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## THE JUDICIAL ROLE IN INTRA-CHURCH DISPUTES UNDER CONSTITUTIONAL GUARANTEES RELATING TO RELIGION

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The relationship between church and state is succinctly delineated by the first amendment's twin guarantees of religious freedom and nonestablishment. This relationship has seldom faced the scrutiny to which the United States Supreme Court subjected it in the case of *Kedroff v. Saint Nicholas Cathedral*.<sup>1</sup> In this historic 1952 decision the Court invoked the guarantees of religious freedom and nonestablishment to invalidate an attempt by the New York Legislature to allow separationists, belonging to a movement labeled the Russian Church in America, which had formed in opposition to the Soviet-dominated parent organization in Moscow, to take over possession of Russian Orthodox properties in New York. As the seat of the Moscow-controlled patriarchate's authority there, Saint Nicholas Cathedral was a prime target of a suit testing the power of the state to decide religious controversies that are couched in terms of civil law relationships.

Legislation had been passed by the New York legislature purporting to entitle the anti-Bolshevik separationist faction to possess the Cathedral in question, along with other Orthodox Church property.<sup>2</sup> A suit was instituted to eject from the Cathedral the Moscow-centered church organization whose representative was Metropolitan Benjamin, serving the parent ecclesiastical body as Archbishop of North America.<sup>3</sup> The objective of the separatists was to secure Saint Nicholas Cathedral as a residence and headquarters for their chosen leader whom a convention, or *sobor*, of American Orthodox churches had elected to preside over them.

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<sup>1</sup> 344 U.S. 94 (1952).

<sup>2</sup> N.Y. RELIGIOUS CORPORATIONS LAW § 107 (McKinney 1952).

<sup>3</sup> *Saint Nicholas Cathedral v. Kedroff*, 302 N.Y. 1, 96 N.E.2d 56, 94 N.Y.S.2d 453 (1950).

The original defendants, occupying Saint Nicholas Cathedral by authority of the Moscow-based parent body, won a trial court judgment that blocked an initial attempt by the American separatist group to oust them through ejectment proceedings. Owing to a tie vote the intermediate court affirmed the trial court's ruling. The New York Court of Appeals, however, reversed the judgment by deciding in favor of plaintiffs, the judges splitting 4-3 on the issues.<sup>4</sup> It ruled that the relevant part of New York's law on religious corporations violated no constitutional requirements and took judicial notice of the Russian government's exercise of effective control over the central ecclesiastical organization of the Orthodox religion. What the New York legislature had done was no more than a reasonable step to enable the American churches of that faith to free themselves from the subversive influence and atheistic taint of international communism emanating from Moscow. The Russian Church in America could thereby maintain its religious integrity and hold in trust the purpose of its faith. This would prevent the political exploitation of its pulpit.<sup>5</sup>

Under these circumstances, New York might legitimately provide for the incorporation of an autonomous body of Orthodox churches in America to be administered independently of the central ecclesiastical organization in Russia. Ownership of the record title to Saint Nicholas

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<sup>4</sup>In the summarizing words of David Fellman:

The New York Court of Appeals held, in a 4-3 decision, that the prelate appointed by the ecclesiastical officials in Moscow was not entitled to the cathedral on the basis of a 1945 state statute which in effect brought all . . . the New York churches formerly subject to the administrative jurisdiction of the Moscow authorities into an autonomous North American metropolitan district.

Fellman, *Constitutional Law in 1952-1953*, 48 AM. POL. SCI. REV. 63, 95-96 (1954).

<sup>5</sup>As majority spokesman for the United States Supreme Court, Justice Reed summarized the rationale behind the decision of the New York Court of Appeals this way:

Although § 5 of the Religious Corporations Law had long controlled religious corporations, the Court of Appeals held that its rule was not based on any constitutional requirement or prohibition. Since certain events of which the Court took judicial notice indicated to it that the Russian Government exercised control over the central church authorities and that the American church acted to protect its pulpits and faith from such influences, the Court of Appeals felt that the Legislature's reasonable belief in such conditions justified the State in enacting a law to free the American group from infiltration of such atheistic or subversive influences.

This legislation, Art. 5-C, in the view of the Court of Appeals, gave the use of the churches to the Russian Church in America on the theory that this church would most faithfully carry out the purposes of the religious trust. Thus dangers of political use of church pulpits would be minimized.

344 U.S. at 108-09.

Cathedral properly belonged to the American separatist movement, and this disposed of the claim to possession made by the Moscow patriarchate's representatives.

While the appeal to the United States Supreme Court was couched in terms of the religious guarantees of the first amendment, a dominant consideration was the inherent feeling shared by much of the judiciary that the ejection proceedings under judicial consideration in the *Kedroff* case involved a claim unamenable to settlement without the state's interjection into an essentially religious struggle. Courts were not unaware of the danger of state intervention in the sectarian conflicts of a religiously pluralistic society like our own. Hence, to the extent of their unavoidable involvement in the process of determining conflicting civil claims asserted in court by contending religious groups, judges were well-advised to adhere to traditionally observed church custom and law before the occurrence of any schismatic disruptions.<sup>6</sup> Religious as well as temporal organizations had a confined right of access to the courts for the determination of their civil claims. Rival elements among the communicants of a religion likewise could resort to secular tribunals. In response to this right, limited though it might be, the courts owed a duty to the litigants to reach judgment in the exercise of a marginal kind of judicial review, and to do so within the church's construction of its own law, by which the association of all members, including the parties in court, was to be governed.<sup>7</sup>

These principles governed the approach of the United States Supreme Court to the controversy as it weighed the right to judicial relief against the guarantee of religious liberty. Justice Reed, as majority spokesman, stated that the state's enactment exceeded constitutional limits. The state could not take sides in an intra-church factional dispute and favor a party by statutory arrangements. The

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<sup>6</sup> Justice Frankfurter in his concurring opinion asserted: "[W]hen courts are called upon to adjudicate disputes which, though generated by conflicts of faith, may fairly be isolated as controversies over property and therefore within judicial competence, the authority of courts is in strict subordination to the ecclesiastical law of a particular church prior to a schism." *Id.* at 122.

<sup>7</sup> *Id.* at 122. With reference to this, Justice Frankfurter cited the 1929 case of *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). Justice Brandeis in that case defined the role of the judiciary in the following phrase:

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

280 U.S. at 16.

American schismatics, who wanted to free their faith from feared subversive and atheistic influences attributable to control exerted by a Communist government in Russia over the parent ecclesiastical organization, could not count on secular support through legislation to achieve their objective.

The fourteenth amendment, having absorbed the first amendment's guarantee of the free exercise of religion, precluded state interference in religious controversy. This controversy would have to be fought out by the disputants without the benefit of the state's hand tipping the scales either way. State intervention would violate the constitutional separation of church and state. Thus, the twin first amendment safeguards against any law establishing religion or prohibiting its free exercise were invoked in applying the fourteenth amendment to decide *Kedroff* adversely to the separatists.<sup>8</sup> It remained true that situations might arise requiring secular courts to demark areas of state and church responsibility in the use and disposition of property; but where property rights could be shown to be derived from church customs or canon law, the ecclesiastical rule would control the issue.<sup>9</sup>

What vitiated the relevant provisions of the New York law was its attempt to regulate the administration of ecclesiastical affairs by making them conform to the church ordinances adopted by the separatist movement. This violated the constitutional ban contained in the first and fourteenth amendments against state interference with freedom of religion. Such was the main thrust of Justice Reed's opinion for the Court.

Behind this main conclusion lay other points lending strength to Justice Reed's opinion. Sympathy for the separatists, who regarded themselves as trustees of the true Orthodox religion, and support for their autonomous objectives were understandable among Americans; but there was no constitutional way to translate this favorable sentiment into legislation that would dispossess the original church and turn

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<sup>8</sup> 344 U.S. at 107.

<sup>9</sup> Justice Reed concluded his opinion in these words:

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 the 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.

*Id.* at 120-21.

its properties over to the dissident element. This was so even though political aims of an atheistic *regime* were alleged to have subverted the fundamentals of Orthodoxy. The law could reach any subversive activity in which ecclesiastical officials might engage. When it came to enforcing the law, clerics were no different from anybody else.<sup>10</sup> In the absence of criminal allegations, there was no basis for penalizing church people simply because of their unpopular organizations. To do so would deny them freedom of religion. It would encroach upon the free exercise of whatever religion they happened to profess. Constitutional safeguards for liberty of worship barred the way to state intervention in that area.

As authority for the Court's decision to strike down New York's law as an unconstitutional interference with the free exercise of religion, Justice Reed relied heavily on an eighty year old precedent involving factionalism within a church during the days of the American Civil War, *Watson v. Jones*.<sup>11</sup>

What gave rise to this controversy was the manifestation of an underlying fissure within the Presbyterian Church regarding slavery. When the Civil War broke out in 1861, the Presbyterian General Assembly took a stand against slavery, denouncing it as sinful, and threw its moral support to the Union. Southern sympathizers inside the church refused to go along with such an insult to their views. Those in the Presbytery of Louisville, Kentucky protested against the General Assembly's action and labeled it heresy. Parishioners took sides, some of them proclaiming their loyalty to the Presbyterian General Assembly and others renouncing their allegiance. The rebels gained ascendancy in the Walnut Street Church in Louisville. The loyalist faction then went into state court to challenge the pro-slavery element. No relief was forthcoming; judgment was rendered against the loyalists. Kentucky's judiciary decreed that the pro-slavery churchmen were legally in possession of the Walnut Street Church and entitled to conduct its affairs.

Beaten in the state courts, the anti-slavery faction resorted to another forum. Asserting a property interest in the Walnut Street Church sufficient to give them standing, Unionist members instituted

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<sup>10</sup> "Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense. But in this case no problem of punishment for the violation of law arises."

*Id.* at 109-10.

<sup>11</sup> 80 U.S. (13 Wall.) 679 (1872).

an action in federal court under its diversity jurisdiction.<sup>12</sup> This meant that the rights of the disputants, who had come into a court of the United States as citizens of different states, would be resolved in light of general law, instead of Kentucky's.<sup>13</sup> This worked for the anti-slavery faction whose claim to the Walnut Street Church was ultimately vindicated when the case reached the United States Supreme Court in 1872.

The Court pointed out that the American doctrine of separation of church and state required secular tribunals to keep hands off controverted questions of faith. It also criticized Kentucky's Court of Appeals for substituting its judgment for that of the highest ecclesiastical body in the Presbyterian Church. For a civil court to determine ecclesiastical questions where a property matter was concerned could only result in compounding the difficulty.<sup>14</sup>

In affirming the judgment below, the Court made it clear that the conclusions reached by the General Assembly, as the highest judicatory of the Presbyterian ecclesiastical organization, were to be considered binding. Hence, the loyalist element of the local congregation stood entitled to possession of the Walnut Street Church property.

While the decision in *Watson v. Jones* did not rest directly on constitutional grounds, there were passages in the Supreme Court's opinion that expressed ideas intimately related to the matter of religious liberty. One was that secular courts would have to regard themselves as bound by the determinations of the ultimate tribunal of an ecclesiastical organization.<sup>15</sup> No court should interfere with the tri-

<sup>12</sup> U.S. CONST. art. IV, § 2.

<sup>13</sup> At that time, the rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) was in effect. Not until 1938 did *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, overrule it.

<sup>14</sup> The Court feared the consequences of any procedure that: [W]ould in effect transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

And this is precisely what the Court of Appeals of Kentucky did in the case of *Watson v. Avery*, [65 Ky. (2 Bush) 332 (1867)]. Under cover of inquiries into the jurisdiction of the synod and presbytery over the congregation, and of the General Assembly over all, it went into an elaborate examination of the principles of Presbyterian Church government, and ended by overruling the decision of the highest judicatory of that church in the United States, both on the jurisdiction and the merits; and, substituting its own judgment for that of the ecclesiastical court, decided that ruling elders, declared to be such by that tribunal, are not such, and must not be recognized by the congregation, though four fifths of its members believe in the judgment of the Assembly and desired to conform to its decree.

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<sup>15</sup> In this class of cases we think the rule of action which should

bunal's way of resolving controverted questions over the content or organization of a religion. Where conflict arose between religious factions as to the control of church property, the jurisdiction of a civil court might be invoked. Even then, the highest judicatory of the parent ecclesiastical organization would have to be regarded as the decisive authority on which party to the intra-church dispute represented the legitimate arm of the church. As such, its claim deserved to be respected.

In addition to the rule on noninterference with strictly religious affairs, a meaningful proposition to be acknowledged by the courts of this country was that there existed full freedom of belief and a right to practice it so long as no violation of the personal and property rights of others or the laws of morality was involved.<sup>16</sup> No such offense as that of heresy was prosecutable under civil law. People could set up their own religious tribunals to resolve controversies over what to believe and establish an ecclesiastical organization to govern the relations between members and officials of the church. These things lay beyond the reach of the state. The law might be invoked to protect

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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.

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

<sup>16</sup>In his opinion deciding *Watson v. Jones*, Justice Miller incorporated these ideas as follows:

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

*Id.* at 728.



the right to engage in such voluntary religious expression but could neither channel nor control it. That was a function reserved solely for the church or ecclesiastical organization concerned.<sup>17</sup>

What was said by the Court in *Watson v. Jones* weighed heavily in the majority opinion resolving the *Kedroff* case eighty years later. The relevance of *Watson* to *Kedroff* is of more than passing interest. It was decided long before the doctrine of incorporation received judicial approval, so as to render the first amendment's religion clauses effective against state encroachment through the term "liberty" guaranteed in the due process clause of the fourteenth. Of course, this assimilation lent an enlarged coercive thrust to the constitutional ban on laws entailing the establishment of religion or inhibiting the free exercise thereof.<sup>18</sup>

In deciding *Kedroff*, the Court found time-tested guidelines previously enunciated in the *Watson* case. Radiations from that precedent had cast an atmosphere of liberty around organized religion, rendering it independent of state control and immune from secular regulation.<sup>19</sup> This meant that religious organizations were not manipulable by the state but were able to reach their own decisions. Church self-government was thereby ensured. The state had no authority to interfere with the freedom of churches to organize themselves and determine their own articles of faith. Thanks to the process of incorporation, churches had gained protection under the federal Constitution for their freedom to worship unimpeded by state or local government.

This freedom carried with it the right of churches to choose their own clergymen. In saying this, Justice Reed added a caveat: The methods of choice must be above board. An unrestricted right to select the occupants of pulpits might conceivably depend on the propriety of methods employed. Thus, the majority spokesman in *Kedroff* showed himself cognizant of constitutional protection for a church's right to pick its own clergy. This right fell within the meaning of freedom of religion and, as such, enjoyed immunity from state intervention where there was no demonstrable impropriety about its exercise.<sup>20</sup>

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<sup>17</sup> *Id.* at 728-29.

<sup>18</sup> In his majority opinion in the *Kedroff* case, Justice Reed made reference to belated "judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action." 344 U.S. at 115.

<sup>19</sup> *Id.* at 94.

<sup>20</sup> Justice Reed wrote: "Freedom to select the clergy, where no improper

On the theory that the Russian Church in American would maintain the purity of the Orthodox religion in trust, New York had sought to justify its legislation transferring control of that religion's churches in the state to the separatist movement by resort to the doctrine of *cy pres*.<sup>21</sup> The Court refused to countenance this attempt to get around the constitutional ban on governmental obstructions to religious liberty.<sup>22</sup>

The *Kedroff* case was not to be controlled by a much earlier one involving the Mormon Church,<sup>23</sup> the crucial elements of which were nonexistent in the instant controversy. Looking back to the 1890 Mormon Church case, Justice Reed pointed out that it had involved a property seizure by the United States through escheat procedure following revocation of the church's charter as a religious corporation in the Utah Territory. This had occurred as a result of its illegal practices growing out of Mormon advocacy of polygamy. Though the Utah Territory had confirmed the Church's incorporation, the power of Congress over federal territories<sup>24</sup> superseded the authority of the subordinated jurisdiction. Territorial acts were subject to the superior constitutional power of Congress. Inasmuch as it was a charitable and religious corporation that was dissolved, its property could be distributed for a beneficent purpose under the *cy pres* rule. Thus, it might be given over to the use of Utah's public schools. Such objects of use-

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methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.* at 116.

Justice Reed's reference to "improper methods of choice" was prompted by the case of *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), where the designation of a chaplain was at issue. In that case the judiciary was asked to determine whether one who claimed a chaplaincy by virtue of a will could be deprived of such by a decision of the Archbishop that he was not qualified under canon law. Justice Brandeis in the Court's opinion declared: "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." 280 U.S. at 16.

Justice Frankfurter also addressed himself to this point in the following words: "[I]t is not a function of civil government under our constitutional system to assure rule to any religious body by a counting of heads. Our Constitution does assure that anyone is free to worship according to his conscience." 344 U.S. at 122-23.

<sup>21</sup> 344 U.S. at 119.

<sup>22</sup> *Id.*

<sup>23</sup> *Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890).

<sup>24</sup> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . ." U.S. CONST. art. IV, § 3.

fulness, if not charity, were appropriate recipients of benefits derived from the escheated property in question.<sup>25</sup>

What rendered the Mormon Church decision inapplicable was that the *Kedroff* situation involved a transfer of administrative authority over a church to a religious faction rather than the outright seizure or dissolution of the church's property by government. Therein lay the crucial difference. It was the state's attempt to shift the locus of ecclesiastical authority from the parent body of the Orthodox religion to a separatist movement that offended the Constitution. This shift could be justified only if the court were to find that the separationists represented the true body of thought of the Russian Church in America and that they were the legal owners by virtue of their maintenance of the original church purpose. The judiciary was not a proper tribunal to settle property disputes which rested solely upon the determination of ecclesiastical doctrine.

This distinction between purely legal controversies, which were a proper subject for judicial determination, and religious controversies, which were beyond the realm of the judiciary, weighed heavily upon Justice Frankfurter.<sup>26</sup> In a separate opinion, he took the position that if the issue were capable of being isolated in a property dispute, a court's obligation was to decide it in line with the ecclesiastical law prevailing before any schism arose to divide church loyalties.<sup>27</sup> It was Justice Frankfurter's view that any attempt to invest by law the candidate of a schismatic body with sacerdotal authority would invade the constitutionally protected religious domain of relationships within a hierarchically structured ecclesiastical organization. For the state to encroach on an area so obviously off limits to secular authority in-

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<sup>25</sup> Speaking for the Court in the 1890 Mormon Church case, Justice Bradley declared:

The State has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practised. . . . And since polygamy has been forbidden by the laws of the United States, under severe penalties, and since the Church of Jesus Christ of Latter-Day Saints has persistently used and claimed the right to use, and the unincorporated community still claims the same right to use, the funds with which the late corporation was endowed for the purpose of promoting and propagating the unlawful practice as an integral part of their religious usages, the question arises, whether the government, finding these funds without legal ownership, has or has not, the right, through its courts, and in due course of administration, to cause them to be seized and devoted to objects of undoubted charity and usefulness . . . .

136 U.S. at 50.

<sup>26</sup> 344 U.S. 94, 121 (1952).

<sup>27</sup> See note 6 *supra*.

evitably invited the discipline of ultimate judicial invalidation under the fourteenth amendment.

Saint Nicholas Cathedral thus was not to be cordoned off from the communicants and clergy loyal to the central governing body of the Orthodox religion, despite a suspicion regarding their loyalty to America by dint of the mother church's location in Communist-dominated Moscow. Justice Frankfurter gave short shrift to the claim that potential peril to the state could justify legislative divestment of a church merely because of its ecclesiastical ties to religious organizations in politically hostile foreign countries. The problems which that would raise should be obvious, considering the possibility of different solutions by multiple state jurisdictions within a federal system.<sup>28</sup> Lessons of the past were scarcely to be ignored in that regard.

With all this in mind, Justice Frankfurter found it impossible to sanction New York's substitution of its legislative judgment for a far more qualified assessment of the credentials of the Russian Orthodox Church under the Moscow patriarchate. American state legislators were hardly in a position to appraise the validity of claims to the governance of a church whose ecclesiastical center was located in another country.<sup>29</sup> To do so was presumptuous and even audacious, without demonstrable justification. In any event, the Constitution clearly forbade a state to adjudge the validity of ecclesiastical titles. New York had exceeded secular bounds by trenching on an area reserved to religion, which alone was qualified to control its own house. To the same degree that the first amendment placed the spiritual sphere beyond political control, the fourteenth shunted the states away from the religious realm.<sup>30</sup> New York had contrived to enter it and so would have to be pushed out by holding its mandate as to the disposition of Saint Nicholas Cathedral unconstitutional.

Justice Jackson remained unconvinced, however. In brief compass, he portrayed the background of the church in Russia, showing it to have been dominated by the state from the start. First, the czar had

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<sup>28</sup> In rejecting the position taken by the New York Court of Appeals, Justice Frankfurter used these words:

The consideration which permeates the court's opinion below would give each State the right to assess the circumstances in the foreign political entanglements of its religious bodies that make for danger to the State, and the power, resting on plausible legislative findings, to divest such bodies of spiritual authority and of the temporal property which symbolizes it.

344 U.S. at 123.

<sup>29</sup> *Id.* at 125.

<sup>30</sup> *Id.* at 126.

manipulated the church for his own purposes; after the Bolsheviks had seized power, they also dominated the church. A schism arose when American communicants differed with the pro-Soviet group in charge of the church and registered their aversion by launching a separatist movement.<sup>31</sup>

In Justice Jackson's opinion, no religious liberty was being impaired by New York's law, which actually served to promote liberty.<sup>32</sup> Nothing in New York's law required the denomination concerned to incorporate under its terms. By seeking incorporation under this law, the denomination voluntarily subjected its temporal interests, including the real property of the Cathedral in question, to the state's legal jurisdiction. This enabled it to take advantage of provisions that would render it immune from personal liability and extend other practical benefits. Justice Jackson noted that New York's constitution had empowered the legislature to pass acts of incorporation subject to subsequent alteration. Of course, this could not be carried to the point of deprivation of due process of law in disregard of the fourteenth amendment. The state's capacity to exercise the power reserved to it, while not unlimited, was far reaching. The enactment of the statute in question amounted to a proper amendment of New York's Religious Corporations Law. Accordingly, in the exercise of its reserved power over corporations properly classified as religious, New York was able to convey control of Saint Nicholas Cathedral to the Russian Church in America. The whole matter could have been disposed of under New York law on this ground alone, said Justice Jackson.

A property issue that should not have been sublimated into a religious matter underlay the *Kedroff* controversy, as Justice Jackson analyzed it. He insisted that the dedication of the property under litigation to a religious purpose did not justify bringing it within the protection of the constitutional guarantee of freedom of religion.<sup>33</sup> It made no sense to him to subordinate a state's law to canonical custom or ecclesiastical regulation. The supremacy clause made federal law superior to that of any state.<sup>34</sup> The full faith and credit clause also might have the effect of requiring state deference to the law of another jurisdiction, namely that of a sister state.<sup>35</sup> There was nothing in the

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<sup>31</sup> *Id.* at 127.

<sup>32</sup> "This statute does not interfere with religious freedom but furthers it."  
*Id.* at 128.

<sup>33</sup> *Id.* at 130.

<sup>34</sup> U.S. CONST. art. VI, § 2.

<sup>35</sup> U.S. CONST. art. IV, § 1.

Constitution, however, that would require a state to defer to the law of any church. If a state had to give way to canon law, separation of church and state would become a misnomer. In Justice Jackson's opinion, majority thinking on the subject within the *Kedroff* controversy pointed the wrong way.<sup>36</sup> To subordinate a state's law to an ecclesiastical rule revealed a misconception of the meaning of separation.

Justice Reed's opinion, speaking for the Court, implied that a church as a corporate entity possessed a freedom of its own, subject to direct rather than derivative constitutional protection. The freedom of the church was something different from that of its members and could be invoked by the organization itself. Inherently, unlike the freedom of individuals to believe or disbelieve anything, the liberty of a church possessed a character and purpose of its own. On the strength of its reasoning, the Court accorded novel recognition to an international body of believers whose church government had its home in an alien land.<sup>37</sup>

The *Kedroff* case called forth a ruling that reaffirmed the principle of nonintervention earlier enunciated in *Watson v. Jones*. The effect of this was to fix the idea of nonintervention in the first amendment. The Court identified church-state separation with religious liberty. On its face, only the issue of church-state separation was involved. Justice Jackson recognized this in his dissent in which he pointed out that New York had interfered with no one's exercise of religion.<sup>38</sup> Secular authority had not prevented anybody from worshipping the way he wanted. Although the Court's opinion made passing reference to church-state separation as a factor,<sup>39</sup> it relied primarily on religious liberty as the ground for invalidating the challenged terms of New York's law.<sup>40</sup> Where a church organization is riven by a schism, its supreme judiciary alone can determine which of the con-

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<sup>36</sup> "I do not see," Justice Jackson wrote, "how one can spell out of the principles of separation of church and state a doctrine that a state submit property rights to settlement by canon law." 344 U.S. at 131.

<sup>37</sup> As to pluralistic aspects of the *Saint Nicholas Cathedral* controversy, see related comments in Gilkey, *Mr. Justice Frankfurter and Freedom of Religion in Terms of Separation of Church and State*, 27 U. KAN. CITY L. REV. 3 (1958).

<sup>38</sup> 344 U.S. at 130.

<sup>39</sup> As spokesman for the Court, Justice Reed wrote: "Here there is a transfer by statute of control over churches. This violates our rule of separation between church and state." *Id.* at 110.

<sup>40</sup> "This transfer [of property] takes place by virtue of the statute. Such a law violates the Fourteenth Amendment. It prohibits in this country the free exercise of religion." *Id.* at 107.

tending factions represents the true faith. Civil government has no alternative but to accept and abide by the judgment of its ecclesiastical counterpart in matters of faith.

As a result of the remand of the *Kedroff* case to the New York Court of Appeals,<sup>41</sup> a later Court had to deal with the ultimate disposition of Saint Nicholas Cathedral. On grounds of common law, New York's ultimate tribunal came to the same conclusion reached in its first ruling.<sup>42</sup> This led to another reversal by the nation's highest Court, which held unanimously that the state could not accomplish judicially what was forbidden to its legislature.<sup>43</sup> This case was resolved by holding that the Archbishop who represented Moscow's patriarch had a right to use and occupy Saint Nicholas Cathedral, regardless of New York's common law to the contrary. The state judiciary's determination that Soviet domination of the patriarchate in Russia precluded the exercise of such a right under domestic common law amounted to an unconstitutional secular interference with the government of a church. It impaired the free exercise of religion by an ecclesiastical organization, contrary to the rationale of the *Kedroff* precedent.

*Kedroff* for the first time phrased the nonintervention principle of *Watson* and *Gonzales* in constitutional terms. *Kreshik* placed the same limitation upon the judiciary that *Kedroff* had placed upon the legislature. Throughout these cases, there was an ever-present awareness that a proper scope for state intervention exists, even where a religious organization is a party to the controversy. Mapping this admittedly limited area of acceptable state action became the problem of the Warren Court.

In 1968, the Court was presented with a novel approach to settlement of internal church disputes. The case of *Presbyterian Church in the United States v. Mary Elizabeth Blue Hall Memorial Presbyterian Church*<sup>44</sup> provided the occasion. There the Court was asked to determine whether the constitutional restraints on state action established in *Kedroff* permitted a civil court to award church property on the basis of judicial interpretation of church doctrine. Two local churches by a vote of their local congregations found that the church hierarchy had departed from the religious doctrines existing

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<sup>41</sup> *Id.* at 121.

<sup>42</sup> *Saint Nicholas Cathedral v. Kreshik*, 7 N.Y.2d 191, 164 N.E.2d 687, 176 N.Y.S.2d 226 (1959).

<sup>43</sup> *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960).

<sup>44</sup> 393 U.S. 440 (1969).

at the time the local churches affiliated with the parent ecclesiastical body. These local churches filed suits in Georgia Superior Court seeking to enjoin the general church from trespass on the local church property, title to which was in the local churches.<sup>45</sup> The Georgia court ruled that "Georgia law implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith . . . at the time of affiliation by the local churches."<sup>46</sup> The parent body was enjoined from further interference.

Clearly this did not constitute the "counting of heads" concept rejected in Frankfurter's concurrence in *Kedroff*;<sup>47</sup> it almost paralleled the "prior ecclesiastical law" concept that Frankfurter had favored.<sup>48</sup> The problem lay in whether the judiciary was the proper interpreter of the ecclesiastical law.

In reversing the Georgia court, the United States Supreme Court held the "departure-from-doctrine" standard was defective because it required a "civil court to determine matters at the very core of a religion — the interpretation of particular church doctrines and the importance of those doctrines to the religion."<sup>49</sup> By virtue of *Watson*, there could be no judicial finding of heresy. To phrase this in the constitutional language of *Kedroff*: "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."<sup>50</sup>

### CONCLUSION

The continuing vitality of *Kedroff*, as reaffirmed by the *Mary Elizabeth Blue Hall* case, stands as a guide to courts confronted with internal church disputes phrased in legal terms. The mere existence of a legal question gives the judiciary no license to examine church doctrine. At the same time, the presence of a factual dispute involving church property does not prohibit resort to state organs for resolution of that controversy. The nature of the state action is the decisive

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<sup>45</sup> *Presbyterian Church in the United States v. Mary Elizabeth Blue Hall Memorial Presbyterian Church*, 224 Ga. 61, 159 S.E.2d 690 (1968).

<sup>46</sup> 393 U.S. 440, 443 (1969).

<sup>47</sup> See the comments of Justice Frankfurter at note 20 *supra*.

<sup>48</sup> See note 6 *supra*.

<sup>49</sup> 393 U.S. 440, 450 (1969).

<sup>50</sup> 344 U.S. 94, 120-21 (1952).



factor; it must neither establish a religion nor prohibit its free exercise, but may represent the application of neutral legal principles to secular aspects of an intra-Church controversy, even though the affected party may be a religious institution. The continued vitality of *Kedroff* as a guiding light in the application of this standard continues to be acknowledged. It represents one of the most scholarly examinations of a continuing dilemma in a society dedicated to both the rule of law and religious liberty.