these encounters did the parties to it concede the uncanonical status of the so-called "Living" or "Renovated" church, child of the 1923 sobor. Indeed, it was imperative for Kedrovsky in both his 1918 and 1924 actions to rely on canonicity. The reason for noting this point is that it underscores the difficulty of dryly following the logic of a rule, in this instance the rule of *Watson v. Jones*.³⁰

Whatever else was contested in the above actions, neither party disputed the hierarchical attributes of the Russian Church. As such, it was clearly a case for *Watson v. Jones*, category three. And so the

²⁷ The action, involving deeds to 135 church properties in 19 states and Alaska, was titled *Kedrovsky v. Archbishop and Consistory of the Russian Orthodox Greek Catholic Church*, 218 App. Div. 121, 217 N.Y.Supp. 873 (1926) *rev'd*, 249 N.Y. 75, 162 N.E. 587 (1928).

²⁸ *Kedrovsky v. Rojdesvensky*, 123 Misc. 159, 204 N.Y.Supp. 442 (Sup. Ct. 1924), *rev'd*, 214 App. Div. 483, 212 N.Y.Supp. 273 (1925), *aff'd per curiam*, 242 N.Y. 547, 152 N.E. 421 (1926). It was this opinion which found the 1923 Sobor to be proper and canonical.

²⁹ The establishing resolution provided for autonomy and subordination to its own elected archbishop, but stated that not all spiritual ties with the mother church, for which it should always pray, would be broken.

³⁰ *Supra* note 16.

court thought when the 1924 action was appealed.³¹ All the testimony in favor of Platon was that his standing as archbishop depended on an oral order of Tikhon, but oral, be it noted, because of the strained political conditions under which the prelate operated. Kedrovsky, on the other hand, was able to show written confirmation of his appointment by the 1923 sobor, which Platon vainly assaulted as uncanonical. The court concluded: "the Patriarch had no power to appoint an Archbishop, and since in any event an oral appointment would be invalid,³² [Platon's] title does not seem to be well proven, nor is the claim of recognition by various persons who have no right of appointment any proof of authority to act as Archbishop in this diocese, and thus to administer the trust in the real property herein involved."³³

If the virtue of a law is found in its ease of application the ingredient was present in this decision. It was quite simple, the torpid path of logic from *Watson v. Jones* to Platon's defeat. But the dissent would seem to have extracted from the testimony the real crux of the case, and at the same time afforded support to those who fear the legalistic application of lifeless legal formulas. Certainly the decision would be agreed unjust if the dissent were correct when it remarked:³⁴

. . . He [Kedrovsky] is the servant of a group who have reached a position of power in their church organization through the revolution in Russia and by what appears to be questionable means. It is extraordinary that they should have the aid of a court of equity to displace those who are administering the trust strictly as it was intended to be administered.

Ironically, the uncanonical status of the 1923 sobor and the Renovated Church which it created, was conceded in an action initiated in 1945 against the successors in interest of Kedrovsky.³⁵ By this time, several intervening moves of importance had been taken. The cathedral had been incorporated in 1925 and title transferred to the corporation. Kedrovsky died in 1934, but his son Nicholas Kedroff took up occupancy of the property, and remained until his demise in 1944, when another brother John Kedroff continued occupancy as "priest."³⁶ Of two outstanding developments in the intervening years, however, one was the 1927 Soviet permission for the Patriarchal Church to reopen its central office. But the policy of the new church authorities in

³¹ 214 App. Div. 483, 212 N.Y.Supp. 273 (Sup. Ct. 1925).

³² *Id.* at 487, 212 N.Y.Supp. at 276, citing INDEX CANONUM, 33D APOSTOLIC CANON.

³³ *Id.* at 487-88, 212 N.Y.Supp. at 276-77.

³⁴ *Id.* at 490, 212 N.Y.Supp. at 279.

³⁵ *Supra* note 21. The premise for this concession was that the 1923 sobor was not ecumenical, that is, world wide.

³⁶ There was grave doubt even in the mind of John Kedroff about his status as a priest. See 302 N.Y. at 20, 96 N.E.2d at 66.

Moscow demanded from clergy and laity alike loyalty to the Soviet government, a condition of full communion with the mother church of Moscow existing even now. Benjamin Fedchenkoff was in 1933 appointed by the Moscow authorities as archbishop of the Aleutian Islands and North America. Decently and in good order allegiance to the Soviet government was denied by the American church. Because of this, the nearly ten year old proclamation of autonomy was ruled an act rudely violative of church discipline, and the American faithful were unilaterally declared schismatic on August 16, 1933.

Platon died in 1934, and the American Church elected its own ruling bishop, Theophilus Pashkovsky of Chicago.³⁷ All subsequent attempts at full communion have failed because of the refusal of the Moscow authorities to relax this obviously political requirement.

The second principal event was the enactment by the New York Legislature of a law³⁸ which declared the Russian Orthodox Church of North America to be the Russian Orthodox Church of corporate standing. The statute became effective on April 10, 1945. It did not outwardly purport to transfer title to the cathedral from one body to another, but it did establish a basis for a new attempt by the Russian Orthodox group rejecting Moscow supremacy to regain possession of the cathedral. The new action was started on the 9th of April, 1945.

³⁷The authority of the American-elected Bishop Theophilus to direct the affairs of the church was upheld in *Waipa v. Kushwara*, 259 App. Div. 483, 20 N.Y.S.2d 174, *app. den.* 283 N.Y. 780, 28 N.E.2d 417 (1940).

³⁸Religious Corporations Law, Article 5-C, effective April 10, 1945, reads in part: § 105. "The 'Russian Church in America' . . . refers to that group of churches . . . of the Eastern Confession . . . which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.

"A 'Russian Orthodox church' . . . is a church, cathedral . . . or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to *administrative jurisdiction of said mission, diocese or autonomous metropolitan district herein above defined as the Russian Church in America.* (New matter italics, L. 1948, c. 711, § 1, eff. March 31, 1948).

§ 107.(1) "Every Russian Orthodox church in this state, whether incorporated *before or after the creation of said autonomous metropolitan district . . .*

Opinions³⁹ from the New York trial court through those of the United States Supreme Court are in each instance interesting reading, but brevity compels moving directly to that of the highest Court, which reversed the New York disposition of the case that had been in favor of the claimant Russian Church in America. But first a comment on the status of the case as it was when it proceeded to the Supreme Court.

More than five years after commencing the action and nearly three years from the date of decision in trial term, the court of appeals of New York ruled⁴⁰ for the American church on the ground that the new legislative provision was not violative of the federal constitution as repugnant to the religious establishment clause.⁴¹ But it also observed that a common law ground existed upon which the decision could be predicated, namely, whether or not the revival of the patriarchate in Moscow had been a political move. "If the Moscow patriarchal throne has been resurrected by the Soviet Government solely as a means of influencing opinion at home and abroad, and if it may now operate on an international scale, not as a true religious body, but only as an ex-

shall recognize and be and remain subject to the jurisdiction and authority of . . . the Russian Orthodox Church in America. . . ."

³⁹ *Supra* note 21.

⁴⁰ 302 N.Y. 1, 96 N.E.2d 56 (1950). The pilgrimage of Article 5-C in the lower courts was not without obstruction. Trial term (192 Misc. 327, 77 N.Y.S.2d 333 (1948)) ruled that the act amounted simply to a recognition of the American Russian Orthodox Church, but as a separate entity, without reference to ownership in the property interests of the Russian Orthodox Diocese of North America and The Aleutian Islands.

Much of the same interpretation was rendered in the appellate division, (276 App. Div. 309, 94 N.Y.S.2d 453 (1950)) which was disturbed by the constitutional implications of the plaintiff's suggestion that the statute be read to mean that the right to possession and use of the church properties "continues" in the American Church. "It should not be construed to mean that the legislature has taken sides in the religious controversy as to the right of autonomy. . . . Such a construction would show an intent by the legislature to interfere in ecclesiastical concerns which is hardly within the competence of legislative action. . . . We can find no suggestion in the present Article of any intention to transfer any beneficial interest of a religious trust in the St. Nicholas Cathedral to the "Russian Orthodox Church in America" contrary to the wishes of the supreme ecclesiastical authority of the beneficiary church." *Id.* at 316-17, 94 N.Y.S.2d at 458-59. A dissent took the position, later to emerge with significance, that "instead of being schismatic, the group in America to which plaintiff belongs is adhearing, insofar as possible, to the Orthodox tradition, from which the Russian high church authorities departed when, yielding to force, they accepted what might be termed the Russian Orthodox Church of the Communist Obedience." *Id.* at 322, 94 N.Y.S.2d at 463. On Article 5-C, the dissent said that it was constitutional, and that the majority had construed it too narrowly in saying that it merely recognized the existence of the American Church group.

⁴¹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend I. Made applicable to states through the fourteenth amendment. See *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

tension or implementation of Russian foreign policy, then it is clear that the North American metropolitan district and not the appointee or ambassador of the central authorities in Moscow, is the proper trustee to manage for the benefit of the faithful in this hemisphere those religious temporalities dedicated to the use of the Russian Orthodox Mission and Diocese prior to 1924 when it became an administratively autonomous metropolitan district."⁴²

When the case was at last argued in the nation's highest tribunal, Kedroff and the Russian alignment pounded away at the proposition that article 5-C was an undue infringement into church affairs. Strategically, this move was sound, though it had no precedent in any case on point. It was also a successful maneuver, for the Supreme Court agreed that 5-C was unconstitutional. It read the statute to mean that all Russian Orthodox churches in New York, founded before or after the year 1924, had through the Russian Orthodox Church in North America declared their autonomy from the Moscow patriarchate, and that the legislative recognition of this had the effect of transferring⁴³ control of the New York churches from the central governing hierarchy of Russia to the North American synod. This the Court said was unconstitutional. "It prohibits in this country the free exercise of religion. Legislation that regulates church administration, the operation of the churches, the appointment of clergy, by requiring conformity to church statutes adopted at a general convention . . . prohibits the free exercise of religion."⁴⁴ The Court viewed the provision as displacing "by fiat" one church with another. "It 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."⁴⁵

VI

There are several points to be noted about the Court's reasoning. First, the appeal to religious freedom. That argument is quite as valid to the American Church group as to the defendant Kedroff Russian alliance. It is granted by all parties that religious freedom is to be protected, but the crux of the problem is how and by what and whose freedom? That of a "church"? Or the group of persons which makes up the physical church? The support which the Moscow oriented group of the Russian Orthodox Church received from American Russian Orthodox believers was exceedingly small, for nowhere does it appear that anything less than 80 per cent of Russian Orthodox Christians of American parishes were behind the maneuvers of the American group. There is some indication from the facts that while there was not unani-

⁴² 302 N.Y. at 22, 96 N.E.2d at 67.

⁴³ *Supra* note 40.

⁴⁴ 344 U.S. 94, at 107-08.

⁴⁵ *Id.* at 119.

mous approval of the breach with the Moscow hierarchy, there was except for the Moscow appointed clerics no affirmative adherence to the Russian organizational authority.⁴⁶ If such are the facts of any given case, it becomes apparent that a dry adherence to denominational authority and supremacy may, as indeed it has,⁴⁷ result in a denomination with a shrine, a shrine without worshipers, and worshipers without a shrine. There is hardly anything functional about a decision with these consequences.

Maybe functionalism is irrelevant if the concept of church and state separation is to develop along lines absolutistic. There is certainly some merit to the position that a culture must proceed from certain basic propositions, and that decisions are to conform to the prescriptions, even though in the process someone may occasionally be injured. Common agreement, however, is rarely achieved concerning the consequences which are congruous with a given cultural principle. Opposing interests often conceive, as they did here, their solutions to be consonant with developing principles of religious liberty in the United States.

The precise ruling of the Court was that the New York legislative attempt to transfer property from one church faction to another must fail because afoul of the federal constitutional provisions respecting freedom of religion. That there was constitutional ground for arguing the invalidity of the Article 5-C may be true,⁴⁸ but whether this position ought to have been predicated upon the non-establishment clause is another matter. Particularly is this true since the broader reading of the

⁴⁶ The American group was described as "comprising at least four fifths of the Russian Orthodox churches in the United States. . . ." 276 App. Div. 309, 322, 94 N.Y.S.2d 453, 464 (1950). Uncontested statements appearing in the brief for appellee on appeal to the Supreme Court (p. 103) were to the effect that there was no Russian Orthodox church in New York desiring to recognize the administrative jurisdiction of the Moscow patriarchate. However, numerical division is not of significance in schisms involving congregations submitting to a centrally organized church hierarchy. See ZOLLMANN, *American Civil Church Law*, 77 COLUMBIA UNIVERSITY STUDIES IN HISTORY, ECONOMICS, AND PUBLIC LAW Ch. 7 (1917).

⁴⁷ Frequently, the laws of a denomination will provide that property of a member unit which attempts to withdraw will revert to the judicatory immediately superior. For instance, By-Law 16 of the Evangelical and Reformed Church provides that "If a Congregation or a Synod withdraws from the jurisdiction of the Evangelical and Reformed Church, the property of said congregation or Synod shall revert to the charge and control of the Judicatory immediately above, in the case of a congregation to the Synod, and of a Synod to the General Synod." THE CONSTITUTION AND BY-LAWS OF THE EVANGELICAL AND REFORMED CHURCH, as amended, 1956. Denominational executives have expressed dissatisfaction with such provisions, because "in litigation based on such a clause, even though a denomination can sustain its claim, it usually wins nothing more than an empty building." Letter from Rev. James E. Wagner, President, Evangelical and Reformed Church, dated March 2, 1959. The letter states also that present merger efforts are proceeding with the intention of discarding any such reversion clauses.

⁴⁸ See *infra* at 529.

decision is that not only was the New York statute, or any like it, invalid, but that courts must accept as final the adjudication of the highest ecclesiastical tribunal. As the Court phrased it:⁴⁹

Ours is a government which by the "law of its being" allows no statute, state or national that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion.

There are difficulties here especially with the Court's attitude on the Constitutional imperative. If the decision is read in the perspective of early cases involving church property disputes, it becomes clear that there is in it a considerable change from previous cases. In the first place, the *Watson v. Jones* case above discussed was not one on constitutional law.⁵⁰ Further, without any suggestion of a constitutional infraction, jurisdictions have in the past required reconciliation of church discords by democratic process. This was true, for example in Pennsylvania.⁵¹ While at first blush this may not appear inconsistent with the present ruling, in fact such decisions or statutes would seem now on constitutional analysis foreclosed, for to require disposition of a church dispute by any legislatively prescribed process would be to deny validity to a decree of an ecclesiastical tribunal attained through the decisional process established by the custom or law of a given church society.⁵²

⁴⁹ 344 U.S. at 120-21.

⁵⁰ The Supreme Court admitted this: "The opinion [of *Watson v. Jones*] did not turn on either the establishment or the prohibition of the free exercise of religion." 344 U.S. at 110.

⁵¹ Act of April 26, 1855, P.L. 328, Sec. 7: ". . . property . . . bequeathed, devised or conveyed . . . for the use of any church, congregation, or religious society . . . shall not be otherwise taken and held or enure, than subject to the control and disposition of the lay members . . . according to the rules . . . of the religious society shall belong. . . ." Repeated by Act of June 20, 1935, P.L. 353, sec. 1, which was held constitutional in *Canovaro v. Brothers of Order of Hermits of St. Augustine*, 326 Pa. 76, 191 Atl. 140 (1937), and *Post v. Dougherty*, 326 Pa. 97, 191 Atl. 151 (1937), noted in 4 U. PRR. L. REV. 76 (1937). The 1855 statute was in essence a codification of the common law decision in *Maceirinas v. Chesna*, 299 Pa. 70, 149 Atl. 94 (1930). See also *Mazaika v. Krauczunas*, 233 Pa. 138, 81 Atl. 938 (1911) where the court declared against public policy a resolution of a congregation that the Roman Catholic bishop hold all property in conformance with the laws and usages of the Roman Catholic Church.

⁵² Christian theology teaches that the authority of the Church proceeds from the Triune God. But Christian communions differ in the conceptions of how authority is expressed in organizational policy. Roman Catholic theology denies to the laity any authority in the discipline or structure of the church. Evangelical Lutheran theology puts less stress on outward form, so that the world's Lutheran

Other instances may be recalled to demonstrate that civil courts did not deem themselves constitutionally incapable of adjudicating church disputes, even when ecclesiastical tribunals had spoken. Classic examples are the cases which cavalierly refused to apply the rules of *Watson v. Jones*,⁵³

As lawyers well know, the Constitution and what it meant in 1787 has before been altered at the hands of Supreme Court justices. Therefore the preceding criticism for all its validity is rendered somewhat paralytic by precedent. But the court of 1953 had earlier opportunities to reflect upon its concept of religious liberty, of separation of church and state, and it might be well to recall them to test the Court's consistency.

The sweeping decision, and one which caused rumblings of many sorts was *McCullum v. Bd. of Educ.*⁵⁴ It will be remembered that there the Court ruled unconstitutional the utilization of Illinois tax-supported public school buildings to enable groups to give religious instruction to public school pupils. Justice Black reiterated his earlier stand⁵⁵ that neither state nor the federal government could establish a church or pass laws which aid one religion, all religions, or prefer one over the other. Jefferson's "wall of separation" metaphor was invoked, indeed was exceedingly taxed when Justice Frankfurter added that "[s]eparation means separation," "eternal separation," clear, distinct, not that of a "fine line easily overstepped."⁵⁶

Nobody seems quite sure what all is meant by the *McCullum* words. The point to observe here is that it was very prophylactic in tone. Whatever may be said of the historical justification for its exaggerated position—and there is considerable evidence that the framers of the Constitution did not mean all of that⁵⁷—it nevertheless is what the

bodies are variously structured. Extremely opposed to the Roman Church's position is that of the Baptists, who regard autonomy and self-determination as alone theologically correct.

⁵³ See, e.g., *Watson v. Garvin*, 54 Mo. 353 (1873); *Olear v. Haniak*, 235 Mo. App. 299, 731 S.W.2d 375 (1939); *Kreker v. Shirey*, 163 Pa. 534, 30 Atl. 440 (1894). The Court limited *Watson v. Jones* a few years later when it said an obvious usurper in ecclesiastical office would not be permitted to control church property. *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872).

⁵⁴ *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

⁵⁵ *Everson v. Board of Educ.*, 330 U.S. 1 (1947). This and the *McCullum* case, *supra* note 54, have received endless comment, and there is no intention here to add another. Among the better reflections on the cases are those in a symposium on *Religion and the State*, 14 LAW & CONTEMP. PROB. (1949).

⁵⁶ The full quotation is: "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped. . . . 'The great American principle of eternal separation' . . . is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities." 333 U.S. at 231.

⁵⁷ Professor Edward S. Corwin has given a short and incisive comment on

Court in its exegesis said is the thrust of the concept of religious liberty under our political system. On the other hand, and in the context of the same principle, *Kedroff*, as broadly construed, gives religious societies an institutional liberty, an autonomy in limited but important fields. It is a sovereignty clothed with constitutional sanctity, beyond the reach of state activities by a religious society.⁵⁸ One may be excused if the inconsistency confounds, for in the name of separation, it is a gigantic leap with a bundle of aid. In view of the overly platitudinous character of the *McCollum* decision, perhaps the incongruity is not surprising.

Without disparaging critical intent, it is observed that the *Kedroff* reasoning as a legal principle is of inestimable value to churches as such, especially those organized centrally. Conjointly, it is accommodating to certain extensions of the Christian theological position that the Church looks to Christ, not to the state, for authority for its existence. The Church as the *communio sanctorum*, does, according to Christian dialectics, exist despite the state.⁵⁹ But when this dogma is thrust into the arena of practical political issues of jurisdiction, as between an organized church and the state, there is no common agreement as to what the precise position of a church is. Church authority is spoken of as two-fold: to teach⁶⁰ and to govern.⁶¹ The latter is its authority of jurisdiction encompassing its members who are by it to be governed in the interest of the Church. Some Christian bodies through their emphasis on this function and favored by the political culture of the time, have erected detailed legal systems.

Now of course to say that the Church has a governing authority or office does not mean much until certain concrete issues are met. As a statement of a principle it is sufficiently vague so as to be susceptible of vanishing into political nothingness. If when translated into practical meaning for practical men it signifies that the state has no jurisdiction over disputes between members of an organized church, or over conflicts

the Court's characterization of the concept of separation of church and state as applied to state governments through judicial interpretation of the fourteenth amendment, in the *Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949).

⁵⁸ The Court conceded that "legislative power to punish subversive action cannot be doubted." 344 U.S. 109. In view of the preemption conflict existing over state and federal espionage laws, however, the Court's concession is not necessarily very meaningful. See, *e.g.*, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), and Collings, *Criminal Law and Administration*, 1957 ANNUAL SURVEY OF AMERICAN LAW 93, 94.

⁵⁹ As an historical organization, the Church is subject to secular law. But as a total organism, it is the body of Christ (*Ephesians* 1: 23) which, though persecuted, exists without authority from the state. An excellent discussion of "The Church and the Forces of History" appears in ELERT, *THE CHRISTIAN ETHOS*, ch. 10, (1957) translated from the German, *Das Christliche Ethos* (1949).

⁶⁰ *Matthew* 28: 19.

⁶¹ *Matthew* 18: 18.

between the members of a church and the church itself, or that the jurisdiction of the state is simply to formalize ("to apply") the decisions of an ecclesiastical tribunal,⁶² then clearly competition with state political authority is implicated. To such hermeneutics, the accommodating merits of the Supreme Court *Kedroff* decision are patent.

That the decision is suitable for church purposes is not in itself improper. On the contrary, and the law in this country has been no barrier to orderly church administration. Allow one more observation to be made, however. If the authority of a church tribunal is from its members, presumably the source of the authority can revoke, modify, or otherwise affect it. Such governing power proceeds from consent, and as such would justify a civil court's enforcement of church decrees on contractual grounds. Voluntarily associated persons ought to be able to set forth the rules which govern them in their organization. If, however, the authority asserted by the ecclesiastical powers is dependent on an alleged commission from Divinity exclusive of lay expression,⁶³

⁶² This jurisdictional approach is suggested in a series of articles, titled *Separation of Church and State in Restatement of Inter-Church-and-State Common Law*, appearing in 5 JURIST 73 (1945), 6 JURIST 503 (1946), and 7 JURIST 259 (1947). The authors, writing in the publication of the School of Canon Law of the Catholic University of America, advocate a conflicts of laws approach to cases where church law and civil law are on a given issue different. Therefore, in a civil action which would involve, let us say, a Roman Catholic party or parties, the civil court would apply the law of the Roman Catholic Church, looking to the canon law of that denomination. In criticizing the decisions of the Supreme Court which have declared unconstitutional statutes making it an offense for one peddling religious wares to refuse to leave the private premises upon the request of the owner, the authors maintain that the Jehovah's Witness legislature could not impose duties on members of other religious bodies, for lack of jurisdiction. Therefore, the authors state that the decision that Jehovah's Witnesses have the right under religious liberty to go on the property of others to preach or play records is incorrect. (See *Grace Marsh v. Alabama*, 326 U.S. 501 (1946). The property being a company owned town.) Similarly, the authors go on, "if priests of the Roman Catholic Church entered upon the land of another for the purpose of exercising their religion by administering spiritual goods, and objections were made thereto by the State or individual citizens, resulting in court proceedings, secular courts could not look to the so-called 'freedom of religion' clause of the first amendment to determine whether or not the priests had the right so to do. Secular courts would first have to look to the *Codex Iuris Canonici*, the law of the (Roman) Church, to discover what rights had been conferred and what duties imposed, in these respects, by the Church; and, secondly, would have to determine whether or not the State will recognize the asserted rights as valid, under the principles of *Inter-Church-and-State Common Law*." 6 JURIST at 519.

⁶³ It is not being suggested that the authority of the Church proceeds from its members. As a revealed religion, Christianity depends upon Revelation for its doctrine and authority. However, most theologians agree that doctrinal issues are of unequal significance. One obvious area is how church government is manifested over the temporal assets of the churches. There is nothing inconsistent with the principle that Church authority to govern its property, though of Divine commission, may be exercised in response to legitimate desires of its members, and

the power is theoretically free-wielding, limited only by divine law (which in turn is defined by the ecclesiastical authority) and potentially insulated from the demands and desires of those affected by the exercise of that authority. Under the broad interpretation of the *Kedroff* ruling, a state would be powerless to respond to misgivings which its citizens may have after reflecting on the potentials of this theorem.

Another point to note is that no exigencies of the case drove the Court into the corner of illogic. By choice or quite unwittingly it alone was responsible, for an excellent foundation avoiding inconsistent consequences under the religious liberty principles of previous decisions was available. In the opening sentence of his concurring opinion, Justice Frankfurter remarked that "a legislature would not have the power merely because the property belongs to a church" to "displace the judicial process and decide a particular controversy affecting property" so as to decree that one party rather than the other "owns it or is entitled to its possession."⁶⁴ Of course. It is not the job of the legislature to determine a litigious issue by statute, let alone by one which transfers property. Once the Court took the position that Article 5-C "transferred" ownership from one party to another, enough was said to condemn the statute,⁶⁵ without getting into the murky waters of religious freedom. To this the only apparent counter argument would have been that no "transfer" took place, that the statute only "continued" the property in the previous owners; but this was precisely the position which the Court rejected by concluding that there was a transfer.⁶⁶ Some would hope that when bases other than religious freedom are available, the latter would be by-passed, to take its turn when others fail.

indeed this is the approach of, for instance, the presbyterian form of church government. The Roman Church rules out a representative government by believing its priesthood as alone commissioned with authority. See CATHOLIC ENCYCLOPEDIA, *Title Church* (1908).

⁶⁴ 344 U.S. 94, 121.

⁶⁵ Cases involving descent of property have frequently said that a legislature has no power to transfer a vested property interest from one to another. This is a due process concept under the state and federal constitutions, and, though complex and with many ramifications, it would seem to have been useful in the context of the *Kedroff* case. *Schumacker v. Chapin*, 228 S.C. 77, 88 S.E.2d 374 (1955); *Muldow v. Caldwell*, 173 S.C. 243, 175 S.E. 501 (1934). "It seems to us that a statute which declares in terms, and without more, that the full and exclusive use of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision." *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877).

⁶⁶ It has been held constitutional to repeal a statute which required church property to be held subject to the control of its members in favor of an act requiring it to be held according to the rules of the church, even if the rules vest complete control in church hierarchy, the argument being that under the repealed statute no property rights vested in the members. *Canovaro v. Brothers of Order*

VII

When the *Kedroff* case was back in the Court of Appeals of New York, a decision⁶⁷ was handed down which in some measure diluted the impact of the Supreme Court reasoning. It has been observed on an earlier page⁶⁸ that the initial New York Court of Appeals rationale bottomed itself on Article 5-C, but that the court acknowledged a common law approach also to be available. That recognition assumed importance at this juncture, for after examining and determining what it considered to be the scope and effect of the Supreme Court decision the court invoked the aid of its previous analysis. The Supreme Court, it said, resolved nothing beyond the constitutionality of Article 5-C, for its decision "repeatedly returned to the theme that the statute in question . . . was beyond the legislative power of the state of New York and violated the Constitution rule against prohibition of the free exercise of religion."⁶⁹ From this perspective of the Supreme Court ruling, it was a simple step for the court to reject the idea that *Watson v. Jones* had been elevated to constitutional status, and to argue:⁷⁰

Whatever other limitations have been or will be placed upon the rule of *Watson v. Jones*, there is one basic qualification to its application. That is that the highest church authority or tribunal, whose decision is to be accorded final and conclusive effect, must in truth and fact be capable of functioning freely with its activities directed by churchmen in the interests of the church and in accordance with the organic law of the church. In other words, where a property right turns upon a decision of the church authority, the civil court is under a duty, if such issue is raised, to ascertain whether the purported authority is duly constituted and functioning. The court is not required, without investigation and in unquestioning obedience to a legal formula, to give conclusive effect to the determinations of any group which purports to exercise authority, particularly as against the contention that the claimed authority is being subverted to secular and irreligious ends.

This argument is couched in terms of ascertaining whether the property

of Hermits of St. Augustine, 326 Pa. 76, 191 Atl. 140 (1937) (see note 51 *supra*). With the cathedral title in the corporation, who had a "vested" interest? The church as such? Or its members? Or neither, so that the corporation could control its use, and the statute could be read as not affecting any vested interests?

⁶⁷ 306 N.Y. 38, 114 N.E.2d 197 (1953).

⁶⁸ *Supra*, page 523.

⁶⁹ 306 N.Y. 38, 49, 114 N.E.2d 197, 203 (1953).

⁷⁰ *Id.* at 51, 114 N.E.2d at 204.

is being administered properly in accordance with the terms of a trust.⁷¹

The New York court was not unanimous. In dissent it was said that the Supreme Court did make the rule of *Watson v. Jones* one of constitutional dignity, and that it meant simply this:⁷²

. . . that, as to a subordinate body of a general church organization the civil courts must accept, as finally binding, the decisions of the supreme judicatory of the general organization in all matters of discipline or belief, or ecclesiastical custom or law. Since, said the Supreme Court in its opinion in our case, the Russian Orthodox Church is hierarchical in government, the power to appoint, and the choice of, its archbishops is a matter of ecclesiastical government, as is the right of that appointee, as such, to occupy the cathedral. Therefore, the question sought to be litigated in this suit was one with which the civil courts had nothing whatever to do. Any state interference with such choice of a prelate, or such occupancy, would be violative of freedom of religion under the Federal Constitution.

The split at this point is crucial, for the equivocation it created is currently the single most important ingredient in the law of this area. It is conjecture to argue the correctness of either position, but the argument's resolution is decisive. If the dissent reflects more accurately what the Supreme Court intended, a throng of cases goes by the wayside. And there is strong support for the dissent, both in the Supreme Court's own words⁷³ and from the general agreement among com-

⁷¹ Courts frequently talk in terms of trust law, though in fact a gift to a church for its general purposes does not create a technical trust. 4 SCOTT ON TRUSTS § 348.1 (2d ed. 1956). This leads to difficulties which the majority here overlook. When the majority says that the court will look to see who of the parties is carrying out the purposes of the trust it is assuming a jurisdiction which is expansive if the court is willing to analyze doctrine, but which is very narrow if it allows the highest tribunal of a church to decide the "trust purposes." Acknowledgment and submission to church superiors is central to the theology of hierarchical churches of the Roman Catholic and Eastern types. It is not the privilege of the laity or inferior clergy to question the legitimacy of the highest official, though there is a means to remove even an infallible hierarch. Should a civil court presume, then, to litigate the legality of an occupancy even of the highest office? The court of appeals majority clearly answers this affirmatively, putting it in terms of trust inquiry. To the writer, this is the only proper approach, but it must be stated that it operates as a limitation on the *Watson* rule as handled by the Supreme Court in the *Kedroff* decision. Some of the authority cited by the New York court to support its trust rationale is not precisely on point, because faithfulness to trust purposes was predicated on conformity to denominational positions set by the church authorities, not by the court. *E.g.*, *Westminster Presbyterian Church of West Twenty Third Street v. Trustees of Presbytery of New York*, 211 N.Y. 214, 105 N.E. 199 (1914).

⁷² 306 N.Y. at 55, 114 N.E.2d at 207.

⁷³ "Freedom to select the clergy, where no improper methods of choice are

mentators⁷⁴ that the court of appeals cavalierly refused to follow the Supreme Court, circumventing its directions by an unwarranted shift to its common law basis.

To this writer, the majority's reasoning is completely proper, and alone acceptable. Influenced perhaps by this disposition, my next remarks may assume too much, but the speculation merits notation.

Shortly after the second court of appeals decision, there was a denial of certiorari by the Supreme Court in a case interesting because of its factual kinship to the *Kedroff* pattern. Though lawyers are told not to ascertain a court's position from its refusal to set a case down for argument, most will admit there is often prophetic insight in taking notice of it. In mind is *Romanian Orthodox Missionary Episcopate v. Trutza*.⁷⁵ These are the facts. From 1929 adherents of the Eastern Orthodox Church were operating under the title of Romanian Orthodox Missionary Episcopate of America. When the church was established in this country it had the power to elect its own bishop, a power delineated in by-laws adopted in 1932.⁷⁶ The Holy Synod of Romania endorsed this power by sending a bishop requested by the American church in 1935. This bishop, named Morusca, led the American church into adopting new by-laws providing that the selection of a bishop would be made by the Holy Synod in Bucharest, whose Patriarch would perform the rite of consecration. These 1936 by-laws also read that "The Holy Synod of the Romanian Orthodox Church is the most supreme authority pertaining to spiritual and canonical matters of whatever nature they may be. . . ."⁷⁷ As events leading to World War II gained momentum, Morusca returned to Romania, and not until 1947 was there again a resident bishop in this country. In that year, the Romania government informed the American church that one Nica was being dispatched, and that he was to be accepted. But Nica was *persona non*

proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." 344 U.S. 94, 116.

⁷⁴ *E.g.*, "The court has taken a realistic view in a delicate situation and justified it by a rather tenuous distinction between accepting a church authority's decision and determining that authority's freedom to act in the church's interest. However, the result, the judicial appointment of a church leader, violates the basic American belief in separation of church and state and appears to be expressly forbidden by the Supreme Court's prior decision." 3 BUFFALO L. REV. 159 (1954). See also, Note, 102 U. PA. L. REV. 405 (1954). "By allowing impeachment of the Patriarch's decision upon a finding that it was motivated by a subservience to secular ends, the court has made an unwarranted exception to the *Watson* rule." 54 COLUM. L. REV. 435, 438 (1954).

⁷⁵ 120 F. Supp. 183 (N.D. Ohio 1952), *aff'd*, 205 F.2d 107 (6th Cir. 1953), *cert den.*, 346 U.S. 915 (1953).

⁷⁶ These provided that the Romanian Orthodox Church in the United States and Canada "forms an autonomous missionary episcopate maintaining spiritual and canonical unity with the Holy Synod of the Romanian Orthodox Church and organic alliance with the Romanian Orthodox Patriarchate." 205 F.2d at 109.

⁷⁷ 205 F.2d at 109.

grata, and the American episcopate was non-receptive. Therefore, it, like its Russian brethren of the Eastern Confession had done three decades and three years before, sought to break fellowship.⁷⁸ There was a meeting to restore the 1932 by-law permitting home rule. To this end a resolution was adopted, and reinstatement took effect in 1948. Since the American episcopate continued in possession, this action in ejectment was brought by the Romanian appointee. It was he who claimed to represent the true church, for acts declaratory of spiritual and organizational autonomy were acts of secession, heretical, and intolerable under church discipline. Similar to *Kedroff* and its surrounding circumstances? Indeed. And authority for the contention that the selection of the Romanian Holy Synod—highest church judicatory—was binding on the civil courts, was grounded in *Watson v. Jones* and the *Kedroff* cases. But the argument got nowhere with either the district court or the court of appeals, the latter saying:⁷⁹

While the cited holdings state the general law upon the subject, we do not discuss them in detail because we think they do not govern the present controversy. In the *Kedroff* case, which was announced after the instant case was decided in the District Court, the Supreme Court held that legislation which determines in a hierarchical church the ecclesiastical administration or appointment of the clergy, or transfers control of churches from one group to another, interferes with the free exercise of religion contrary to the Constitution. Here no ordinance, statute or congressional enactment is involved. This is not a case of legislation claimed to be violative of the First Amendment to the Constitution of the United States. It is a controversy between the American and Canadian church group and the Communistic government in Romania working through the hierarchy.

This eminently intelligent decision recognized the framework within which this case arose, namely that a faithful group of believers

⁷⁸ It has been suggested that it was a strategic error for the American Church to retain its recognition of the spiritual authority of the Moscow Patriarch, 28 NOTRE DAME LAW. 398 (1953). This suggestion is probably correct, especially in view of the latest disposition of the case in the supreme court of New York. *St. Nicholas Cathedral of the Russian Orthodox Church of North America v. Kreshnik* 9 Misc. 2d 1069, 166 N.Y.S.2d 245 (1957). That decision was on the common law ground, and went in favor of the Russian affiliates. However, under the broad reading of the Supreme Court's opinion, in connection with which the above suggestion was made, the point is erroneous, for if under the opinion property could not be carried away by those discarding an organizational hierarchy, their impotence could not be vitalized by throwing off the spiritual authority also. Two wrongs do not make a right. This Romanian church case is, therefore, not distinguishable on the point that the American church withdrew recognition of both organizational and spiritual obedience.

⁷⁹ 205 F.2d at 110.

found themselves dealing not with the Holy Synod, but with a political figure of the home church. There are undertones of an invalid consent *ab initio* to the rule of the Romanian see, especially when the court talks of the American Episcopate's "[discovery] that the controlling and principal party to the agreement of 1935-1936 [recognizing the authority of the Holy Synod to appoint a bishop] was totally different from the one with which it thought it had been dealing."⁸⁰ By talking in these terms, the possibility of a revocation of the "contract" and return to the status *quo ante* was obvious, and may be read as the rationale of the court.

Nevertheless, the court did, as the quotation above shows, specifically distinguish these facts from those in *Kedroff* on the absence of any state legislative provision. And that is the important point, for if the Supreme Court was dissatisfied with the ingenuity displayed by the New York court in circumventing the former's *Kedroff* ruling, here was an excellent opportunity to speak. Presumably the Court knew what had transpired in Albany, for the court of appeals had displayed its deftness in July of 1953, almost a half year before the Supreme Court turned down a hearing of the *Trutza* case.⁸¹

Not surprisingly the court made a comment on religious freedom and the protection given it by the *Kedroff* decision. A very interesting comment, too, for it is essentially a quotation from the *Kedroff* decision which, when transported into the context of this case, gives a considerably changed emphasis to the point made. The court remarked:⁸²

We also think that this conclusion is in accord with the spirit, if not with the letter, of the *Kedroff* case, which declares that freedom to select the clergy, where no improper methods of choice are proven . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against the interference of an individual American state, we think it should be equally true as to protection against the domination and interference of a foreign state.

Notice the words "no improper methods." What are their implications? At least if there is evidence of a foreign state interference, "freedom of religion" here appears directed at the freedom of the communion of members to choose their clergy, and not the freedom of the church qua church to make the choice, an exceedingly different variation on the same theme. This emphasis did not appear in the *Kedroff* decision, principally because the unconstitutionality of a statute was involved, but also due to the imprecision of the Court's remarks addressed to the obligation of a civil court to follow the decree of a

⁸⁰ 205 F.2d at 112.

⁸¹ The denial of certiorari, 346 U.S. 915, was on December 14, 1953. The second court of appeals ruling from New York, circumventing the Supreme Court decision, came down on July 14, 1953, 306 N.Y. 38, 114 N.E.2d 197.

⁸² 205 F.2d at 112.

church judicatory. What else may fail to meet the test of a proper method is for speculation, with adherence to proper procedure coming instantly to mind. The point is, there is a loophole here which can permit a civil court to avoid being a mere rubber stamp when exigencies so merit.

Again, though emphasizing that denial of certiorari is all that there is to go on, it may be that the scope of the *Kedroff* decision in the Supreme Court is more aligned with what the New York Court of Appeals said it was than with the contextual implications of its own words.

VIII

From the preceding, it is clear that any thinking that the *Kedroff* decision overthrew an extended history of cases in American courts should not too soon be crystallized. My own judgment is that the handling of church dispute cases in the courts has been affected very little. True, the Court's decision does appear to paralyze remedies through the legislature; but that is not where relief is sought anyway. It is to courts that these squabbles come for resolution, and by and large American courts have handled them very successfully and intelligently.

To understand judicial treatment of these cases, searching must penetrate considerably beyond the monotonously reiterated statements that courts will not hear purely religious issues, or that a state may not extend preferential or even nondiscriminatory aid, or that a given fact violates the precept of religious freedom. These high level abstractions are at best inept guides for setting the standard of conduct an organ of government may or may not pursue. This is not to say that nothing of value springs from their use. Surely it is true that they characterize a point of departure, a framework within which to operate, which is considerably more comfortable than jumping off from a premise prescribing an affirmative governmental duty to aid religion. In the final analysis, government even in this country traditionally has, as it must, rendered some services. Incorporation statutes for religious societies are excellent examples, and it would be stretching a principle to ridiculous limits to declare them unconstitutional.⁸³

Whatever may be said of the platitudinous language of the courts, one thing is certain. Through the decades, there has been a slow but certain trend for courts more and more to rely on the decision of the proper church judicatory. The disposition of a civil court merely to formalize a church tribunal's decision is greater or less depending upon the context out of which the dispute arises. The presence of a property interest is not by any means the sure guide it is said to be.

⁸³ Only under the constitutions of Virginia and West Virginia, are the legislatures not permitted to grant a charter of incorporation to a religious body. VA. CONST. art. IV, § 59. W.VA. CONST. art. VI, § 47.

It is fitting and proper for civil courts to be reluctant to adjudicate controversies of a religious nature, and the propriety of this disposition increases if the given fact pattern does not involve a property interest. American law knows no theological orthodoxy, and it is beyond the competence of a court to determine the verity of any religious dogma. Among the myriad of church cases, a relatively small proportion appear from their facts not to involve property rights, or at least alleged property rights. One such area is, for example, the pretension on the part of a member that it has a right to determine when church sacraments ought to be administered to it. The courts have not had too many opportunities to speak on this precise point, but where the cases have arisen, they are clear that the administration of church sacraments is a prerogative of the proper cleric to decide; it is his authority to give or withhold. The clearest and most outstanding case to this effect came from Massachusetts.⁸⁴ The court was explicit in denying relief, even stating that the priest's denunciation of the member as a public sinner, so long as made in the privacy of church business, was not actionable.

Contractual consent was the basis of the Massachusetts court's decision. However there are difficulties in talking in terms of contract. Membership in a church often comes by baptism, at which time a person if it is infant baptism ought not in civil courts to be talked of as having contracted. Even the renewal of the baptismal vow at confirmation is at a time in most persons lives when they are not in their majority, not legally capable of contracting. This is a minor objection, unless the basis of a decision is solely contractual. Sufficient as a reason should be the nature of a voluntary religious association, for it must be the function of the appointed clergy to determine the right to church sacraments. They are the primary property of the Christian Church, as are the religious rites of any faith. Policy considerations would direct that the proper church clerics or officials decide their use, for it is patently arguable that if the spiritual accouterments of participating in a church sacrament or other spiritual rights of membership are of such interest to the complainant member, its remedy is the sequence of contrition and remission, not the civil courts.

Frequent cases of membership also appear. As an isolated issue, this, too, should be solely in the dominion of proper church officials. Voluntary association presumably means voluntary, and not coerced membership. There is a pervasive legal concept that another has no legal right to membership in a private group, and this concept, whatever may be said of its deterioration in other areas, is zealously respected in religious society cases. Here again, arguments in terms of contracting to accept the rules of the society are subject to the objection that the incoming member does not think seriously, if at all, along these

⁸⁴ *Carter v. Papineau*, 222 Mass. 464, 111 N.E. 358 (1916).

lines.⁸⁵ It is an unnecessary if not in some instances improper application of contractual concepts. Absent any property interest, the properly executed action of the church body should be final,⁸⁶ and that is generally the attitude of American courts.

Notice the use of the adverb "properly" in the preceding sentence. This raises the question, should the civil court concern itself with the procedural integrity of an expulsion? Courts have answered this both ways. Curiously, here would appear to be a more appropriate place for the application of contract principles, and yet many courts which refuse jurisdiction to give relief, because of the consent a member is said to have given in joining a religious society, fail to take the next step of enforcing the rights received to make his consent binding.⁸⁷ The least that might be demanded is that religious societies adhere to their prescribed methods for effectuating an expulsion. However, the standards frequently lack precision, and in the context of such a pattern courts have enforced their notions of due process without achieving desirable results. An enthymeme of these cases is that the court conceives

⁸⁵ *Hendryx v. People's United Church*, 42 Wash. 336, 84 Pac. 1123 (1906), in which the court remarked, in the context of a case protecting expelled members, that persons joining a church should not be held too closely to a knowledge of its arbitrary rules of procedure in expulsion and other matters. It makes sense however, to speak in contract terms when referring to ministers or priests. "The minister, in legal point of view, is a voluntary member of the association to which he belongs. The position is not forced upon him, he seeks it. He accepts it, with all its burdens and consequences; with all the rules and laws, and canons then subsisting, or to be made by competent authority; and can, at pleasure and with impunity, abandon it." *Chase v. Cheney*, 58 Ill. 509, 533-34 (1871).

⁸⁶ The following have been held not to be property interests: *Membership, Mt. Olive Primitive Baptist Church v. Patrick*, 252 Ala. 672, 42 So. 2d 617 (1949) (a person no matter how dissatisfied cannot invoke the supervisory power of a civil court so long as no civil right is involved, membership not being such); *Waller v. Howell*, 20 Misc. 236, 45 N.Y.Supp. 790 (1897); *cf. Galton v. Nesson*, 201 Mass. 534, 88 N.E. 2 (1909) (membership in the corporation is a civil right because representing ownership). Support and salary, *State v. Holy Roman Apostolic Catholic Church*, 183 Mo. App. 190, 170 S.W. 396 (1914); *Baxter v. McDonnell*, 155 N.Y. 83, 49 N.E. 667 (1898); *contra, Kaminski v. Hoynak*, 373 Pa. 194, 95 A.2d 548 (1953). Right to continue as priest or pastor, *Coleman v. Swanson*, 293 Ill. App. 622, 11 N.E.2d 840 (1938); *King v. Smith*, 106 Kan. 624, 189 Pac. 147 (1920); *Bonacum v. Murphy*, 71 Neb. 463, 104 N.W. 180 (1905) (court will not look into regularity of proceedings dismissing Roman Catholic bishop); *contra, Slaughter v. Dempsey*, 71 Cal. App. 396, 162 P.2d 843 (1945) (contract term of three months notice enforceable); *cf., Free Will Baptist Church v. Franklin*, 148 Fla. 277, 4 So. 2d 390 (1941) (court will act only in case of a showing of "fraud, collusion, or arbitrariness" of ecclesiastical decision). Burial rights, *McQuire v. St. Patrick's Cathedral*, 54 Hun. 207, 7 N.Y.Supp. 345 (1889).

⁸⁷ This inconsistency may also be found in a single opinion. A court may talk in terms of submission to ecclesiastical jurisdiction of a church as a condition of membership, and at the same time ignore what those conditions may have been when the membership was assumed. *Stewart v. Jarriel*, 206 Ga. 855, 59 S.E.2d 368 (1950).

membership per se a civil right within the protection of the courts,⁸⁸ that for jurisdiction to be exercised a property right need not first be established.

To illustrate, a recent case⁸⁹ from Ohio presented the following fact pattern. The constitution of the congregation provided that members could be expelled for "gross sin and failure to repent thereof" and that a "fair and impartial investigation and trial" would first be had "according to *Matthew* 18:15-17." This is the Biblical exhortation that "if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee thou has gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell it unto the Church; but if he neglect to hear the Church, let him be unto thee as a heathen man and a publican." On several occasions the pastor and deacons of the church called on the complainant, and upon her repeated refusal to renew church attendance, she was dismissed. The exegetical insight of the court must have been rare, for it deemed itself competent to say that the visits of pastor and deacon, together with their formal expulsion at a properly constituted meeting were not in compliance with this Biblically oriented constitutional prescription of the congregation.

The court spoke of the discharge as being arbitrary. But was it? A good deal of effort failed to get the expelled interested in church affairs and worship, and on her reticence, indeed her sheer refusal, the hand of fellowship was withdrawn. There was no evidence of a con-ning to get rid of the plaintiff's membership, and what the church officials did seemed quite consonant with its constitutional directive. By notice and opportunity for a hearing the court seemed to mean but one

⁸⁸ See Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930). Professor Chafee wrote that "excommunication from a church means loss of the opportunity to worship God in familiar surroundings with a cherished ritual, and inflicts upon the devout believer loneliness of spirit and perhaps the dread of eternal damnation. In comparison with such emotional deprivations, mere losses of property often appear trivial. It would seem natural that courts of equity should consider the desirability of remedying such injuries to personalities. . . ." *Id.* at 998. Conceding that there are occasions where expulsions appeared to have been unjust (*e.g.*, *Moss Point Baptist Church v. Dees*, 17 So. 1 (Miss. 1895)). Expelled member had donated most of the labor and money to construct the church, and was then dismissed by nine of fifty members under a preconceived plan.), the instances are rare, and usually contain facts sufficient for redress on independent grounds. Professor Chafee's argument ignores the avenue of contrition and repentance—doctrines not to be ignored when dealing with Christian communions—which is open to the "devout believer" with the "dread of eternal damnation," whose emotional disturbances referred to in the quotation are more likely a phantom than reality. The argument has considerably more appeal in the instances of labor unions, because of their enormous influence over the well-being of their members.

⁸⁹ *Randolph v. First Baptist Church*, 53 Ohio Op. 288, 120 N.E.2d 485 (1954).

thing, a formalized trial and opportunity for cross examination. But it is not the function of civil courts to tell church societies what procedures are necessary for dismissal from the spiritual bond of the communion of the faithful.⁹⁰

Segregation of a claim for reinstatement or for sacramental participation from an alleged property right is rare. Nearly all church disputes involve the claim that property rights are being interfered with. That judicial standing to assert a property claim is no formidable problem is explicable in view of the class action theory and its codification in most states.⁹¹ Consequently, the norm that courts will not decide purely religious issues is one which appears infrequently as the single ratiocination. How, then, is the bulk handled?

Recall that the *Watson v. Jones* decision spoke of three general classifications of property cases coming from ecclesiastical bodies. The first two distinguished between those where property was held under an instrument deeding it to the propagation of some specific form of religious doctrine or belief and those holding property as an independent congregation. That distinction is considerably clearer than it is useful, for two reasons. First, a huge category of congregations will fall into the hierarchical classification by virtue of their subordinate position to a larger ecclesiastical body, so that if a deed read that property were given in trust for the teaching of a stated religious belief, which belief is that of a religious denomination, subsequent conflicts over the use of the property might possibly be settled by the denominational hierarchy and not by a civil tribunal's application of a property or trust concept. Secondly, property of an ecclesiastical group is most frequently held for a designated congregation, specific doctrines not being denominated, except insofar as may be inferred from the congregational name. It then redounds upon the court to categorize the case.⁹² This is a signifi-

⁹⁰ The opposite judicial attitude, and probably that more often repeated, was expressed in *Stewart v. Jarriel*, 206 Ga. 855, 59 S.E.2d 368 (1950). In an action for a declaratory judgment on who were rightful members, the court said, "All questions relating to the faith and practice of the church and of its members belong to the church judicatories, to which the members have voluntarily subjected themselves, since, when a person becomes a member of a church, he does so upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are involved." *Id.* at 855, 59 S.E.2d at 370. To the same effect are, *Evans v. Shiloh Baptist Church*, 196 Md. 543, 77 A.2d 160 (1950) (court, in sustaining demurrer to plaintiff's suit to be reinstated to full membership, said that even irregularity of proceedings would not justify equitable intervention); *White v. Mt. Beulah Baptist Church*, 319 Mich. 392, 29 N.W.2d 774 (1947). See also *Velasco v. Protestant Episcopal Church*, 200 Md. 634, 92 A.2d 373 (1952).

⁹¹ VA. CODE ANN. § 57-13 (1950).

⁹² The nature of the property may aid the classification. A church building is used principally by local worshippers, whereas a college plant is used by members of an entire denomination. Therefore, though the same denomination is

cant step, for it sets the pattern of the rationale to follow, a rationale which may on the one hand be directed at the conflicting religious positions of the contestants or on the other hand be influenced more by the continuity of the given congregational body.

A few cases will demonstrate the point and also indicate some of the difficulties incumbent in either approach.

A Missouri court⁹³ a decade ago had to resolve a conflict over who would serve as pastor of an unincorporated congregation "affiliated" with a loose group of churches called the Free Will Baptist Church. The plaintiffs had judicial standing as successors to those originally holding title as trustees. Their suit was to enjoin the defendants, who represented the majority of the congregation, from expelling them as members and from interfering with their right to use the property. First, the court stated that an unincorporated religious body could not hold title to land, but that it must be held by trustees for the society. But such was a bare legal title, carrying with it no rights to complete custody and control, empowering only those acts necessary for the trust purpose of holding for the church. Who decided church purposes? Since it had been customary for the congregation, though totally autonomous and independent of any larger organized church body, to follow the rules of the Treatise of Faith and Practice of the Free Will Association, the court sought an answer in that document, which read that "Fellowship, expulsion, and all other items of business of the church shall be settled by a vote of the majority present." In view of this, it was for the congregation to determine the use of the property, and therefore that part of a lower court injunction against the defendant's interference with the use of the plaintiff was reversed. Membership remained as the sole issue, and since the court had in earlier decisions determined that to be a matter purely ecclesiastical the congregation's majority vote was final. The injunction against interference with membership rights fell because that issue stood alone, leaving the plaintiffs without remedy.

If the objection is raised that this permits the majority to change the purposes of the trust, the objection is not acceptable. To begin with, is it not arguable that one purpose of a trust to a congregationally organized church is that the congregation may decide the use of its

involved, a court may in the latter case follow the decision of a denominational tribunal, but in the former decline to follow it. This distinction was neatly made in two Missouri cases, one involving a local Presbyterian congregation near St. Louis, *Watson v. Garvin*, 54 Mo. 353 (1873), and the other a Presbyterian affiliated college in St. Louis, *Watson v. Farris*, 45 Mo. 183 (1869). The cases came out of the same dispute as did *Watson v. Jones*, and there is no doubt that political implications played a role. For a full treatment of Missouri church cases, see Losos, *Courts and the Churches in Missouri*, 1956 WASH. U. L. Q. 67 (1956).

⁹³ *Murr v. Maxwell*, 232 S.W.2d 219 (Mo. App. 1950). Cf. *Longmeyer v. Paine*, 205 S.W.2d 263 (Mo. App. 1947).

property? Further, even the sweeping approach of the *Murr* decision has limitations. But first among its merits is that it keeps courts out of the business of private societies which are religious. Functionally, it preserved the continuity of the congregation, investing the use of its property in the majority of its members, and avoiding the raft of complexities and imponderables of going into the matter of doctrinal analysis. True, the court stated that no doctrinal matters were in dispute. But are not issues of who shall serve as pastor and matters of internal church government doctrinal considerations? Many churches think so. What the court really did was to circumvent that problem by following the decision of the highest tribunal, which for an independent church was the majority vote of the congregation.

When courts talk about changes in doctrine in order to find an inpingement of a trust, amazing words proceed from the lips of men trained in the law and not in things ecclesiastic. *Ragsdall v. Church of Christ in Eldora*,⁹⁴ was the customary suit by ousted members to establish a trust in ecclesiastical property allegedly diverted to a faith different from that adhered to by all parties prior to the development of the rift. The defendants were the pastor and officers of the church. Articles of incorporation had been amended to allow for the adoption of by-laws, setting up an expulsion procedure which was used to strip the plaintiffs of their membership. Any member, the by-law read, could be dropped for delinquent church attendance, or for any other cause deemed sufficient by a concurring vote of two-thirds of the members after a full hearing held upon ten days written notice. "As far as all spiritual and religious matters are concerned," the church articles provided that "the membership shall follow the general leadership of the Church of Christ, but as far as property and property rights are concerned, this organization shall be free and independent of every other organization."⁹⁵

At the time the changes were instituted a schism between the plaintiffs and the defendant pastor was already forming. It climaxed when the pastor succeeded in convincing a majority to "cooperate" with a different church body. Choice of cooperation ran either to the Church of Christ or the Christian Church, both Campbellite groups which according to some of the testimony had exchange of pulpit fellowship. The thrust of the plaintiff's complaint was that cooperation was moving in the wrong direction. The court did not agree, seeing no legal distinction between the two. To take this *de minimus* position is sometimes both necessary and good.⁹⁶ But it is pregnant with danger;

⁹⁴ 244 Ia. 474, 55 N.W.2d 539 (1952).

⁹⁵ *Id.* at 479-80, 55 N.W.2d at 542.

⁹⁶ Two cases, involving the same doctrinal dispute, illustrate the point. One was disposed of by reference to the contractual terms of the pastor's office. *Blauert v. Schupmann*, 241 Minn. 447, 63 N.W.2d 578 (1954). The other, deprived of this analysis and without a higher church organ to look to for a decision, had

and this case is a stellar example, for in meeting the plaintiff's challenge that the new affiliation constituted a change in denomination, therefore proscribed even as against an independently organized religious society, the court argued that the newly embraced denomination must be "fundamentally" different in doctrine. This is a generally accepted principle, which, when applied here, the court said, would not vitiate the conduct of the defendants. What was the context of this application? One of the alleged doctrinal departures was that the defendants had added a "fundamental" tenet in providing for "No Creed but Christ." Somehow this was hooked up with belief in the virgin birth of Christ, on which the court had this to remark:⁹⁷

But is this doctrine of the Virgin Birth so fundamentally different from belief "in the Fatherhood of God," "that Jesus is the Son of God and the Savior," and "that the Bible is the Word of God"? Is it basically a violation of the dictum or tenet "no Creed but Christ, no rule of faith and conduct but the Bible"? There may be some theological distinction but there is none to the ordinary lay person. To most people trinitarian belief imputes divine origin to Jesus, stemming from the New Testament account of his birth.

Theologians would shudder at such patent misinformation. The dogma of the virgin birth may be deemed as solid as any pillar in the framework of Christian theology, an essential ingredient in the philosophical construct supporting the divinity of Jesus Christ, and a principal article of the creeds of the Church.⁹⁸ And what court may say otherwise? The words of the court are amazing both for their lack of information and for their suggestion that an alleged similar intellectual deficiency on the part of the run-of-the-mill members of a church should set the standards of the church's doctrine. When a court brings attitudes concerning the virgin birth within the orbit of "nice distinctions

to meet squarely the doctrinal charge. The court compared the words and grammar of the opposing statements, and, finding no real distinction, granted relief to the majority which had approved the revised wording of the doctrines. *Mertz v. Schaeffer*, 271 S.W.2d 238 (Mo. App. 1954). Unlike the *Ragsdall* situation, the *Mertz* facts did concern theological hair-splitting, in which event it is well to refrain from finding a doctrinal change, thus permitting the majority to continue in possession of church properties.

⁹⁷ 244 Ia. at 485, 55 N.W.2d at 545.

⁹⁸ Having made this New Testament reference on the dogma of the virgin birth, the court might have exercised care to search the Biblical pages. *Matthew* 1: 23, reads: "Behold, a virgin shall be with child, and shall bring forth a son, and they shall call his name Emanuel, which being interpreted is, God with us." The Old Testament prophecy reads in *Isaiah* 7: 14, "Therefore the Lord himself shall give you a sign; Behold, a virgin [young woman, (Revised Standard)] shall conceive, and bear a son, and shall call his name Immanuel." The chief creeds—Apostles' and Nicene—of the Christian Church both include the virginal reference.

or shades of opinion on doctrinal points or practice" not meriting the "interference of a court of equity," which may be had "only when the departure from the faith is so substantial as to amount to a diversion of the property from the trust purpose,"⁹⁹ the danger of following the doctrinal analysis in settling church disputes becomes distressingly obvious. While the case may be an extreme example,¹⁰⁰ the illustration serves to underscore the merit of an organizational orientation rather than a doctrinal quest in settling church disputes. For if courts are to be insensitive to theological hairsplitting, as this court thought this conflict to be, it were better to be so not by judging doctrine, but by erecting more functional solutions, like that of the *Murr* decision.

The impropriety of the *Ragsdall* decision is marked not only by its stunning indifference to doctrinal distinctions, but also by the fact that, aside from the majority rule solution, an innocuous hook on which to hang the decision was available. Adoption of the revised articles of incorporation took place after a filing was made with the proper state official—a flaw in the sequence commanded by statute. Where such an "out" is available to a court, it ought to be and frequently is invoked.¹⁰¹ It is a fact of these disputes, that unless the deed conveying property sets forth certain doctrines to be propagated through the use of the gift,¹⁰² it is relatively rare where a court absolutely must get involved with doctrine.

On its surface, the decisional pattern that a majority may not change the denominational affiliation of a church society, or may not fundamentally change its doctrine, seems not only proper but utilitarian. And it is true that the rule has some usefulness. The simplest pattern for application of the norm would be that a majority may not vote a Baptist church into unity with Presbyterians, or Methodists, or Lutherans, or Roman Catholics, and so on.¹⁰³ But so simple a picture is not the type

⁹⁹ 244 Ia. at 485, 55 N.W.2d at 545.

¹⁰⁰ Cf. *Marr v. Galbraith*, 238 Mo. App. 497, 184 S.W.2d 190 (1944), and *Boyles v. Roberts*, 222 Mo. 613, 121 S.W. 805 (1909).

¹⁰¹ E.g., *Bomar v. Mt. Olive Missionary Baptist Church*, 92 Cal. App. 618, 268 Pac. 665 (1928). Control of the congregation was acquired by a minority through incorporation, achieved by falsely representing to the secretary of state that required formalities were complied with. The court ordered a reconveyance of the property to the plaintiffs as trustees of the unincorporated church. "The bald question here is, Can a man or set of men, or a majority of the church organization, by chicanery, deceit and fraud, divert the property of a church organization to a purpose entirely foreign to the purposes of the organization, for their own selfish benefit, whether by the expulsion of members or in any other fraudulent manner? Neither the law nor public policy will sustain such a rule." *Id.* at 626, 268 Pac. at 668, quoting from *Nance v. Busby*, 91 Tenn. 303, 13 S.W. 874 (1892). See also, *Kubilius v. Hawes Unitarian Congregational Church*, 322 Mass. 638, 79 N.E.2d 5 (1948); *West Koshkonong Congregation v. Otteson*, 80 Wis. 62, 49 N.W. 24 (1891).

¹⁰² E.g., *Chatfield v. Dennington*, 206 Ga. 762, 58 S.E.2d 842 (1950).

¹⁰³ Cf. *Harmon v. Dreher*, 1 Speers Eq. 87 (S.C.) (1843).

giving courts their work. As in *Ragsdall*, there is usually an attempt to affiliate with groups whose distinctions are considerably more subtle. Even if a court does not go astray to the extent that the *Ragsdall* court did, comparison of the cases points up that with judicial restraint a desirable state of the law is not necessarily forthcoming.

Two cases typify the weakness, essentially one of predictability. *Reid v. Johnston*¹⁰⁴ was a 1954 decision where the court reiterated that a majority could not change the denominational affiliation of a church. The North Rocky Mount Missionary Church was a congregationally organized society affiliated with the Southern Baptist Convention. The pastor became dissatisfied with certain developments in the convention, including their adoption of the Revised Standard Version of the Bible. After ill feelings ripened, a vote approved the pastor's urgings to have the congregation withdraw. Secession accomplished, all support of numerous convention programs terminated. No attempt was made to affiliate with a new church group. Rather, a resolution was adopted that the body remain independent, whereupon was initiated this action to restrain the defendants from interfering with use of the property.

Searching for a possible doctrinal transposition, the court said that simply withdrawing from the convention might not have been a breach of trust purposes, but when coupled with the cessation of long rendered support of missionary and other programs, and especially the resolution to remain independent, it constituted a fundamental change of doctrine, usage, and custom. The majority by voting this course had by their conduct ceased being members¹⁰⁵ of the church, and control of the property was vested in the plaintiffs.

On the surface, the decision seems sound. There is the anomalous suggestion that had the congregation upon withdrawing from the convention not resolved to remain independent, but had voted to affiliate with another convention, perhaps one not adopting the Revised Standard Version,¹⁰⁶ the result would have been different. Something akin to this occurred in *Kempf v. Lentz*,¹⁰⁷ an Ohio ruling of eleven years earlier. There the chief cause of dissention was withdrawing support from college and seminaries sponsored by the Ohio District Convention of Brethren Churches. Rather than stopping support altogether, the con-

¹⁰⁴ 241 N.C. 201, 85 S.E.2d 114 (1954).

¹⁰⁵ Cf. *West Koshkonong Congregation v. Otteson*, 80 Wis. 62, 49 N.W. 24 (1891), where the court said there could be dismemberment only in one of two ways, voluntary withdrawal or expulsion, and as long as disputants both claim to be the true members, there is no voluntary withdrawal, and if there has not been an effective expulsion, both remain as members.

¹⁰⁶ This court apparently considered the adoption of the Revised Standard Version to be a contributing element in a fundamental doctrinal shift. Is it not fair, in view of their similarity and of the interpretive variances surrounding a single version, to inquire of the court's competence to make this judgment?

¹⁰⁷ 68 N.E.2d 339 (1943).

gregation shifted its efforts to another Brethren seminary, but as a result incurred the disapproval of the Ohio Convention, which denied it affiliation. The independently organized congregation was therefore unconnected, but was channeling support to different territories. Yet the court did not rule that the majority had withdrawn itself from membership, because the changes were not regarded as fundamental. The result was good; but not the reasoning, it being difficult to reconcile with the equally vulnerable application of the same rule. Factually, the two cases were essentially indistinguishable,¹⁰⁸ and yet productive of opposing results. Utilization of the majority rule formula¹⁰⁹ would have served well the desire for predictability, though under it the *Reid* results would have changed. That, too, may have been for better, leaving the pleasures of possession to the majority as fewer heads cooled while the congregation patched up its unsightly differences.

By emphasizing the majority control or doctrinal analysis tests as solutions to church disputes, there is no intention to convey the impression that these are the only remedies. They are the most frequent. A decree could be issued, however, to force the sale of church property,¹¹⁰ and distribute the proceeds according to a court approved plan. But the market for church property is not large, and most edifices can be sold for only a fraction of either their replacement or functional value. Consequently, this remedy is very fortunately, sparingly used by the courts.¹¹¹

¹⁰⁸ The suggestion that in *Lentz* the independent status was involuntary because of denial of affiliation by the higher authorities on analysis fades as a distinction, for the act which brought denial was voluntary.

¹⁰⁹ *Douglas v. First Baptist Church of Ft. Collins*, 132 Colo. 286, 287 P.2d 965 (1955); *Wright v. Smith*, 4 Ill. App. 470, 124 N.E.2d 363 (1955) (in this case the court said, without discussing the point, that disaffiliation and termination of missionary activity in itself did not constitute a fundamental change of doctrine. The case involved a Disciples of Christ congregation.)

¹¹⁰ *Ferraria v. Vasconcellos*, 31 Ill. 25 (1863) (most members of a Presbyterian congregation were Portuguese, and had been baptized Roman Catholic. The presbytery ruled against the validity of the Roman baptism, but withheld disciplinary orders since the congregation had been organized prior to attachment to the presbytery. The pastor refused rebaptism, and by a vote of 105 to 101 led withdrawal from the presbytery, though continuing in Presbyterian teachings. The court held that by withdrawing the majority did not lose their membership, and in view of the near even split, ordered the property sold. See also *Niccolls v. Rugg*, 47 Ill. 47 (1868). Some congregations are organized with an agreement that in case of dispute the property will be sold and the proceeds distributed according to a prearranged formula. See, e.g., *Canadian Religious Association of North Brookfield v. Parmenter*, 180 Mass. 415, 62 N.E. 740 (1902).

¹¹¹ This attitude is expressed in *German Ev. Lutheran Trinity Congregation v. Deutsche Ev. Lutherische Dreieinigkeits Gemeinde*, 246 Ill. 328, 92 N.E. 868 (1910). Even though independently organized, if feuding factions appoint a third party or council to determine which of them is faithful to the doctrines of the church, the decision of the mediator, though in favor of the minority, ought to be followed. The court thus avoids discussing doctrine, and compels compliance with

Churches prelatially or centrally organized are not immune from internal conflagrations any more than are their independently structured brethren. But they possess built-in machinery for the disposition of their internal difficulties, and the use of and decisions by these organs are not ignored in the civil courts. Adhesion to the decrees of a church's highest tribunal is strongly favored, a natural development in descent from *Watson v. Jones*. Frequently it is repeated that the determination of the highest church judicature, even where property rights are involved, is conclusive upon the civil courts. But this is so, "not because the law recognizes any authority in such bodies to make any decision touching civil rights, but because the parties, by their contract, have made the right of property to depend on adherence to, or teaching of, the particular doctrines as they may be defined by such judicatory."¹¹²

Earlier on these pages comment was made on the propriety of using contract principles. Now it is necessary only to recognize the consequences of applying the rule that the highest church body controls.

A recent case¹¹³ reflects well the current judicial response to internal disputes in centrally organized churches. St. Paul's Methodist Church of Defiance, Ohio, was a member of the Ohio Conference of the Methodist Church. Its articles of incorporation provided that the congregation would be subject to the Discipline, usage and ministerial appointments of the Methodist Episcopal Church in the United States, but that secular affairs of the church would be managed and controlled by a board of trustees elected and organized according to the provisions of the Discipline. With this was the superficially conflicting reservation that the local congregation had power to sell, hold, or purchase property. That was an issue presented when the Methodist bishop, believing the congregation in need of a change of pastor, made an appointment not acceptable to the congregation. The board of trustees refused to relinquish possession of the parsonage to the new appointee, and withheld salary payments pending settlement of the dispute. To reach a conclusion, the court noted first, that the provision of the Methodist Discipline concerning the appointment of a pastor were properly followed; second, that the congregation was part of the Methodist Conference under the articles of incorporation, and therefore the properly exercised authority of church discipline controlled.¹¹⁴ It was a mere matter of

the decision of a council consented to by both factions. See *Mt. Zion Baptist Church v. Whitmore*, 83 Ia. 138, 49 N.W. 81 (1891).

¹¹² *East Norway Lake Norwegian Ev. Lutheran Church v. Halvorson*, 42 Minn. 503, 44 N.W. 663, 665 (1890).

¹¹³ *Ohio Annual Conference v. Richards*, 130 N.E.2d 736 (1954).

¹¹⁴ The court talked of two types of churches, congregational and connec-tional, the latter being subject to higher church authorities. Most courts will speak of three classifications (independent, presbyterian, and hierarchical) though at least one case refers to a fourth, papal. *Elston v. Wilborn*, 208 Ark. 277, 186 S.W.2d 662 (1945).

formalizing the properly constituted decisions of the church.

Little in the case alluded to the empty distinction between religious and property disputes. The court might have said that it would not rule on the pastorate occupancy, regarding that as purely ecclesiastical. Instead it ascertained the subordinate status of the congregation, examined the higher church tribunal's action to ascertain its regularity, and ruled accordingly—on both the pastoral occupancy and the control of church property. No trust rationale, no doctrinal analysis with its many weaknesses. Rather, a solid, functional disposition of the case, barely extending a deferential curtsy to the time-worn distinction between purely religious issues and those involving property.

The logic of the preceding case has extensions which lead to the conclusion that a church tribunal can change the doctrines of the church, and take with it the property of its congregations. It is not unknown among church bodies that sometimes enormous doctrinal modifications are made. By applying the rule of the highest church tribunal, the courts open themselves to the analysis that their interest lies principally with organizational continuity rather than doctrinal. Though there are cases which seem to make no exceptions,¹¹⁵ it is safe to say that limitations similar to those imposed on congregationally organized churches are equally valid here.¹¹⁶

A fair measure of predictability prevails under the preceding reasoning, subject only to the fact that what is a centrally organized church is itself an unsettled issue. Neither decisions of civil tribunals nor church documents, as constitutions, by-laws, and the like, are a certain guide. That a larger church body has rules by which local congregations become attached to it would tend to show that the church is centrally organized; and yet this very provision may be the pitfall to the central organization's claim against the alleged misuse of a local congregation's property. For if there has not been full or substantial compliance with the rules of admission, it may be ruled that the local congregation has maintained its independent status, despite close affiliation with the central church body.¹¹⁷ Such a disposition is hard to

¹¹⁵ *First Protestant Reformed Church of Grand Rapids v. De Wolfe*, 344 Mich. 624, 75 N.W.2d 19 (1956) (court pro forma applied the decision of the higher church body which had ruled a local pastor and his constituents heretical, though they in turn had alleged the same of the higher body.)

¹¹⁶ "Nor will we ourselves assume to override an ecclesiastical judicatory unless a departure from accepted faith and teaching threatening to divert property to a purpose radically different from that for which it was acquired is plain and unmistakable, for it is not to be supposed that judges of the civil courts can be as competent to interpret the religious doctrines of every denomination as are the ablest men in each in respect to their own." *Church of God v. Church of God*, 355 Pa. 478, 486, 50 A.2d 357, 361 (1947).

¹¹⁷ *African Methodist Episcopal Church v. Jenkins*, 139 Conn. 418, 94 A.2d 618 (1953) (the polity of the national body was episcopal. The local congregation had not gone through all formalities prescribed for attachment, but had cooperated

square with a decision which holds that on account of a congregation's name it has become denominationally integrated.¹¹⁸ But the confusion in the courts is no more annoying than the failure of churches to take into account, when drafting their governmental regulations, the availability of an increasingly more accepted principle which allows churches to decide how their internal differences will be settled. Churches, however structured and at all levels, need to exert appreciably more effort to avoid the pitfalls which lead to litigation. The starting place is in their own polity,¹¹⁹ after which attention should be turned to advising benefactors on the form of their conveyances.¹²⁰

IX

If the concern of civil church law is to protect the maximum degree of free action by individuals, then it can be said that the common law decisional pattern has developed well. *Watson v. Jones* commenced the demise of compulsory democratic management of church temporalities, and gave strength to those cases which had argued for enforcing the decrees of higher church authorities to which members had voluntarily submitted. Nothing is necessarily abhorrent about the shift, for free men to the extent that they are not able voluntarily to organize and delegate to another the management of their organization's property

closely with the national body, even to the point of accepting its pastor by the latter's appointment. The court nevertheless ruled the local church independent.)

¹¹⁸ *Michigan Congregational Conference v. United Church of Stanton*, 330 Mich. 561, 48 N.W.2d 108 (1951).

¹¹⁹ A survey of church constitutions and by-laws, for both local congregations and national bodies, of most American church bodies revealed many areas of potential conflict, too numerous for listing here. A typical example is the *Methodist Conference* case, *supra* note 113.

¹²⁰ In *Church of God of Decatur v. Finney*, 344 Ill. App. 598, 101 N.E.2d 856 (1951), there was a conveyance of property to the local congregation for its use "so long as the church maintained doctrinal unity with the General Ministerial Assembly." This assembly was purely voluntary, and by its regulations had no authority over local congregations. The defendant pastor had been a member of the assembly, but was expelled, and suit was brought against him and his supporters to enjoin them from interfering with the plaintiff's use of church property. The court held for the plaintiff, but not, as it might have done, on the basis of the wording of the deed, but because it deemed that the close cooperation which it had enjoyed with the assembly made it subject thereto, and the majority could not vote or amend church by-laws to permit eradication of this association. Cf. *African Methodist Episcopal Church v. Jenkins*, *supra* note 117, and *Ginossi v. Samatos*, 3 Ill. App. 2d 514, 123 N.E.2d 104 (1954) (local constitution provided that referral to higher church body should be made on certain contingencies, and the local congregation received its priest through appointment of the higher authority, and yet the court held the local church had not become subject to the higher body. The case involved political undertones of trying to cast off a communist Albanian appointed bishop in favor of an appointee of the Patriarch of Constantinople.)

are not free. The discussion of the preceding pages has indicated to what extent the courts go in enforcing the orders of higher church bodies, when it is found that to them others have submitted. The discussion herein has also meant to punctuate the poorer disposition of cases emerging from independently organized religious societies.

The foremost blemish in this decisional evolution are the words (broadly interpreted) of the Supreme Court in the *Kedroff* decision. That case is, in the judgment of this writer, neither good precedent nor intelligent in result. It is not the latter for it failed to account for the kindling causes of the dissension. While preventing, under the guise of separation of church and state, self expression of the American church group,¹²¹ it permitted a wholesale interference with their religious activities by the government of another country, let alone that of a government dangerously hostile to our interests.¹²² Poor conclusions have before resulted from imperceptive applications of words which make attractive sounding principles.

Nor is the Court's reasoning good precedent, especially if one proceeds from the premise that if liberty is to mean anything, it must refer to individuals, not to institutions qua institutions—state, church, labor, or otherwise. It is not even an extension ad absurdum of the *Kedroff* reasoning to remark that it permits of higher church authorities the perpetration of fraud and deceit on their adherents, for alone as a self-limitation of the decision was something unfortunately sounding in "clear and present danger." The Court appeared unconcerned with the Soviet communist influence in the affairs of the Russian church. That disposition is not surprising, for the institutional application of constitutional liberties leads logically to a stultification of the great Anglo-American concepts of property rights, among which is free contract, and the application thereto of common law concepts of fraud, deceit, duress, and the other developments which contribute to a well-ordered but free society.

¹²¹ Compare cases dealing with the efforts of Anglicans who discarded the control of the Church of England in favor of the Episcopal Church. No cases suggested the illegality of that move. *Sohier v. Trinity Church*, 109 Mass. 1 (1871). Cf. *Presbyterian Congregation v. Johnston*, 1 W. & S. 9 (Pa. 1841).

¹²² The 1957 judgment of trial term dismissing the complaint on the ground that the Moscow patriarch was the head of a functioning church organization is most unpersuasive, and to this writer, shockingly inconsiderate of the American faction's practical inability to acquire evidence to support its allegations of communist influence. The burden of proof would appear to have been met; but aside from that, the Soviet government obviously was not prepared to admit American churchmen to gather evidence to support a position inimical to propaganda interests of the Soviet dictatorship. 276 App. Div. 309, 166 N.Y.S.2d 245 (1957).