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## THE ESTABLISHMENT CLAUSE AND THE ECUMENICAL MOVEMENT

*Robert C. Casad\**

FOR nearly one hundred years after the adoption of the Constitution no really important case concerning the interpretation of the religious freedoms contained in the first amendment was decided by the Supreme Court.<sup>1</sup> Apparently there was sufficient acceptance by the people of the meaning of the terms "establishment of religion" and "free exercise thereof" that litigation over their interpretation did not often arise. It did not occur to many people in the nineteenth century that Sunday closing laws, or Bible reading in school, were unconstitutional. Most of the cases involving the constitutional validity of state activities relating in some way to religion have been decided in the past fifty years.

An examination of the reasons for the concentration of church-state cases in recent years is beyond the scope of this paper. It is mentioned here because it is a phenomenon that has taken place contemporaneously with some others that, together, tend to signal some basic changes in the role of religion in American society and in the attitudes of the American people concerning religion in general.

One of these phenomena is the growth in power and influence of the Catholic and Jewish minorities—"shifts in status of the nation's religious forces" that are said by one noted writer to have "pointed up a significant new pattern of American religious pluralism which marks the end of the so-called Protestant era in American history."<sup>2</sup> Another is the development, largely within Protestantism itself, that is called the "ecumenical movement."<sup>3</sup>

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<sup>1</sup> "The Supreme Court's concern with the religion clauses of the first amendment begins, for all practical purposes, with the case of *Reynolds v. United States* [98 U.S. 145 (1878)], where the Court first adopted the Jeffersonian statement that the amendment erected 'a wall of separation between church and State.'" Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 6 (1961).

<sup>2</sup> Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1, 2 (1961).

<sup>3</sup> The word "ecumenical," as defined in WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d unabridged ed. 1961), means: "of, relating to, or being a chiefly 20th century movement toward worldwide interconfessional Christian unity originating in Protestantism and now focused in a world council of churches that is supported by many Protestant, Eastern Orthodox, and other church bodies and that promotes through functional organizations cooperation on such common tasks as missions and work among students and

During the time when the "new pattern of American religious pluralism" has been developing through the growth of Catholic and Jewish influence to end the "Protestant era in American history," a new spirit of Protestant unity has been growing, marking the end of the separatist era in church history.

In recent years the Roman Catholic Church has begun to give tentative official support to the view that eventual reconciliation with the Protestants is feasible and desirable. The acceptance of the ecumenical ideal by the Roman Catholic Church removes virtually all doubt that in the ecumenical movement organized Christianity is facing an upheaval of major importance, comparable perhaps to the Reformation.<sup>4</sup> It is not likely to lose force after a few years, as so many minor religious movements do. It is definitely under way, gaining momentum year by year. It is bound to have far-reaching effects and give rise to a great many problems, like all dynamic movements aimed at changing the existing state of things. This article will attempt to identify some of the foreseeable legal problems that will arise in the wake of this movement, and to examine the adequacy of the present law to provide solutions.

The first problem to be discussed is the possibility that the policy underlying the first amendment religious freedoms is basically anti-ecumenical; this also involves the paradox this possibility poses in the light of recent decisions interpreting the establishment clause. The second problem area is that illustrated by the experience of one unfortunate church that was torn apart by schism because of a confusion of the ecumenical movement with left-wing political activity. The third problem area is that concerned with the legal consequences of denominational mergers.

## I. THE PARADOX OF THE FIRST AMENDMENT RELIGIOUS FREEDOMS

One problem that presents itself at the outset lies in the fact that the constitutional religious freedoms may have been designed,

through conferences mutual understanding on fundamental issues in belief, worship, and polity and a united witness on world problems." "Ecumenicity" is defined by the same source as "the condition of being ecumenically united in a worldwide interconfessional and interdenominational Christian fellowship." These terms will be used throughout this paper conformably to these definitions. See Visser 't Hooft, *The Word "Ecumenical"—Its History and Use*, in ROUSE & NEILL, *A HISTORY OF THE ECUMENICAL MOVEMENT* 735 (1954).

<sup>4</sup> "[The ecumenical movement] has brought changes in religious thinking comparable to the changes caused by the 'Reformation' of the sixteenth century." LEEMING, *THE CHURCHES AND THE CHURCH* vii (1960).

in part at least, as a declaration of a public policy favoring the separation of the Christian church into a large number of different sects.<sup>5</sup> One of the framers of the first amendment, James Madison, expressed the opinion that the policy of the country ought to be to promote a "multiplicity of sects," and that the first amendment was designed to accomplish this end.<sup>6</sup> There have been no decisions of the Supreme Court actually holding this, although there has been dicta suggesting that the first amendment has that meaning.<sup>7</sup> It is logically difficult, however, to conclude that the policy of the United States positively favors multiplicity of sects, yet at the same time opposes the establishment of religion and favors the free exercise thereof.

The meaning of the establishment clause is not very well understood, even today.<sup>8</sup> The recent decisions of the Supreme

<sup>5</sup> See Stringfellow, *Law, Polity, and the Reunion of the Church: The Emerging Conflict Between Law and Theology in America*, 20 OHIO ST. L.J. 412 (1959).

<sup>6</sup> "In a free government," Madison added, "the security for civil rights must be the same as that for religious rights; it consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects." Hunt, *James Madison and Religious Liberty*, 1 AM. HIST. ASS'N ANN. REP. 165, 170 (1961). "He [Madison] believed it was best for the country to have a large number of religious sects, but it is doubtful if he ever dreamed that the process of splitting up would go as far as it has." 1 STOKES, CHURCH AND STATE IN THE UNITED STATES 348 (1950). For fuller treatment of Madison's idea of multiplicity, see Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U.L. REV. 1274, 1287 (1961).

<sup>7</sup> That Madison was the author of the first amendment religious freedoms was recognized by Mr. Justice Rutledge in his dissenting opinion in *Everson v. Board of Educ.*, 330 U.S. 1, 33 (1947). In addition, he noted that resort might properly be had to the "documents of the times, particularly of Madison" for insight into the amendment's meaning. *Id.* at 34. Some writers doubt that Madison was author of the final form of the first amendment, cf. 1 STOKES, *op. cit. supra* note 6, at 538-49, but Madison's most authoritative biographer, Irving Brant, feels there is very little ground for arguing that Madison was not the author. "Madison was chairman of the three House conferees. There is no positive proof that he wrote the final version which came out of the conference, but it was a House victory and neither Sherman nor Viring had displayed any interest in this subject. The guaranty that became part of the Constitution could be ascribed to Madison on the basis of the legislative history, even if its wording did not clearly identify him as the author." BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 271 (1950). The Supreme Court has recently reiterated its acceptance of Madison's authorship. In *Engel v. Vitale*, Mr. Justice Black, in the majority opinion, refers to "James Madison, the author of the First Amendment." 370 U.S. 421, 436 (1962).

<sup>8</sup> Leo Pfeffer would disagree with this statement. He sees in the fact that Mr. Justice Black failed to cite a single judicial decision as authority for his majority opinion in *Engel v. Vitale* "the implicit assumption that the meaning of the no establishment clause is now so well settled and known that even a decent respect to *stare decisis* did not require citation of judicial authorities." Pfeffer, *Court, Constitution and Prayer*, 16 RUTGERS L. REV. 735, 743-44 (1962). Edmond Cahn, on the other hand, whose personal views seem to correspond rather closely with those of Pfeffer on what the meaning of the establishment clause ought to be, finds in the establishment cases "one of the most baffling aspects of recent Constitutional doctrine in the Supreme Court." "Taking into account the whole train of recent 'establishment of religion' cases, what one faces is quite a juristic enigma." Cahn, *supra* note 6, at 1274-75.

Court in *Engel v. Vitale*<sup>9</sup> and *School District v. Schempp*<sup>10</sup> make it fairly clear, however, that the clause proscribes not only tangible financial support and official preferences as between religious groups or doctrines, but also *any* official support of religion in general or of particular institutions or doctrines.<sup>11</sup> The problem of what institutional form a religion is to assume is basically a religious question, answered by each religious group according to its own beliefs. Official public support of one institutional form over another would seem to constitute an establishment of the favored form. Few would argue that it would not be an establishment of religion as well as a restriction upon the free exercise thereof if a law, applying equally to all religious groups, Christian, Jewish or others, were to require that the organizational structure of all groups conform to congregational principles of polity. By providing official sanction for one form of ecclesiastical polity, such a law would establish the religious doctrines upon which that polity rests. Similarly, a law that does not require conformity to that polity, but encourages it over all other alternative forms, would likewise seem to be an establishment. It might not violate free exercise in such a case, but it would be an establishment. Recital of the prayer in *Engel v. Vitale* was not required by the Regents; it was at most encouraged. The official support given the prayer was, nevertheless, held an establishment of religion.<sup>12</sup>

<sup>9</sup> 370 U.S. 421 (1962). Mr. Justice Douglas, in concurring, placed the issue on the more familiar ground of financial support of religion. "The point for decision is whether the Government can constitutionally finance a religious exercise." *Id.* at 437. The majority opinion of Mr. Justice Black does not seem to rest upon that ground, however: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. *But the purposes underlying the Establishment Clause go much further than that.*" *Id.* at 431. (Emphasis added.)

<sup>10</sup> 374 U.S. 203 (1963).

<sup>11</sup> "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits." Majority opinion of Mr. Justice Clark, *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

<sup>12</sup> "The fact that no coercion is employed and that children are free to refrain from participation, or even from being present, is immaterial. The ban on establishment of religion, unlike that on laws prohibiting its free exercise, forbids any governmental activity in furtherance of religious purposes even if no direct compulsion is shown." Pfeffer, *supra* note 8, at 750. See generally on the meaning of the *Engel* case, Rodes, *The Passing of Nonsectarianism—Some Reflections on the School Prayer Case*, 38 NOTRE DAME LAW. 115 (1963); Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962).

Before *Engel v. Vitale* and *School District v. Schempp* the establishment clause was usually understood to require equal official treatment of all denominations, none being preferred over another. It is now apparent that the establishment clause goes farther and requires not only that one denomination shall not be preferred over another, but also that religion itself shall not be preferred over irreligion.<sup>13</sup> The Court's willingness to consider "religion" at a higher level of abstraction suggests, if it was not already implicit, that the impact of the establishment clause on the Christian religion does not necessarily have to be viewed at the denominational level. In this country we have tended to consider the Christian religion as being necessarily embodied in a varying number of denominational churches, but there is nothing absolute about this system of denominational churches. It is the product of historical forces that may now be largely spent. It is just as appropriate—perhaps more so—to regard the Christian religion as being embodied in one universal "church," with each denomination being viewed as a subdivision of that larger body.<sup>14</sup> If the "church" is viewed at that level, instead of each denomination being considered a separate church or separate religion, it seems clear that a law requiring that larger "church" to adhere to the institutional structure of multiple sects would be an establishment of religion in the same sense that a law requiring denominations to adopt congregational polity would be. Likewise, it would seem

<sup>13</sup> "[T]his court has rejected unequivocally the contention that the establishment clause forbids only governmental preference of one religion over another." *School Dist. v. Schempp*, 374 U.S. 203, 216 (1963); *cf.* note 11 *supra*.

<sup>14</sup> Much of the confusion in the subject of church and state relations surely must stem from the fact that the word "church" has so many different meanings. Since all of the alternative meanings relate to a religious institution of some sort, formal or informal, the prohibition against establishment should apply to every meaning of the word "church." The word is used in two different senses in the Bible: (1) the entire body of believers who comprise the "body of Christ" or the Church catholic; and (2) any local congregation of believers. See, *e.g.*, Taylor, *The Biblical Doctrine of the Church and its Unity*, in NELSON, *CHRISTIAN UNITY IN NORTH AMERICA* 43, 44, 51 (1958). In modern usage, however, the word has still other meanings. Principally, it is applied to different denominations or communions, such as the Methodist Church and the Presbyterian Church.

"It is impossible to avoid the modern usage, and to confine our use of the words 'church' and 'churches' to describe what they mean in the New Testament. We have to do two things: (i) recognize frankly that our modern usage is unbiblical and that therefore we must be careful how we seek to find in New Testament passages the answer to our present day problems, and (ii) be careful, in considering any modern statement, to determine from the context the sense in which the word 'church' is being used." Report of conversations between representatives of the Archbishop of Canterbury and of the Evangelical Free Churches in England, quoted in LEEMING, *op. cit. supra* note 4, at 278.

that a law officially encouraging that larger church to assume the form of multiple sects in preference to a unitary, catholic institutional form would be an establishment, just as a law encouraging denominations to adopt congregational polity would be.

If the Madisonian principle of multiplicity of sects is deemed to be incorporated into the first amendment religious freedoms, then, a sort of paradox is produced. The first amendment itself would, in that event, accomplish what it specifically forbids—the establishment of religion—since it would officially support one institutional form, and perhaps prefer that form over an alternative form.

This is not a true paradox, of course. The first amendment in terms only denies Congress the power to effect an establishment of religion. There is no reason why the Constitution could not establish some religious view or doctrine, but in view of the strong language of prohibition it contains, and of the round-about way in which it would accomplish the establishment if the multiplicity principle were read in, it does not seem likely that the framers consciously thought they were establishing anything. Rather, they probably thought of themselves as laying the philosophical foundation for a complete disestablishment.

When the first amendment was adopted, the religious climate in America was such that the multiplication of sects was foreseeable as a probable consequence of the disestablishment of religion.<sup>15</sup> If official support was removed from the established churches, they were in a less favorable position to compete with vigorous, relatively new groups such as the Baptists and Methodists, and less able to resist divisive schisms within their own institutional structures. But the fact that multiplicity of sects was a likely *result* of disestablishment at that point in history does not mean that the multiplicity of sects was the *objective* of disestablishment. Madison may have felt it a desirable objective, but it was desirable to him primarily for political reasons: to prevent the concentration of too much power in the hands of a few institutions and to facilitate the control of religious strife.<sup>16</sup> Political expediency, however,

<sup>15</sup> See NIEBUHR, *THE SOCIAL SOURCES OF DENOMINATIONALISM* (1954).

<sup>16</sup> "Madison followed Voltaire in insisting, as he frequently did, that the best possible safeguard of religious freedom was not in legal guarantees but in the sheer multiplicity of religious sects." Cahn, *supra* note 6, at 1287. Voltaire, commenting upon religion in England, said: "If there were one religion in England, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and happiness." Quoted in STOKES, *op. cit. supra* note 6, at 228.

is hardly more palatable as a reason for supporting the multiplicity of sects than as a reason for suppressing particular sects or for establishing a politically controlled state church.

There may be better reasons than political expediency, however. There were religious groups then, and there are some now, who regarded the multiplicity of sects as a valid religious principle; they supported on a religious basis the principle Madison accepted on political grounds.<sup>17</sup> The fact that some religious groups found religious support for the principle, of course, does not justify its adoption as official public policy. It does, however, tend to explain why the notion that the first amendment favors multiplicity of sects has received widespread support. The groups who approve the principle on religious grounds have supported the view that the Constitution embodies that principle, and those groups have comprised a large proportion of the population and, in some regions of the country, have constituted the most influential religious institutions.

If the first amendment must be read as encouraging the multiplicity of sects it could prove to be a serious impediment to the ecumenical movement, since the ultimate aim of that movement is to unify, not multiply, the sects. The logical problems noted above may prevent the Court from reading the principle of multiplicity of sects into the first amendment when the chips are down, but a number of decisions of the Supreme Court and other courts indicate that, regardless of whether the multiplicity of sects principle was embodied in the first amendment by its framers, the courts will favor multiplicity anyway.<sup>18</sup> These decisions, for the most part rendered on non-constitutional grounds with little or no discussion of possible constitutional implications, are cases in

<sup>17</sup> Certain religious groups, then as now, emphasize the extremely individualistic nature of religion. These groups reject creeds, dogmas and hierarchies—in short, all elements that tend to make the practice of religion uniform for all believers. These beliefs lead to congregational principles of polity and to the view that “any group of like-minded and professed believers have the right to organize themselves into a church.” SPERRY, *RELIGION IN AMERICA* 9 (1945). Baptists and Quakers were leading advocates of this doctrine. Today the largest of the Baptist bodies, the Southern Baptist Convention, remains unaffiliated with the National and World Councils of Churches, and has thus far demonstrated little enthusiasm for the ecumenical movement. Theron D. Price, speaking unofficially of, not for, Southern Baptists, has said: “We tend—partly because we are busy with the work which we believe God has given us to do—to be oblivious to the need for wider unity [i.e., wider than the spiritual unity all Christians share]. . . . [I]t would be difficult to convince us that the visible reduction of the mystical body to one legal corporation would enhance the true unity of the Church.” Price, *A Southern Baptist Views Church Unity*, in NELSON, *CHRISTIAN UNITY IN NORTH AMERICA*, 81, 87 (1958).

<sup>18</sup> See Stringfellow, *supra* note 5; 13 *ECUMENICAL REV.* 287 (1961).



which the court takes sides in a controversy within a religious institution between a faction favoring change and a faction favoring the *status quo*.<sup>19</sup> As will be shown in a later section of this paper, the courts generally favor the *status quo*, which in most cases now happens to be a system of multiple separate sects. There is some basis for contending that these judicial doctrines tending to preserve the *status quo* have constitutional status;<sup>20</sup> thus, even though the principle of multiplicity of sects itself is not read into the first amendment's provisions, the effect may be about the same as if it were. One writer has concluded that the effect of the judicial preference for the *status quo* has been to create a "multiple establishment."<sup>21</sup> The courts have interpreted the first amendment religious freedoms as requiring the complete absence of any state support for religious institutions or doctrines or exercises, but at the same time the courts, as agencies of the state, have consistently lent their support to a particular pattern of religious organization. There may be a danger in this situation, and especially so since it involves a field where basic ideas are in upheaval, as they seem to be today in the area of religious institutions. The ecumenical movement is having an ever-widening effect in changing basic, longstanding notions about the importance of denominational distinctiveness. It is inducing changes in theories as to the nature and role of denominations and probably in notions of religious freedom as profound as the changes wrought by the labor movement in theories relating to freedom of contract. Unless the courts are made aware of these changes they are likely to go on applying to present-day problems rules of law developed to meet the needs of an older order, without realizing that in so doing they are casting themselves in a partisan role in a struggle between the old and the new, in which the state should really be neutral.

The ecumenical movement cannot continue to grow in scope and influence unless the individual church members support the movement. It follows that if the ecumenical movement does continue to grow, it will indicate that more and more people are undergoing these basic changes in religious attitudes and aspirations. To be effective the Constitution must not be seriously inconsistent with the religious views of a majority of the people.

<sup>19</sup> See text accompanying note 107 *infra*.

<sup>20</sup> See text accompanying notes 115-18 *infra*.

<sup>21</sup> Stringfellow, *supra* note 5, at 435.

Separatism<sup>22</sup> may have been sound public policy when the Constitution was adopted because it was not inconsistent with the basic *religious* desires of the people whose voices, in concert, were the most influential.<sup>23</sup> But will separatism be sound policy when the basic religious desires of the people favor ecumenicity? Can meaningful religious freedom be achieved in a society where political institutions operate under a policy of separatism while the religious institutions are striving for ecumenicity?<sup>24</sup>

## II. THE CASE OF *Huber v. Thorn*

Attention is now turned to the second problem. The institutional vehicle for the ecumenical movement in the United States is the National Council of Churches, which in turn is affiliated with the World Council of Churches. These organizations are working to break down the barriers that divide the denominations. Most of the Protestant and Orthodox Christian bodies participate in these councils. Because religious questions frequently have economic and political questions closely connected with them, the Councils feel it advisable from time to time to take a stand on certain issues that have definite political implications.<sup>25</sup> This exposes the Councils to strong criticism by those who oppose their views. Since the Councils are primarily identified with the ecumenical movement, opposition to their activities that is based upon bona fide theological objections to ecumenism tends to be confused with opposition to their political positions.

An excellent illustration of this and of the serious problems that may stem from it is the recent case of *Huber v. Thorn*.<sup>26</sup> That case was a contest for control of the church properties between rival factions of the First Baptist Church of Wichita, said to have

<sup>22</sup> The word "separatism" is used here to refer to the religious principle that each variation of religious belief is entitled to a separate institutional body. In this sense it does not refer to the principle of disestablishment. It is the organizational separation of religious groups from each other, not the separation of church and state.

<sup>23</sup> *I.e.*, separatism was not inconsistent with what Professor Robert Rodes, Jr., has called the "defining consensus." Rodes, *supra* note 12, at 122.

<sup>24</sup> Mr. Justice Brennan, concurring in *School Dist. v. Schempp*, recognized the "endemic" difficulty of distinguishing between hostility toward religion and neutrality. "Freedom of religion will be seriously jeopardized if we admit exceptions for no better reason than the difficulty of delineating hostility from neutrality in the closest cases." *School Dist. v. Schempp*, 374 U.S. 203, 246 (1963).

<sup>25</sup> See, *e.g.*, Statement on Nuclear Weapons Testing, adopted by the Executive Committee of the World Council of Churches at Geneva, February, 1961, 13 *ECUMENICAL REV.* 365 (1961).

<sup>26</sup> 189 Kan. 631, 371 P.2d 143 (1962).

been the largest church in the American Baptist Convention. A majority of the voting members voted to withdraw from the American Baptist Convention, and suit was brought by the minority faction to enjoin the use of the church properties by the majority group. The opinion of the court refrains, perhaps wisely, from detailing the facts of the underlying problem. The only reference to the ideological dispute that produced the schism was this mysterious passage: "It will be noted that the fault was found with the National Council of Churches and not specifically with the American Baptist Convention. This alleged fault is beyond the scope of this opinion, but those interested may see an article in *Look Magazine* for April 24, 1962."<sup>27</sup> The article the court refers to concerns the existence of several nominally religious rightist, anti-communist organizations and the impact that these groups are having upon the regular churches, both Catholic and Protestant. The National Council of Churches and the World Council of Churches have come to be viewed by these groups as organizations bent upon left-wing subversion. Many people and groups oppose the ecumenical movement on bona fide theological grounds, and common opposition tends to draw these together with the rightist extremists at times. This apparently is what happened in the First Baptist Church of Wichita. Some of the story can be gleaned from the records and briefs filed in the appeal, but much of it does not appear even there. It is worth description because the same kind of schism could easily occur in many churches throughout the country as the ecumenical movement advances.

In January, 1960, a group of laymen in the church voluntarily submitted a report to the board of deacons. The report stated that the group was drawn together by an awareness, among other things, "that there is a definite ecumenical movement afoot to tie and bind Protestant churches (including Baptist) into one organization. In other words, a universal Protestant Church with leaders and spokesmen who 'declare' for all Protestant Christians within their organization."<sup>28</sup> Prompted by this awareness, the group "made a study to attempt to find the facts about the ecumenical movement. It wasn't difficult to find that the National Council of Churches was the leading proponent of this move-

<sup>27</sup> *Id.* at 635, 371 P.2d at 146. The article referred to is *The Rightist Crisis in American Churches*, *Look*, April 24, 1962, p. 40.

<sup>28</sup> REP'T TO THE BD. OF DEACONS, FIRST BAPTIST CHURCH, WICHITA, KAN. 1 (Jan. 26, 1960).

ment.”<sup>29</sup> The references for the study were drawn primarily from two sources (both mentioned in the *Look* article alluded to in the court’s opinion); Bundy, *Collectivism in Churches*, and a tract entitled *How Red Is the National Council of Churches*. From these works it was found that the National Council had “a long record of left-wing activities”,<sup>30</sup> that “many leaders in the National Council of Churches are associated with Communist-front organizations”;<sup>31</sup> and that the American Baptist Convention “supports the ecumenical movement as advocated by the National Council of Churches.”<sup>32</sup> Concluding that the local church could no longer subscribe to the policies of a convention that supported the National Council, the group recommended that the church cut off its financial support of the American Baptist Convention.

In response to this report the church, in March, 1960, voted 1174 to 235 to withdraw financial support from the American Baptist Convention, and in July, 1960, voted 739 to 294 to sever all relations with the Convention. The minority group refused to accept this decision and tried for a time to hold separate services in the church building. This situation proved intolerable to the majority group, and eventually the minority group was locked out. The minority sought judicial relief to obtain the church properties, and its suit eventually succeeded.

The point to be noted about the case is not the decision of the court giving the property to the loyal minority faction. This result is not a new departure in any sense of the word.<sup>33</sup> The point is that here a strong, thriving church was torn by an irreconcilable schism, ostensibly over the issue of participation in the activities of the National Council of Churches. In the course of the conflict the ecumenical movement came to be identified, in the eyes of its opponents, with left-wing political action. The ecumenical movement must overcome much internal opposition, some based upon religious considerations and some on political considerations. This may be necessary even within the denominations that theoretically support the movement, as this case clearly shows, to say nothing of overcoming the basic theological objections of the denominations that oppose it, among which is the largest single Protestant

<sup>29</sup> *Ibid.*

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Ibid.*

<sup>33</sup> See text accompanying notes 74-78 *infra*.

denomination in America, the vigorous and growing Southern Baptist Convention.<sup>84</sup>

### III. LEGAL CONSEQUENCES OF DENOMINATIONAL MERGERS

Apart from the potential problems of basic philosophy arising from the constitutional paradox and problems like that illustrated by *Huber v. Thorn*, the ecumenical movement is bound to spawn a host of very practical legal problems. The first objective evidence of the movement in a church or denomination is likely to be an impulse toward organic merger with other groups of similar ideology and polity. Although the World Council of Churches does not claim organic reunification as an immediate objective,<sup>85</sup> its work in breaking down barriers to cooperation and reconciliation will inevitably encourage institutional mergers.<sup>86</sup> As the value of maintaining distinctive organizations diminishes in the eyes of the different denominational groups, economics and the motives of good stewardship, to say nothing of other motives equally strong or stronger, will impel the denominations to mergers and consolidations. This conclusion is not based on speculation alone. The past fifty years—the period, roughly, of the ecumenical movement—have seen the merger and consolidation of several important denominations in this country, in Canada, in Scotland, and elsewhere throughout the world.<sup>87</sup> The organizational unifications that resulted in the Evangelical and Reformed Church, the United Lutheran Church in America, the Congregational Christian

<sup>84</sup> Probably as a response to the tragedy of the Wichita church some unofficial meetings of representatives of the Southern and American Baptist Conventions have been held recently, at which the possibility of eventual merger of the two denominations, among other things, was discussed. These meetings, although strictly unofficial, may herald a relaxation in the traditional Southern Baptist attitude of non-affiliation with other groups. See *Crusader: The American Baptist Newsmagazine*, Jan. 1963, p. 3.

<sup>85</sup> "Among the misinterpretations of the attitude of the World Council towards church unity, these are of special importance.

"The first pretends that the World Council makes organic unity an end in itself and stands for unity at any price. It is an astonishing fact that in spite of all that we have said and done in order to show that we do not believe in union *per se* [there are still those who hold that we do]." Visser 't Hooft, *Various Meanings of Unity and the Unity Which the World Council of Churches Seeks To Promote*, 8 *ECUMENICAL REV.* 17, 22 (1955).

<sup>86</sup> "The distinction [between "Christian unity" and "Church union"] is very important. . . . In the end these cannot be separated, because Christian unity as it becomes deeper will find expression in some form of Church union over wide areas of Protestantism and perhaps beyond. . . ." Bennett, *The American Churches in the Ecumenical Situation*, 1 *ECUMENICAL REV.* 57, 58 (1948).

<sup>87</sup> See NEILL, *TOWARDS CHURCH UNION 1937-1952* (1952); ROUSE & NEILL, *A HISTORY OF THE ECUMENICAL MOVEMENT, 1517-1948* (1954); SILCOX, *CHURCH UNION IN CANADA* (1933).

Church, the Methodist Church, and very recently the United Presbyterian Church in the U.S.A., demonstrate the strength of the impulse away from separatism in these large and important denominations, comprising almost twenty million communicants. The denominational merger of the Congregational Christian and the Evangelical and Reformed churches in 1957 to form the United Church of Christ indicates the feasibility of union even by denominations adhering to entirely different forms of polity.

It is fairly safe to assume that there will be other important mergers among major Protestant denominations in the next few years. It seems likely that the Disciples of Christ will seek union with the United Church of Christ. The Methodist Church and the Protestant Episcopal Church are studying such immediate matters as the unification of ministries and intercommunion with a long-range goal of organic union. Several Lutheran bodies are studying the possibilities and problems of organic union. The United Presbyterian Church in the U.S.A. has hopes of eventually concluding a postponed unification with the "Southern" Presbyterians (Presbyterian Church in the U.S.).<sup>38</sup> There have been tentative and unofficial discussions of the prospects of reunification between the American Baptist Convention and the Southern Baptist Convention.<sup>39</sup>

This is not to suggest that general reunification of the Christian church is imminent. As is true of every movement that looks toward far-reaching changes in the existing order, the ecumenical movement has many strong opponents as well as proponents within organized Christianity, as *Huber v. Thorn* demonstrates so clearly. Schisms requiring judicial solution can arise from the mere existence of the movement, even before any steps toward organic unification are taken.<sup>40</sup> Whenever any *action* is taken to unite or merge denominations, serious legal problems are virtually certain to arise. If these problems are brought before the courts, legal doctrines that will be applied in solving them, as has been noted previously,<sup>41</sup> tend generally to oppose ecumenicity and to favor separatism.

<sup>38</sup> See Nelson, *Survey of Church Union Negotiations*, 9 ECUMENICAL REV. 284, 292-96 (1957).

<sup>39</sup> See note 34 *supra*.

<sup>40</sup> Cf. *Stansberry v. McCarty*, 238 Ind. 338, 149 N.E.2d 683 (1958); *Bramlett v. Young*, 229 S.C. 519, 93 S.E.2d 873 (1956).

<sup>41</sup> See text accompanying note 19 *supra*.

### A. *Judicial Cognizance of Temporal Disputes*

Ideally, it would seem, the law should be absolutely neutral in this matter.<sup>42</sup> The decision whether to unite or cooperate with other groups is a religious question which in itself should be of concern to no one except the groups involved. The choice is one to be made by the groups in the exercise of their own religious beliefs, and their freedom to make this choice is supposed to be guaranteed by the Constitution against federal or state interference.<sup>43</sup> Indeed, the courts frequently declare that they have no power to decide religious questions. This does not mean, however, that courts will not exercise jurisdiction over religious institutions under any circumstances. Religious organizations are not above or outside the law. They have temporal rights and duties with respect to their properties, contracts, etc., that the courts do recognize and give effect to. To refuse to take cognizance of controversies over contracts or property just because a religious institution is one of the parties smacks of a denial of equal protection as well as of a violation of first amendment religious rights.<sup>44</sup> In the leading case of *Watson v. Jones*,<sup>45</sup> the Court said: "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."<sup>46</sup>

<sup>42</sup> See Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953). Mr. Justice Brennan, concurring in *School Dist. v. Schempp*, in discussing the decisions concerning contests for control of a church property and other ecclesiastical disputes, said: "This line [of decisions] has settled the proposition that in order to give effect to the First Amendment's purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide such questions." *School Dist. v. Schempp*, 374 U.S. 203, 243 (1963). This statement is curious in view of the large number of cases, many of which are cited later in this article (including the three decisions of the Supreme Court cited by Mr. Justice Brennan as authority for his statement: *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); and *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960)) in which the courts have undertaken to decide such questions, often with full awareness of the theological character of the question.

<sup>43</sup> The first amendment religious freedoms are protected against state interference by the fourteenth amendment due process clause. See *Kreshik v. Saint Nicholas Cathedral*, *supra* note 42; *Kedroff v. Saint Nicholas Cathedral*, *supra* note 42; *Zorach v. Clauson*, 343 U.S. 306 (1952); *People ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934).

<sup>44</sup> See generally Duesenberg, *Jurisdiction of Civil Courts Over Religious Issues*, 20 OHIO ST. L.J. 508 (1959); 75 HARV. L. REV. 1142 (1962); 54 MICH. L. REV. 102 (1955).

<sup>45</sup> 80 U.S. (13 Wall.) 679 (1871).

<sup>46</sup> *Id.* at 714.

The Court continued with the observation that fortunately these questions could be resolved, as in other cases, by the simple application of common legal principles without raising troublesome religious or constitutional problems. But this solution may not be as simple as it sounds. It can, of course, be argued that the exercise of religion depends, in large part, upon the properties and "temporalities" held by the religious group. Some sort of church edifice is usually required as a place of worship. Chattels of numerous forms are required for purposes directly connected with worship as well as for purposes connected with the administration of the institution's affairs. Employees are needed; money is needed both to discharge legal obligations and to be expended for charitable uses. In short, the institution can hardly exercise its religion without these "temporal" necessities. To the extent that the courts do recognize legal rights and duties with respect to these "temporalities" and enforce them by their decrees, their acts affect the exercise of religion. A judicial decree or judgment in favor of the religious institution can *aid* the exercise of religion; a decree or judgment against the institution can inhibit the exercise of religion. But religious freedoms, like the other constitutional freedoms, are guaranteed only so long as their exercise does not violate protected rights of others. Property rights and contract rights are, of course, protected, and so no violation of the free exercise of religion could be said to result when a judge forces a religious institution to perform its contractual obligations to outsiders. Hence, cases in which a religious institution is *one* of the parties do not normally raise religious or constitutional issues. But is this true of cases in which both plaintiff and defendant claim status as religious institutions?

It does not necessarily follow that because contract and property rights are involved the courts should have general power, free from constitutional inhibitions, to adjudicate the rights of religious institutions. The courts have not distinguished controversies between religious institutions and non-religious institutions, where the issue usually is whether one party has a right and the other a correlative duty with respect to the contract or property in question, from controversies between rival religious groups both claiming title to the *same* contract or property rights. If it is a property contest, the courts feel it is subject to judicial cognizance; it matters not that the contest is between two groups that want the property for the purposes of aiding their exercise



of religion. Of course, if the courts can decide these "temporal" controversies without involving any religious issues, the mere fact that two religious institutions are the litigants raises no constitutional problems. But as a practical matter, courts are seldom asked to decide contests between religious institutions except where some basically religious question underlies the temporal controversy. Questions as to who should control the church properties and for what purposes will normally be resolved by the internal workings of the church organization unless there is some fundamental disagreement. And even fundamental disagreements will normally be settled by compromise unless they involve some basic questions of religious doctrine concerning which the feelings of the rival groups are too strong to allow compromise. Of the hundreds of reported contests between rival religious groups over church properties, nearly all are, at heart, either controversies over the identity of the authoritative decision-making body or over the purposes for which the decision-making body can validly use the properties consistently with the principles of the institution.<sup>47</sup> These questions are really religious questions. They become legal questions only when the law determines that it will support one side or the other. Perhaps the courts must decide these cases one way or the other in order to preserve the rule of law. But it would seem that in doing so they have perhaps unwittingly approached the limits of constitutionality. In every such case where the schism is precipitated by ideological differences, the court, by giving exclusive control of the properties to one group, takes sides in a religious dispute—a result which seems contrary to the first amendment.<sup>48</sup> Its decision on the property question must prefer one religious group over another on religious grounds, and this Mr. Justice Black has said amounts to an "establishment" of the prevailing group.<sup>49</sup> Likewise, such a de-

<sup>47</sup> See authorities cited note 44 *supra*.

<sup>48</sup> See Mr. Justice Brennan's statement quoted *supra* note 42.

<sup>49</sup> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). Mr. Justice Black was speaking, of course, about establishment by legislation. In *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960), the Court held, with respect to the free exercise clause, that a judicial encroachment was as unconstitutional as a legislative one. If this principle applies to the establishment clause as well, and no reason appears why it should not, a judicial decision preferring one religious group over another must come very near to the outer limits of constitutionality as announced by Mr. Justice Black in *Everson*.

cision must impair the free exercise of the losing group, at least to some extent.<sup>50</sup> And so, despite the opinion of the Supreme Court, as expressed by Mr. Justice Miller in *Watson v. Jones*, that contests between rival religious groups can be resolved by simple application of common-law doctrines, these controversies actually contain some very sensitive constitutional questions, which ought to be recognized and dealt with as such.<sup>51</sup>

Before the Supreme Court's decision in the now famous *Saint Nicholas Cathedral* cases,<sup>52</sup> few of the cases had exhibited any awareness of the constitutional implications. This lack of concern is understandable in the earlier state cases, for the religious liberties of the first amendment were not thought to be clearly applicable to the states until the third decade of this twentieth century.<sup>53</sup> It is strange that the problem has not received more attention, however, since most of the cases have purported to follow *Watson v. Jones*, and the Supreme Court was surely aware of it when *Watson* was decided. The Court there, consistently with the view that the solutions to these contests were relatively simple, consciously tried to construct a set of principles which would limit the permissible scope of judicial action very strictly and which would insure that in judging these cases only pure questions of law would be decided by the courts.

#### B. *The Doctrine of Watson v. Jones*

The case of *Watson v. Jones* was the culmination of an extensive and bitter struggle between two factions of the Walnut Street

<sup>50</sup> "If state courts are to decide such controversies at all instead of leaving them to be settled by a show of force, is it Constitutional to decide for only one side of the controversy and unconstitutional to decide for the other? In either case, the religious freedom of one side or the other is impaired if the temporal goods they need are withheld or taken from them." *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 130-31 (1952) (dissenting opinion of Jackson, J.).

<sup>51</sup> It is only fair to note that the views expressed in the two preceding footnotes on the meaning of the establishment and free exercise clauses are not universally accepted as final and authoritative. In spite of Pfeffer's whole-hearted endorsement (Pfeffer, *supra* note 8), Mr. Justice Black's famous dictum has been widely attacked as historically untenable. See, e.g., O'NEILL, *RELIGION UNDER THE CONSTITUTION* (1949); Corwin, *The Supreme Court as National School Board*, 14 *LAW & CONTEMP. PROB.* 3 (1949). The existence of the views held by these Justices, however, supports the point sought to be made, namely, that judicial action in controversies between religious groups comes very close to, if it does not exceed, the limits of constitutionality, and accordingly that the cases are not so simple as Mr. Justice Miller thought in *Watson v. Jones*. Mr. Justice Brennan's statement, *supra* note 42, recognizes the problem but does not attempt to solve it.

<sup>52</sup> *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952).

<sup>53</sup> See note 43 *supra*.

Presbyterian Church of Louisville over control of church properties. The factions had split over the general issue of slavery and allied matters, which had also caused a division at the denominational level in the national Presbyterian Church and in the synod of Kentucky. Both factions claimed to be the true Walnut Street Presbyterian Church. Jones's faction was recognized as the true church by the General Assembly of the Presbyterian Church in the U.S.A. (the northern group). Watson's faction was recognized by the General Assembly of the "Confederate" Presbyterian Church, which had withdrawn from the Presbyterian Church in the U.S.A. and set up a new organization. The case was in the federal courts by virtue of diversity of citizenship, and the doctrines to be applied were, of course, the pre-*Erie*<sup>54</sup> federal common law. The Supreme Court ruled that the faction recognized by the original General Assembly of the Presbyterian Church in the U.S.A. was the true church and, as such, was entitled to the property. In reaching this decision, however, the Court discussed generally the question of judicial relief in church property disputes, and announced three principles which have been frequently quoted (but less frequently followed than is usually realized) in later cases in state courts. In view of the fact that some or all of these principles may now have constitutional status by virtue of the *Saint Nicholas Cathedral* cases, it is worthwhile to examine them in some detail.

The Court first divided into three classifications the cases in which disputes over property of religious institutions generally come before the courts.

(1) Cases where the property was "devoted to the teaching, support or spread of some specific form of religious doctrine or belief" by the express terms of the instrument through which the religious institution received the property.<sup>55</sup>

(2) Cases where the property is held by a church of congregational or independent polity which "owes no fealty or obligation to any higher authority."<sup>56</sup>

(3) Cases where the ecclesiastical body holding the property is "a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some

<sup>54</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>55</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722 (1871).

<sup>56</sup> *Ibid.*

supreme judicatory over the whole membership of that general organization."<sup>57</sup> In this category would fall disputes over properties of church of presbyterial or episcopal polity.<sup>58</sup>

As to cases of the first type, the Court said, the principles of law to be applied in resolving disputes over the use and control of such properties are simply the ordinary equitable doctrines relating to charitable uses. This class of cases, as contemplated by the Court, includes only those where some express statement of purpose or trust is included in the instrument through which the church took title. In such cases the Court can and must intervene to prevent the diversion of the property from the trust to which it is subjected, so long as there is a possibility of its being used for the purposes of its dedication, and so long as there is anyone with sufficient standing to challenge the diversion. Apparently either a member of the church or an heir of the donor or testator would have sufficient standing. In these cases, the Court said, neither the majority of the congregation in an independent church nor the higher authority in an "associated" church has the power to employ the property for purposes contrary to those for which it was dedicated. "The protection which the law throws around the trust is the same."<sup>59</sup> It is clear from the Court's discussion that the interest the courts will intervene to protect in these cases is the interest of the donor, grantor, or testator who originally subjected the property to the trust. Neither the church itself nor individual members, nor *all* the individual members, have any right to use the property for purposes inconsistent with the trust. In these cases, the Court implies, the solution calls for the simple application of trust law principles. The task of determining whether a doctrine or practice varies from the objects of the trust may be a "delicate one and a difficult one,"<sup>60</sup> but the courts must do their duty and protect the trust.

Of course, these statements about the disposition of property subject to express trust were dicta. *Watson v. Jones* was not such a case. Neither was it a case of the second type, although the Court nevertheless offered its observations concerning the appropriate principles for the solution of such cases.

<sup>57</sup> *Id.* at 722-23.

<sup>58</sup> See Note, 75 HARV. L. REV. 1142, 1143-44 (1962) for fuller discussion of the three basic types of polity and a listing of the major denominations of each form.

<sup>59</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 723-24 (1871).

<sup>60</sup> *Id.* at 724.

In cases of the second type the properties have been acquired by the independent or congregational church, whether through purchase, gift or devise, "with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society."<sup>61</sup> "In such cases, where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations."<sup>62</sup> If the organization's own rule is that the manner of using the property is to be determined by the majority vote of members, or by duly elected officers, that determination must be accepted as final by the individual members and by the courts. Those who object to these uses have no rights in the property as individuals and they cannot be permitted to set themselves up as the true representatives of the church over the duly authorized governing body.

"This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed *in some respect* their views of religious truths."<sup>63</sup>

Here again the Court is trying to show that disputes over property of religious institutions of the congregational type must be determined by ordinary principles of law applicable alike to religious and nonreligious voluntary associations.<sup>64</sup> Except for property subject to an express trust, the question of which faction is to control the property is to be determined by the organization itself, under its own rules. The Court should not allow itself to be drawn into a controversy over the manner in which the property is used, even if one faction claims the other has changed or deviated

<sup>61</sup> *Id.* at 724-25.

<sup>62</sup> *Id.* at 725.

<sup>63</sup> *Ibid.* (Emphasis added.)

<sup>64</sup> See generally *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963).

from the traditional doctrines "in some respect." If the Court had not added this last qualifying phrase—"in some respect"—its position on cases of this second type would be clear. The addition of that phrase, however, suggests that there may be some *other* respects in which the change in the position taken by the governing authority within the organization may be such as to warrant judicial relief in favor of the minority faction. Later cases, as will be shown, have found in that qualifying phrase authority for judicial intervention in cases of this second type where there has been a fundamental deviation from the original tenets and usages of the church—a result Mr. Justice Miller probably would not have reached.

The third class of case is the one actually presented by *Watson v. Jones*: where the body holding the property is a subordinate member of a higher organization.

"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, . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding on them, in their application to the case before them."<sup>65</sup>

Thus the courts refuse to decide which faction represents the true religion in this kind of case, just as in cases of the second type. Which faction is the true one is a question to be decided by the higher church judicatory, and that decision is binding upon the courts.

Except, then, for the cases involving an express trust, where the case actually concerns the rights of the church vis-à-vis an outsider, the donor or grantor, the doctrine of *Watson v. Jones* demands judicial restraint. Religious questions must be determined by the religious group, and this determination normally will decide the property questions as well. The Court finds reason for this doctrine partly in the constitutional principle of separation of church and state,<sup>66</sup> partly in the fact that the members who come together to form such organizations must contemplate that the

<sup>65</sup> 80 U.S. (13 Wall.) 679, 727 (1871).

<sup>66</sup> *Id.* at 728.

religious group itself will be authoritative on questions of faith, dogma or discipline, and partly because religious principles and laws are so complex in themselves as to require a tribunal specially schooled in such matters—a condition that characterizes religious judicatories but not civil courts.<sup>67</sup>

The rules announced in *Watson v. Jones* clearly have as one of their purposes the avoidance of religious questions by civil courts. But this has not been the result. The rules still leave to the court certain essentially religious controversies.

In cases of the first type, involving an express trust for religious purposes, the courts will always have to determine the scope of the religious purpose. Theoretically this is a question of the donor's or testator's intent, but normally the intent will be couched in terms of serving a particular faith or denomination. In such cases the court has to determine which uses do and which do not serve the purposes of that particular faith or denomination. This, of course, is a religious question.

In cases of the second and third types the religious questions that in fact must be answered are less obvious. Since the choice as between the second and third rules depends upon whether the church is of congregational or "associated" polity, the court initially may have to decide into which group the church actually falls.<sup>68</sup> Normally, there is no dispute over this question, but occasionally there is, and the court must then decide this basic question of religious doctrine in the face of the contrary contention of at least one group.<sup>69</sup>

If the body is classified as one of associated polity, the rule of *Watson v. Jones* requires the court to defer to the decision of the proper ecclesiastical judicatory. The group entitled to the use and control of the property is the group recognized by the higher judicatory. This presupposes that the proper judicatory is readily

<sup>67</sup> *Id.* at 729.

<sup>68</sup> See Note, 75 HARV. L. REV. 1142, 1158-60 (1962).

<sup>69</sup> The issue sometimes arises when an independent, congregationally organized body becomes affiliated with a denomination that adheres to "associated" or hierarchical polity. If the local church later should vote to withdraw, the question is clearly presented. See, e.g., *Independent Methodist Episcopal Church v. Davis*, 137 Conn. 1, 74 A.2d 203 (1950); *Lumbee River Conference of the Holiness Methodist Church v. Locklear*, 246 N.C. 349, 98 S.E.2d 453 (1957). See also *Monk v. Little*, 122 Ark. 7, 182 S.W. 511 (1916); *McAuliffe v. Russian Greek Catholic Church*, 130 Conn. 521, 36 A.2d 53 (1944); *Clay v. Crawford*, 298 Ky. 654, 183 S.W.2d 797 (1944); *First Church of the Brethren of Lewistown v. Snider*, 367 Pa. 78, 79 A.2d 422 (1951); *Full Gospel Temple v. Redd*, 82 So. 2d 589 (Fla. 1955); *Bunnell v. Creacy*, 266 S.W. 98 (Ky. 1954).

identifiable. This is not always the case.<sup>70</sup> If the dispute within a local church actually reflects a schism at a higher level, there may be two or more higher authorities claiming ecclesiastical jurisdiction over the local church. One of these may have recognized one local group as the true church; the other may have recognized the opposing faction. In such a case, in order to apply the rule of *Watson v. Jones*, the court must decide which of the two higher judicatories is the proper one. This decision is essentially a religious question which the court must resolve before it can decide the question of which local group gets the property. *Watson v. Jones* itself was such a case, although the Court seemingly did not realize that it was. There the general Presbyterian Church had divided into Northern and Southern groups, each claiming the other had abandoned the true faith. The Court apparently did not consider the possibility that the Southern Presbyterian Church might have been the proper judicatory, but by this very failure to consider alternatives the Court decided that the Northern group was the proper judicatory. This decision was essentially one of religious doctrine. The Northern Presbyterian Church was recognized as the true, official church; the Southern church was deviant.

Another such case was *Kreshik v. Saint Nicholas Cathedral*.<sup>71</sup> In that case the property conflict over control of the Cathedral was merely reflective of a doctrinal conflict at a higher level. An American group claimed to be the true hierarchy of the Russian Orthodox Church in America, to the exclusion of a Russian group. The Court, purporting to apply the rule of *Watson v. Jones*, awarded the property to the group recognized by the Russian hierarchy. The per curiam opinion in the case gives no indication that the Court realized the basically religious nature of the issue decided in the *Kreshik* case, although the question of which church was the true church was the only real issue in the case once it was determined that the rule of *Watson v. Jones* was to be applied.<sup>72</sup>

If it is determined that the local church is one of congregational polity, the dicta in *Watson v. Jones* indicates that the right to con-

<sup>70</sup> See Note, 75 HARV. L. REV. 1142, 1164-66 (1962).

<sup>71</sup> 363 U.S. 190 (1960).

<sup>72</sup> See Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). "Especially difficult to comprehend is the compulsory withdrawal of state power in favor of 'ecclesiastical government' when the very issue in the case was which of two ecclesiastical governments was entitled to make the decision." *Id.* at 83. See also *Brun-dage v. Deardorf*, 55 Fed. 839 (1893); *Horsman v. Allen*, 129 Cal. 131, 61 Pac. 796 (1900); *Bouchelle v. Trustees of the Presbyterian Congregation*, 22 Del. Ch. 58, 194 Atl. 100 (1937).



control the property is in the majority of the congregation unless the rules of the church provide otherwise.<sup>73</sup> The courts, it was said, will not interfere with the decision of the majority concerning the uses to which the property may be put unless it is subject to an express trust. This dictum has not been followed, however, by a majority of courts. Most have been willing to defer to the majority's determination only where the decision does not represent a "fundamental deviation from the historic beliefs and tenets of the church." Strangely, the courts often claim to be following *Watson v. Jones* in so holding,<sup>74</sup> but it is reasonably clear from the *Watson* case that Mr. Justice Miller did not contemplate that the courts would become embroiled in questions involving deviations from basic tenets except in cases of express trust. The language quoted above<sup>75</sup> seems to say that no "implied" trust will be found in these cases, but the courts have refused to follow this dictum, or at least have carved out an exception to it. Herein lies another area in which the courts will decide religious questions. Some courts have treated the subject in terms of implied trust,<sup>76</sup> but others have treated it as a limitation on the power of the majority of a congregational church, without reference to the trust idea at all.<sup>77</sup> Only a few courts have followed strictly the principle of majority rule as contained in the *Watson* dictum.<sup>78</sup>

<sup>73</sup> In *Murrell v. Bentley*, 39 Tenn. App. 563, 286 S.W.2d 359 (1954), the laws of the local Church of Christ vested the right of control in the Elders. Their right to control the church property was upheld against the claim of the majority faction. However, in *Bentley v. Shanks*, 48 Tenn. App. 512, 348 S.W.2d 900 (1960), involving the same church, the court upheld the majority's right to excommunicate the Elders as individuals.

<sup>74</sup> See Note, 75 HARV. L. REV. 1142, 1167 (1962).

<sup>75</sup> See text accompanying note 63 *supra*.

<sup>76</sup> See, e.g., *Ashman v. Studebaker*, 115 Ind. App. 73, 56 N.E.2d 674 (1944); *Park v. Chaplin*, 96 Iowa 55, 64 N.W. 674 (1895); *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa 138, 49 N.W. 81 (1891); *Hall v. Deskins*, 252 S.W.2d 417 (Ky. 1952); *Black v. Tackett*, 237 S.W.2d 855 (Ky. 1951); *Linton v. Flowers*, 230 Miss. 838, 94 So. 2d 615 (1957); *Mt. Helm Baptist Church v. Jones*, 79 Miss. 488, 30 So. 714 (1901); *Marien v. Evangelical Creed Congregation*, 132 Wis. 650, 113 N.W. 66 (1907). See also Annot., 8 A.L.R. 105 (1920); Annot., 70 A.L.R. 75 (1931); Note 75 HARV. L. REV. 1142, 1167-75 (1962).

<sup>77</sup> See, e.g., *Stallings v. Finney*, 287 Ill. 145, 122 N.E. 369 (1919); *Smith v. Pedigo*, 145 Ind. 361, 33 N.E. 777 (1893); *Huber v. Thorn*, 189 Kan. 631, 371 P.2d 143 (1962); *Whipple v. Fehsenfeld*, 173 Kan. 427, 249 P.2d 638 (1952), *cert. denied*, 346 U.S. 813 (1953), *rehearing denied*, 346 U.S. 918 (1953); *Hughes v. Grossman*, 166 Kan. 325, 201 P.2d 670 (1949); *Trett v. Lambeth*, 195 S.W.2d 524 (Mo. App. 1946); *Reid v. Johnston*, 241 N.C. 201, 85 S.E.2d 114 (1954); *Dix v. Pruitt*, 194 N.C. 64, 138 S.E. 412 (1927); *accord*, *Mitchell v. Church of Christ*, 221 Ala. 315, 128 So. 781 (1930).

<sup>78</sup> See *Partin v. Tucker*, 126 Fla. 817, 172 So. 89 (1937); *Cape v. Moore*, 122 Okla. 229, 253 Pac. 506 (1927); *First Baptist Church v. Fort*, 93 Tex. 215, 54 S.W. 892 (1900); *accord*, *Monk v. Little*, 122 Ark. 7, 182 S.W. 511 (1916); *Rush v. Yancey*, 349 S.W.2d 337 (Ark. 1961).

### C. *Preservation of Denominational Stability*

In view of the clear intention of Mr. Justice Miller's strong dictum in *Watson v. Jones*<sup>79</sup> relating to congregational churches, one may wonder why the courts have refused to follow it. Why have the courts refused to accept the decision of a congregational majority with the same finality as that accorded a decision of a hierarchical tribunal of an "associated" denomination? Why is the power of a congregational majority to effect basic doctrinal changes limited when that of a hierarchy seemingly is not? Why is property given to a congregational church subject to an "implied trust" while that given to a member church of an "associated" or hierarchical denomination is not?<sup>80</sup>

The courts recognize the need for protecting the reliance of those members of the congregation who, over the years, may contribute to the support of the church without any express reservation and without subjecting their donations to any express trust. These people presumably believe in the basic doctrines and usages of the church or they would not support it. It seems somehow unfair for a religious institution to obtain money from people by holding itself out as an institution thoroughly dedicated to the propagation of some identifiable set of doctrines or beliefs and then to abandon them. A secular institution's actions would be scrutinized very carefully by a court if it attempted to do this, and it might well be estopped from making basic changes after holding itself out for a long period. An ecclesiastical institution should be held to a standard of fair dealing at least as high as that imposed upon non-religious institutions. This argument may perhaps explain why congregational majorities are deterred from effecting fundamental changes. It does not, however, explain why there should be a distinction between congregational churches and "associated" churches in this regard. Individual members of hierarchical churches are just as likely to be tithers; they are just as

<sup>79</sup> See text accompanying note 63 *supra*.

<sup>80</sup> The argument that the action of the higher church authority itself amounts to a deviation has occasionally been argued—usually without success. See, e.g., *Bouchelle v. Trustees of the Presbyterian Congregation*, 22 Del. Ch. 58, 194 Atl. 100 (1937); *First Protestant Reformed Church v. De Wolf*, 344 Mich. 624, 75 N.W.2d 19 (1956); *Kelly v. McIntire*, 123 N.J. Eq. 351, 197 Atl. 736 (1938). The argument was successful in the courts of two states in cases arising out of the merger of the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America. *Boyles v. Roberts*, 222 Mo. 613, 121 S.W. 805 (1909) (later disapproved in *Hayes v. Manning*, 263 Mo. 1, 172 S.W. 897 (1914)); *Bonham v. Harris*, 125 Tenn. 452, 145 S.W. 169 (1911); *Landrith v. Hudgins*, 121 Tenn. 556, 120 S.W. 783 (1908).

likely to rely on the continued acceptance of basic doctrines. It is no answer to say that members of hierarchical churches contribute with full awareness that the use of the church property is subject to the direction of higher church authorities. Members of congregational churches could equally be said to contribute with full awareness of the power of the majority to control the uses to which the church property is to be put.<sup>81</sup>

A key to the answer may be found by examining the kinds of deviations the courts have found to be "fundamental" in cases in which congregational majorities have been prevented from using church properties. Such an examination would show that in most of the cases where the decision of the congregational majority has been held a violation of "implied trust" or outside the majority's powers there has been an attempt to alter in some serious way the connection between the local church and other churches in some larger organization.<sup>82</sup> In most cases the action of the majority held to be a fundamental deviation is an attempt to abandon the denominational affiliation, to change from one denomination to another, or to affiliate a non-denominational church with a denomination. Changes in doctrines and practices other than this are usually held not to be so fundamental as to warrant judicial interference.<sup>83</sup> There are some exceptions, but in general the courts intervene only in order to protect what might be called the "denominational stability" of the church. In spite of the fact that the courts commonly express the principle in terms of preventing doctrinal changes, the real, operative principle seems to be one of preventing institutional change.

<sup>81</sup> This argument was suggested by the Supreme Court itself, referring to churches of associated polity, but using language susceptible of application to congregational churches: "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." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728, 729 (1871), quoted in *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 at 114 (1952).

<sup>82</sup> This is a generalization based upon an examination of over 200 cases. It is impossible to cite them all here. A more detailed treatment of these cases is planned as the subject of another article to appear later in another publication.

<sup>83</sup> Of thirty-four cases examined in which the action of the majority claimed to be a fundamental deviation was something other than an attempt to alter the denominational connection, the court in fact held against the majority in only two cases: *Jackson v. Jones*, 130 Kan. 488, 287 Pac. 603 (1930); and *Parker v. Harper*, 295 Ky. 686, 175 S.W.2d 361 (1943). Neither of these is a strong authority against the proposition made in the text, owing to certain procedural and factual peculiarities.

Perhaps the reliance factor mentioned above is a sufficient reason to justify judicial interference to protect the denominational connection. Of course, any judicial action at all raises constitutional problems, but so would a total refusal of judicial protection.<sup>84</sup> If the courts are to interfere at all, it is perhaps easier to justify interference to protect reliance and denominational stability than to protect the right to change, at least in the light of existing law. Probably the courts should stop talking about preventing doctrinal deviations and enforcing implied trusts. Promoting denominational stability is about as far as they have to go to protect reliance. If the individual members rely on anything in giving their money to the church without reservations, they probably rely upon the continuance of the denominational connection rather than upon particular tenets or usages. Moreover, the denominational organization itself and its other member churches may have an interest in the defecting church's denominational stability that should be considered, but which is seldom given attention under the implied trust-fundamental deviation analysis.

If judicial interference is placed on the basis of preventing institutional changes that disturb denominational stability, rather than upon preventing doctrinal deviations, it becomes easier to reconcile such court action with the first amendment, and easier to explain the courts' comparative willingness to interfere in the case of congregational churches and unwillingness in the case of "associated" churches. In the normal case denominational stability can be preserved by accepting the decision of the hierarchical tribunal. Except in cases where there is a question whether the denomination is one of "associated" polity or not, or cases where there are competing hierarchies, there is little justification for judicial interference in the actions of hierarchical, or "associated," churches. The judicatory tribunal being a denominational instead of a local institution, can be depended upon to preserve denominational stability.

The situation of congregational churches, however, is different. The majority of a congregational church may want to avoid denominational influence. There is not the same assurance that their decisions will preserve denominational stability. Moreover, there are some inherent characteristics of the congregational majority that prevent it from being a really satisfactory tribunal accord-

<sup>84</sup> See text accompanying notes 42-50 *supra*.

ing to standards the courts are familiar with. Congregational polity is based upon the belief that God's will is apprehended through the collective wills of a majority of the members of the local church. The courts, however, have not accepted this as a legal principle. They have recognized that congregations often act in important matters under the influence of passion rather than reason,<sup>85</sup> and so have tended to suspect decisions of majorities where evidence of unreason was present.<sup>86</sup> To a true congregationalist the fact that decisions are not always based on reason is not a serious flaw in the system of majority rule, but to the courts it apparently is. The courts are accustomed to reviewing the acts of legislatures to insure that a passionate majority will take no steps inconsistent with the fundamental tenets of the political body—the Constitution. Perhaps they feel the same sort of necessity to review the acts of ecclesiastical bodies.

But apart from the fact that decisions of such bodies frequently are irrational, the local church congregation has at least two other defects which prevent it from being a really satisfactory judicatory tribunal. Unlike law courts or even ecclesiastical tribunals within associated churches, there is a relatively rapid turnover of membership within churches. Members come and go as they move into and out of the geographical area the church serves. Moreover, the number of members is never fixed as it is in the case of judicial or hierarchical tribunals. It can go up or down as new members are added or removed from the rolls of the church. Accordingly, the "majority" of a congregational church is necessarily a very ephemeral concept; the group of individuals that comprises the congregation varies over relatively short periods of time as to both identity and number of individuals. Because there are no specific restrictions as to the identity or numbers of the persons comprising the congregation, its composition may be subject to manipulation. The cases frequently contain charges asserted by one faction that the other has packed the congregation by bringing in new members known to be sympathetic to its viewpoint.<sup>87</sup> There are also many instances in which the majority faction has tried (occasionally

<sup>85</sup> See, e.g., *Parker v. Harper*, 295 Ky. 686, 175 S.W.2d 361 (1943).

<sup>86</sup> The tenor of the court's opinion in *Huber v. Thorn*, 189 Kan. 631, 371 P.2d 143 (1962) (see text accompanying note 26 *supra*), suggests that it may have felt the majority was acting from motives other than reason.

<sup>87</sup> See, e.g., *Ginossi v. Samatos*, 3 Ill. App. 2d 514, 123 N.E.2d 104 (1954).

with success) to achieve its ends by simply excommunicating the minority.<sup>88</sup>

The cases often speak of the congregational "majority" as though it were an easily identifiable group of people, equivalent in all legal respects to a hierarchical tribunal. This tendency could be avoided if the courts would recognize that the "majority" is inevitably a "temporary majority." It might help, in fact, if the courts would expressly refer to it as the "temporary majority."

In addition to the fluctuating composition of the congregation, the members themselves may or may not be well-schooled in the basic religious doctrines of the denomination. The tribunals of "associated" churches commonly are composed of trained ministers or highly educated laymen. The same cannot always be said of the "temporary majority" of a congregational church. Thus, the majority's decision may not only reflect manipulation of membership and passion in place of reason; it may also be based upon erroneous notions of the denominational position on particular issues. In the light of all these factors, it is perhaps not surprising that the courts have been unwilling to accept the decision of the congregational temporary majority as authoritative when it produces radical changes in doctrine, or at least in denominational affiliation.

The term "denominational stability" that has been employed here must be interpreted liberally. It is sometimes difficult to tell whether a congregationally organized church is affiliated with a "denomination" or merely with a loose "voluntary association." The distinction between the two concepts is seldom defined and is far from clear, but it is obvious from the cases that two different types of organizational connection must be recognized. If the organization is classified by the court as a "denomination" the connection usually cannot be terminated by a vote of the majority of

<sup>88</sup> See, e.g., *Rush v. Yancey*, 349 S.W.2d 337 (Ark. 1961); *Partin v. Tucker*, 126 Fla. 817, 172 So. 89 (1937); *First Regular Baptist Church v. Allison*, 304 Pa. 1, 154 Atl. 913 (1931); *Nance v. Busby*, 91 Tenn. 303, 18 S.W. 874 (1892); *First Baptist Church of Redland v. Ward*, 290 S.W. 828 (Tex. Civ. App. 1927). In *Trustees of Oak Grove Missionary Baptist Church v. Ward*, 261 Ky. 42, 86 S.W.2d 1051 (1935), the minority of seven members claimed to have excommunicated the majority of sixty-three members. The court held that in a congregational church it was impossible for a minority to excommunicate a majority, since the majority controls the church. However, in *Dix v. Pruitt*, 194 N.C. 64, 138 S.E. 412 (1927), the court seemingly approved the right of a minority faction to excommunicate the majority. In *Bentley v. Shanks*, 48 Tenn. App. 512, 348 S.W.2d 900 (1960), the majority of the congregation was able to avoid the church law vesting control in designated elders by simply excommunicating the men who held positions as elders.

the members of the local church. If it is classified as a "voluntary association," the majority of the congregation is usually allowed to abandon the association if it elects to do so.<sup>89</sup> Probably the difference between the two is referable to the degree to which continued membership in the organization is likely to be relied upon by the individual members in making their contributions. Subtle theological conceptions of church polity are frequently meaningless to individual members of churches. An individual member of a local congregational church is likely to "denominate" *himself* as a Baptist or a Quaker, and this sort of "denomination," to him, is the same as a member of Saint Paul's Episcopal Church calling himself an Episcopalian. In spite of the church's official adherence to congregational principles of polity, the individual member of a Baptist church tends to think of himself primarily as a Baptist and secondarily as a member of the Third Street Baptist Church. His loyalty, in the absence of a change of heart, is likely to be as much to a larger organization of Baptists as to the local church. But how can one tell which larger organization of Baptists is a "denominational" organization and which is not? The Third Street Baptist Church may be one of several churches that together form the Sewanee River Association of Baptist Churches. It may also be affiliated with the Southern Baptist Convention. Are these larger organizations "denominations"? The Sewanee River Association surely should not be considered a denomination, not even when viewed, as suggested here, through the eyes of the individual member. His connection with the Sewanee River Association most likely derives from and is dependent upon his membership in the local church. His relation to the Southern Baptist Convention, however, may be quite different. His loyalty to the Southern Baptist Convention may well be prior to and independent of his membership in the local church. It is difficult to generalize, of course, but in most instances it seems more probable that the individual is connected with the local church *because* the church is affiliated with the Southern Baptist Convention than

<sup>89</sup> See *Montgomery v. Snyder*, 320 S.W.2d 283 (Mo. App. 1958). See also *Caples v. Nazareth Church of Hopewell Ass'n*, 245 Ala. 656, 18 So. 2d 383 (1944); *Wright v. Smith*, 4 Ill. App. 2d 470, 124 N.E.2d 363 (1955); *Little Grove Church v. Todd*, 373 Ill. 387, 26 N.E.2d 485 (1940); *Ragsdale v. Church of Christ*, 244 Iowa 474, 55 N.W.2d 539 (1952); *Keith v. First Baptist Church*, 243 Iowa 616, 50 N.W.2d 803 (1952); *Scott v. Turner*, 275 S.W.2d 421 (Ky. 1954); *Rock Dell Norwegian Evangelical Lutheran Congregation v. Mommsen*, 174 Minn. 207, 219 N.W. 88 (1928); *Windley v. McCliney*, 163 N.C. 318, 77 S.E. 266 (1913); *Cape v. Moore*, 122 Okla. 229, 253 Pac. 506 (1927).

that the individual is connected with the Southern Baptist Convention *because* he is a member of the local church. It would not be inappropriate, under such circumstances, to consider the Southern Baptist Convention a denomination, entitled to a relatively stable membership of local churches, in roughly the same sense as the Presbyterian or Methodist or Episcopal denominations.

Since reliance of the members seems to be the primary justification for judicial interference in church property dispute cases, it is reasonable for the courts to consider the question of whether a local church is a member of a denomination from the standpoint of the actual understanding of the average individual member rather than from the standpoint of technical theological principles of polity. This leads to a somewhat subjective standard of what kinds of organizational connection are "denominational," but it is probably better than no standard at all. It must be acknowledged that the courts have not employed this standard. Probably the courts have simply tended to use the term "denomination" to denote connections that the majority cannot terminate and the term "voluntary association" those that it can. Different courts have classified the same kind of associational connection differently. In Kansas and North Carolina, for instance, the American and Southern Baptist Conventions are regarded as denominations.<sup>90</sup> In Texas and Wisconsin they are treated as voluntary associations.<sup>91</sup> In Minnesota, Nebraska, and North Dakota, the Missouri Synod Lutheran Church may be regarded as a denomination;<sup>92</sup> in Iowa, Missouri, and Wisconsin it is not.<sup>93</sup>

#### D. *Alternative Solutions to Religious Property Disputes: Partition and Divided Use*

In view of the objections that can be raised to intervention by the courts in religious disputes, one may well ask why the courts do not simply try to divide the property between the rival factions in some way. A few cases have arrived at solutions based upon

<sup>90</sup> See *Huber v. Thorn*, 189 Kan. 631, 371 P.2d 143 (1962); *Reid v. Johnston*, 241 N.C. 201, 85 S.E.2d 114 (1954).

<sup>91</sup> See *First Baptist Church v. Dennis*, 253 S.W.2d 695 (Tex. Civ. App. 1952); *Anderson v. Byers*, 269 Wis. 93, 69 N.W.2d 227 (1955). See also *Beard v. Francis*, 43 Tenn. App. 513, 309 S.W.2d 788 (1957).

<sup>92</sup> See *Blauert v. Schupmann*, 241 Minn. 428, 63 N.W.2d 578 (1954); *Geiss v. Trinity Lutheran Church Congregation*, 119 Neb. 745, 230 N.W. 658 (1930); *Bendewald v. Ley*, 39 N.D. 272, 168 N.W. 693 (1917).

<sup>93</sup> See *Dressen v. Brahmeier*, 56 Iowa 756, 9 N.W. 193 (1881); *Mertz v. Schaeffer*, 271 S.W.2d 238 (Mo. App. 1954); *Ruhbush v. Buss*, 184 Wis. 439, 198 N.W. 608 (1924).



division of the property. The leading case is *Ferraria v. Vasconcellos*.<sup>94</sup> In that case the members of a local Presbyterian church voted, 105 to 101, to withdraw from the Presbytery to which it had belonged. The minority refused to abide by the decision, whereupon the majority denied the minority the right to use the property. The minority sued to recover the use of the property, claiming that a local Presbyterian church could not withdraw from the Presbytery, and that in attempting to do so the majority had forfeited its right to use the property. The defendant majority claimed that, as the majority of the congregation, it had power to determine how the property was to be used, and that since it had decided to withdraw from the Presbytery, the minority had no right to use the property in a contrary manner. Although both factions claimed the right to all the property to the exclusion of the other faction, the court held that the proper solution was to sell the church property and to divide the proceeds proportionately. The court said that every member of the congregation had an equal interest in the church property, and that one faction could not be allowed to deprive the other of that interest. The court noted that this was the most equitable result where the factions are almost equal in numbers, but that it might not be if the proportions were different.

The decision was followed a short time later in *Nicolls v. Rugg*,<sup>95</sup> a case involving similar facts, except that the ratio between the majority and the minority was two to one (129 to 63), instead of being almost of equal proportions.<sup>96</sup>

The doctrine of the *Ferraria* case was rejected in *Dressen v. Brahmeier*,<sup>97</sup> where the Iowa court held that the rule could not apply to an incorporated church. In *Immanuel's Gemeinde v. Keil*,<sup>98</sup> however, the Kansas court upheld the solution of sale and partition of the proceeds, expressly rejecting the argument that it did not apply to incorporated churches. In 1910, the Illinois court itself, in the case of *German Evangelical Congregation v. Deutsche Gemeinde*,<sup>99</sup> effectively rejected the rule of the *Ferraria* case, saying that in the *Ferraria* and *Nicolls* cases the court had

<sup>94</sup> 31 Ill. 25 (1863).

<sup>95</sup> 47 Ill. 47 (1868).

<sup>96</sup> It is worth noting that both cases were decided before *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

<sup>97</sup> 56 Iowa 756, 9 N.W. 193 (1881).

<sup>98</sup> 61 Kan. 65, 58 Pac. 973 (1899).

<sup>99</sup> 246 Ill. 328, 92 N.E. 868 (1910).

reached the utter extreme of its equitable powers, and that the remedy of partition was not to be allowed at all in the case of an incorporated church, and in the case of an unincorporated church only where there was nearly an equal division of the congregation.

The *Ferraria* doctrine rests upon the premise that individual members of the congregation have some sort of protectable interest in the church property. Otherwise there would be little justification for proportionate division. This idea has no support in religious doctrine, and has been subjected to stern criticism in some cases which have totally rejected the concept of partition.<sup>100</sup> In spite of the logical difficulties posed by proportionate division, however, where the factions voluntarily agree to such a partition as a method of avoiding litigation, the agreement is normally upheld.<sup>101</sup>

Another solution which attempts to accommodate the property interests of both factions is that of allowing both factions to use the property alternately. This solution has been embodied in a statute in Kentucky.<sup>102</sup> It was applied without benefit of statutory authorization in an Oklahoma case.<sup>103</sup> There are obvious drawbacks to this approach. If the factions are so far apart on ideological grounds that they cannot resolve their differences without schism, it is unlikely that an arrangement for the sharing of facilities would prove acceptable for very long. If the court orders this common use of the church property an unstable situation is perpetuated which neither party really wants. Cases are rare in which this solution has been applied, and even in Kentucky, where it is expressly authorized by statute, the courts have held that the statutory solution of alternate or divided use is only a temporary measure, to be applied only until it can be determined which of the factions is the one entitled to all of the property.<sup>104</sup> The statute does not apply at all to congregational churches, according to the recent decisions.<sup>105</sup>

<sup>100</sup> Cf. *Le Blanc v. Lemaire*, 105 La. 539, 30 So. 135 (1901); *Schradi v. Dornfeld*, 52 Minn. 465, 55 N.W. 49 (1893).

<sup>101</sup> *Bogard v. Boone*, 200 Ky. 572, 255 S.W. 112 (1923); *Lost River Norwegian Evangelical Lutheran Congregation v. Thoen*, 149 Minn. 379, 183 N.W. 954 (1921); *accord*, *Wicks v. Nedrow*, 28 Neb. 387, 44 N.W. 457 (1889).

<sup>102</sup> "In case of a division in a religious society, the trustees shall permit each party to use the church and property for divine worship a part of the time, proportioned to the members of each party. . . ." KY. REV. STAT. § 273.120 (1955).

<sup>103</sup> *Huffhines v. Sheriff*, 65 Okla. 90, 162 Pac. 491 (1916).

<sup>104</sup> *Jones v. Johnson*, 295 Ky. 707, 175 S.W.2d 370 (1943).

<sup>105</sup> *Fleming v. Rife*, 328 S.W.2d 151 (Ky. 1954); *Bunnell v. Creacy*, 266 S.W.2d 98 (Ky. 1954).

The cases involving judicial division of the property between the factions—either by sale and division of proceeds, or by alternate use—are few and for the most part old.<sup>106</sup> In the great majority of the cases the courts have felt it necessary to rule that the property belonged exclusively to one faction or the other.

#### E. *Protecting the Status Quo*

Because the courts will not review religious disputes except when presented in a property context, and because the principal underlying justification for judicial interference is the protection of reliance and denominational stability, when a court does overrule the decision of the ecclesiastical authority, it inevitably does so in the interest of preserving the *status quo*. The policy of the law, as it is reflected in the cases, is against innovation and change in the denominational structure of the institution and perhaps in the basic doctrines. In view of this, even duly constituted authorities of the church cannot, in the face of opposition, feel safe in devoting church property to radically new uses. The free exercise of new religious views may be inhibited by the fear of forfeiture of the properties of the church. Of course, it is not a function of the law to see that persons or groups are always free to exercise their religion without fear or sacrifice. In this situation, however, the sacrifice is imposed by the law—by the state. Judicial enforcement of the rule against fundamental deviation from basic doctrines is just as much state action as is judicial enforcement of restrictive racial covenants in deeds. The state thus takes an active part in inhibiting basic innovations by interposing its authority in favor of the *status quo*.

It is difficult to see how this result can be reconciled with the principle of free exercise of religion. Even if it be granted that "free exercise" is a privilege of individuals, not of organizations,<sup>107</sup> the anomaly remains, for the individual members of the group favoring change normally have contributed money and property to the church, just as have those who oppose change. Their right to have the "temporalities" of their church applied to the uses they consider proper in the exercise of religion should be as strong as that of those individuals who oppose the change.

<sup>106</sup> See cases cited notes 94-103 *supra*.

<sup>107</sup> See Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U.L. REV. 1274 (1961), for discussion of the problems of constitutional interpretation stemming from the differences between an individual and an institutional acceptance of "religion" in the first amendment.

If the courts must decide these cases, and if partition or alternate use are not feasible solutions, there appears to be no way out of the dilemma. The court simply has to favor one side or the other. The choice of either side will have the effect of impairing to some extent the other's freedom of exercise of religion. Both sides can make plausible claims of reliance. The side favoring the change could argue reliance upon the power of the institution by its own internal rules to change with changing times. The side opposing change can argue reliance upon the *status quo*. The courts must choose one side or the other. The choice has been to prefer the *status quo*.

How do these judicial doctrines, derived from the property dispute cases, bear upon the denominational mergers that are likely to be effected as the ecumenical movement advances? Every attempted merger can be challenged in the courts in the form of a property dispute. If the denomination in question is one that follows hierarchical principles of polity, the issue can be raised when a local church seeks to avoid affiliation with the new merged denomination or when a denominational group claims to have acceded to authority in the denomination when the old hierarchy decided to merge, thus giving up the denomination's distinctiveness. The courts may have to decide which hierarchy is the true one in order to determine which group is entitled to control the property. If this decision depends upon which group has the strongest doctrinal connection with the old denomination, the group seeking to avoid the merger will probably be preferred. If the decision depends upon which group has the strongest institutional connection, the decision may well go for the new merged denomination.

If the denomination is one that follows congregational polity, the merger can be challenged when the local church majority votes to remain aloof from the merged denomination. Under existing legal doctrines, the decision will depend upon whether the merger constitutes a fundamental deviation from the historic principles of the denomination. If it does, the local church need not go along. The issue can also be raised by a group claiming power over denominational properties after the regular denominational authorities decide to merge, the theory being that by merging with another denomination the regular authorities have effected a fundamental deviation and have abandoned the original denomination which alone has power to control the property.

### F. *Mergers Under Religious Corporation Statutes*

Several states have statutes dealing specifically with mergers of religious institutions.<sup>108</sup> Usually these apply only to incorporated religious institutions, although in a few states there are statutes that deal specifically with unincorporated groups.<sup>109</sup> For the most part these statutes are not specifically limited to mergers of local churches, but most of them do not really fit the situation of denominational mergers. Those that do apply to denominational mergers do not deal with the perplexing problem of what is to become of the properties of individual local churches whose members may not unanimously favor the merger.

In any event, these merger statutes probably have little effect on the problem of whether the property of the organization will go to the merged institution or remain with a group that desires to remain aloof.<sup>110</sup> Even if provisions of the statutes purport to vest the property of the older institutions in the new one formed by the merger, the provisions probably will have no binding effect if the merger is regarded as a fundamental change. Examples can be found in the cases of attempts to change the character or fundamental beliefs of the institution by incorporating, re-incorporating, or altering the charter. These attempts are seldom if ever successful.<sup>111</sup> The "corporation" of a religious institution has no rights to the property except those of the "society" from which it was formed. The corporation may have title to the property, but that does not mean that the corporation's officers are free to determine the uses to which the property may be put. The properties can be used only for uses sanctioned by the denominational hierarchy or

<sup>108</sup> Colorado, Connecticut, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont, Washington, Wisconsin, and Wyoming have statutes specifically dealing with mergers or consolidations of religious institutions. In several other states religious mergers are covered by the general charitable or non-profit corporation statutes.

<sup>109</sup> Connecticut, New Jersey, and Pennsylvania have statutes applying to some types of religious groups. Under several others, unincorporated groups conceivably could officially merge by forming one corporation from the two or more unincorporated societies.

<sup>110</sup> Cf. *Cadman Memorial Congregational Soc'y v. Kenyon*, 197 Misc. 124, 95 N.Y.S.2d 133 (Sup. Ct. 1950), *rev'd*, 279 App. Div. 1015, 111 N.Y.S.2d 808 (1952), *aff'd*, 306 N.Y. 151, 116 N.E.2d 481 (1953).

<sup>111</sup> See *Bomar v. Mount Olive Missionary Baptist Church*, 92 Cal. App. 618, 268 Pac. 665 (1928); *Jackson v. Jones*, 130 Kan. 488, 287 Pac. 603 (1930); *Michigan Congregational Conference v. United Church of Scranton*, 330 Mich. 561, 48 N.W.2d 108 (1951); *Calvary Baptist Church v. Shay*, 292 Mich. 517, 290 N.W. 890 (1940); cf. *Holm v. Holm*, 81 Wis. 374, 51 N.W. 579 (1892).

for those (in the case of congregational churches) that do not constitute a fundamental deviation in most states.<sup>112</sup> The fact that the corporation is allowed by statute to merge with another does not mean that the merger will also carry the properties of the societies to the new merged corporation.

It is necessary to distinguish three different entities, each of which may exist in one ecclesiastical body. The constituency of each may be different from that of the others. Zollman has defined two of these entities in these terms:

“In order effectually to disseminate Christian truths, educate men in Christian principles, and spread Christianity effectively, the church must have a secular as well as a spiritual vitality. An unincorporated church, so called, if it has any interest in property at all, therefore, presents a twofold aspect. It has a body, the society, with which courts can deal, and a soul, with which courts cannot deal. The church is the spiritual entity with spiritual sanctions and spiritual bonds of union. . . . The society is the temporal body with temporal understandings and temporal articles of association. The church is subject to spiritual censure; the society is subject to the temporal powers. The object of the church is the worship of God; the object of the society is the ‘acquisition and management of property.’ ”<sup>113</sup>

As an unincorporated church “presents a twofold aspect,” an incorporated one presents a threefold aspect. Besides the “church” and the “society,” as defined by Zollman, there is the corporation, which is not necessarily the same as the society. The function of the corporation is to serve as the jural entity through which the society acts in matters related to its properties.

Of these three entities it is the church (or its individual constituents) that has the protectable constitutional freedoms of religious exercise; it is the society that has the beneficial interest in the “temporalities.” The corporation is only the formal coat that the church or society puts on whenever it needs recognized status to perform certain effective jural acts: namely, to contract; to convey or receive property; to sue or be sued. Depending upon the type of church polity, the denominational organization, and the type of corporation statute, the constituencies of the three entities

<sup>112</sup> See, e.g., *Lindstrom v. Tell*, 131 Minn. 203, 154 N.W. 969 (1915); *Presbytery of Bismark v. Allen*, 74 N.D. 400, 22 N.W.2d 625 (1946).

<sup>113</sup> ZOLLMAN, *AMERICAN CHURCH LAW* 143 (1933).

may be identical or radically different. They serve three different functions, and their constituencies are not necessarily the same. Accordingly, the statutes dealing with incorporation, merger, consolidation, dissolution, amendment of charters, extinction of churches, etc., do not determine the property problems that will be presented when denominations seek to become reunited.<sup>114</sup>

The fact that the general merger statutes usually are not regarded as conclusive in questions of property division does not mean that statutes could not have conclusive effect. If the courts can prescribe, as a matter of common law, the basis for allocating the properties, it is difficult to see any reason why the legislature should not be able to prescribe the basis by statute. There is an indication in a recent Supreme Court case, however, that neither state common law nor state statute law may be conclusive on the question of the distribution of property in schism cases—and every merger that is opposed will present a schism case. The subject may now be a matter of federal constitutional law.

That case is *Kreshik v. Saint Nicholas Cathedral*.<sup>115</sup> In a contest between rival hierarchies over the cathedral properties of the Russian Orthodox Church in New York, the New York state courts had held for the group which had been formed in America after the Soviet revolution drove the church underground in Russia as against the reconstituted Russian hierarchy, appointed after World War II. In a per curiam opinion the Supreme Court reversed in favor of the Russian group, holding that, under the doctrine of *Watson v. Jones*, New York had to abide by the ruling of the duly constituted hierarchical authority, which the Court said was the Russian group. From the brief per curiam opinion it seems apparent that the Court did not consider two very important questions raised by the case. The first of these is, why should New York be bound to follow the rule of *Watson v. Jones*? That decision, it will be recalled, although a decision of the United States Supreme Court, did not purport to be based upon constitutional principles, but upon pre-*Erie* federal common law. The second point is, granting that *Watson v. Jones* should apply, why should the United States Supreme Court's view as to which of the two

<sup>114</sup> Some states (e.g., Connecticut, Michigan, New Jersey, New York) have very comprehensive statutes dealing with all temporal activities of religious institutions; frequently they purport to regulate denominational affiliation by separate statutes for each of several different denominations. The effectiveness of such statutes for purposes other than the purely formal aspects of jural existence is questionable.

<sup>115</sup> 363 U.S. 190 (1960).

rival hierarchies represented the true church prevail over the decision of the New York court? Actually, the only real question in the case was, which group represented the true church and which was schismatic? The Court held, without discussion of the point, that the Russian group was necessarily the true church, and refused to let New York's decision to the contrary stand.

The *Kreshik* ruling determined that the New York decision violated the Russian group's freedom of exercise of religion. There is no consideration of the question whether the decision of the Supreme Court itself did not violate the freedom of exercise of the American group. It has been pointed out previously that the decision of these church property contests by resort to "religious" issues poses an almost irreconcilable dilemma: a decision in favor of one group over the other on the ground that the favored group represents the "true church" necessarily impairs the freedom of exercise of the disappointed group and could be said to constitute a *pro tanto* establishment of the favored group as the officially sanctioned church.<sup>116</sup> In view of the fact that any decision at all involves impairment of free exercise of someone, it might be thought that the states should be free to make this decision upon any reasonable basis—whether prescribing the result by statute or deriving it by judicial decision. There is no logical necessity for favoring the group with the closest historical organizational connection to the original group in order to serve the interests of "freedom of exercise" generally; yet this was apparently the rationale of the *Kreshik* decision. Nevertheless, it seems clear, after the *Kreshik* case, that states are not entirely free to adopt their own bases for deciding these cases. Statutes or state judicial decisions providing for distribution to the newer group in a case such as *Kreshik* would now seem to violate the first amendment's protection as applied to the states through the fourteenth. Thus, even if the merger and consolidation statutes in the states were clearly intended to be conclusive on matters related to the distribution of properties, they could be effective for this purpose only if their provisions were consistent with the *Kreshik* and *Watson* cases.

Of course, the full meaning of the *Kreshik* case is far from certain. Mr. Justice Brennan's statement in *School District v. Schempp*<sup>117</sup> that the *Kreshik* case "reaffirmed" the proposition that

<sup>116</sup> See text accompanying notes 48-50 *supra*.

<sup>117</sup> Quoted *supra* note 42.



the courts should not undertake to decide theological questions in church property dispute cases does not clarify the meaning of the case, since the Supreme Court itself in the *Kreshik* case did precisely that: it decided the theological question of choosing the proper hierarchy. Moreover, the opinion in the case was per curiam, and that fact deprives it of some of its force. For another thing, the Court probably did not need to rule that New York *must* award the property according to the doctrine of *Watson v. Jones*. The New York court seemed to be especially concerned about the political implications of deciding for the Russian group. The Supreme Court might have reversed the New York decision on the ground that political considerations do not provide a suitable basis for making a property decision as between two conflicting religious groups, without assuming to dictate the precise basis on which the property must be awarded. But even if the case does give *Watson v. Jones* constitutional status, there is still another element of uncertainty. That is whether all of what has come to be considered as the doctrine of *Watson v. Jones* now has constitutional status, or whether only the actual holding of the case has that status. The doctrine of *Watson v. Jones*, as it has been discussed in legal literature and in the cases, is usually understood to include all three of the points made in Justice Miller's opinion.<sup>118</sup> His observations on two of these points, of course, was dictum. The *Watson* case, like the *Kreshik* case, actually involved a contest between two competing hierarchies. The decision was that the local church's property should go to the local group sanctioned by the appropriate hierarchy, and the hierarchy with the closest organizational connection to the original, traditional, historic denominational authority was held to be the appropriate hierarchy. The *Kreshik* case is within the scope of the holding of *Watson v. Jones*. The question at once arises: will the court hold that aspect of the *Watson* doctrine dealing with property of congregationally organized churches to be likewise, now, a principle of constitutional law? If this be true, a further question must be answered. Does the constitutional principle with respect to congregational churches which derives from *Watson v. Jones* include only the principle of strict majority rule (which we have previously herein assumed to be Mr. Justice Miller's real intention) or does it include as well the "implied trust-fundamental deviation" excep-

<sup>118</sup> See text accompanying notes 55-65 *supra*.

tion which most states have grafted onto it? If the former is true, the doctrines presently applied in most states with respect to properties of congregational churches are unconstitutional. If the latter is true, the court is exposing itself to a potentially immense mass of litigation as the ecumenical movement advances. The decisions of the state supreme courts will no longer be final: the United States Supreme Court may always have the last say on the religious question of which view represented by the contesting groups corresponds most closely to the fundamental tenets of the church, unless the question is limited, as has been suggested above, to the protection of denominational stability.

Apart from these uncertainties there remains the suspicion that by taking upon itself the duty to decide these essentially religious questions, the Supreme Court has itself brought about the "establishment of religion." It has been shown previously that judicial action favoring one party in these cases probably must be recognized as establishing the doctrinal view of the prevailing party, under recent decisions of the Court defining establishment.<sup>119</sup> Action of the Supreme Court is judicial action just as is action of state courts. True, the first amendment applies in terms only to congregational action, but it has been held to apply to the states through the fourteenth, and to prohibit both state legislative and judicial action. If it does not apply to the United States Supreme Court that court will be the only governmental agency in the country not subject to the first amendment's restrictions.

#### IV. CONCLUSIONS

In light of the uncertainties noted, what can be said of the law relating to mergers of religious institutions?

Existing state statutes relating to religious corporations, including the merger statutes, will have very little effect upon the merger movement. They deal only with formalities; they really concern only the legal name or shell of the religious society. To the extent that they purport to determine the temporal rights and obligations of the religious society from which the corporation was formed, they are probably unconstitutional, or at best ineffective in the face of the strong judicial doctrines that have been discussed. This does not mean the statutes do not have to be complied with where they are applicable. It merely means that the existing statutes will

<sup>119</sup> See text accompanying notes 48-50 *supra*.

probably have no bearing upon the serious issues that will be posed by mergers—principally the question of whether the properties of the merged societies will go to the new institution that the merger produces, or remain with factions within those societies which refuse to approve the merger.

The pertinent judicial doctrines are confusing and ill-defined, but there are enough actual cases in some areas to permit cautious prediction. For instance, there is probably not too much doubt now in cases involving properties of local churches affiliated with denominations of associated or hierarchical polity. There may be a knotty problem as to whether the polity is in fact hierarchical, but once this issue is determined the results in the cases are reasonably certain and uniform. The courts will follow the decision of the highest church judicatory within that denomination. This is true whether the parties to the case be the higher church body and a recalcitrant local church or two factions within the local church. A few cases have specifically ruled that a local church does not have to go along with a denominational merger even though the denomination be one of hierarchical polity.<sup>120</sup> Most cases, however, seem to require the local church to follow the higher authority into the merger,<sup>121</sup> and it seems probable now, after the *Kreshik* case, that to absolve the local church from the duty to follow the hierarchical authority would be unconstitutional. Thus the picture is fairly clear for denominations of hierarchical or associated polity.

There may be problems where there is a contest within the hierarchy itself to determine which group represents the true church, and therefore whose ruling is to be followed by the courts in these cases. The *Kreshik* case, however, in spite of its possible logical flaws, probably settled this problem too; that group with the strongest and closest organizational connection with the traditional hierarchy will probably be preferred.

In the case of congregationally organized churches, however,

<sup>120</sup> See *Boyles v. Roberts*, 222 Mo. 613, 121 S.W. 805 (1909), later disapproved in *Hayes v. Manning*, 263 Mo. 1, 172 S.W. 897 (1914); *Bonham v. Harris*, 125 Tenn. 452, 145 S.W. 169 (1911); *Landrith v. Hudgins*, 121 Tenn. 556, 120 S.W. 783 (1908); cf. *American Lutheran Church v. Evangelical Lutheran St. Paul's Church*, 140 Colo. 186, 343 P.2d 711 (1959); *Hayman v. St. Martin's Evangelical Lutheran Church*, 227 Md. 338, 176 A.2d 772 (1962).

<sup>121</sup> See *Permanent Comm. of Missions v. Pacific Synod, Presbyterian Church*, 157 Cal. 105, 106 Pac. 395 (1909); *Nagle v. Miller*, 275 Pa. 157, 118 Atl. 670 (1922); *Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821 (1943); *Reformed Bethanien Church v. Ochsner*, 72 S.D. 150, 31 N.W.2d 249 (1948); *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909).

the law is far from clear. In the first place, it is difficult to say whether the *Watson* principle relating to congregational churches is now a principle of constitutional law. The *Kreshik* case contains broad language generally endorsing *Watson v. Jones*; but if the congregational branch of the *Watson* doctrine is now a matter of constitutional law it is so by virtue of a dictum in the *Kreshik* case endorsing a dictum in the *Watson* case. It may be that when the Supreme Court is squarely faced with the necessity of applying the *Watson* case to resolve a property dispute within a congregationally organized church it will refuse to do so. On the other hand, if property disputes within hierarchical churches are now to be regarded as covered by the first amendment, it is hard to see why the determination of property disputes within congregational churches should not likewise be subject to constitutional restrictions. And if constitutional limitations are applicable, it seems most likely that the limitation should be that prescribed by the dictum of *Watson v. Jones*, since that case is the only one decided by the Supreme Court containing any discussion of the distribution of property of congregational churches.

But if the dictum of *Watson v. Jones* is now a principle of constitutional law as applied to congregational churches as well as to hierarchical churches, the question still remains whether the principle is simply that of majority rule without any other restriction (as Mr. Justice Miller probably intended) or whether it includes the implied-trust idea that most states have attached as a limitation on the principle of majority rule. If the former proves to be the true interpretation, then the existing common law of most states on this point is unconstitutional, although the result in future cases is rather easily predictable. The properties will go with the majority faction in most cases. If the latter interpretation is correct, unless the inquiry is restricted to preserving denominational stability, there will remain in almost every case the problem of deciding the religious question of what are the basic tenets and usages of the church and what constitutes a fundamental deviation. The Supreme Court will have to declare a position on the question whether an attempted merger of local churches with one another, or of one denomination with another, or an attempt by the local church to abandon the denomination or to join another denomination because of an attempted merger or other reasons, constitute fundamental deviations, since these will be the real questions in most cases.

If the *Kreshik* case does not impose the congregational branch of the *Watson* doctrine upon the states, two views are possible under existing law. If the denominational organization has merged with another, congregations that vote by regular procedures to remain aloof from the merged denominations may be permitted to do so.<sup>122</sup> The theory of such a result would be that where the denomination itself has abandoned its basic beliefs and usages by merging with another, the local church need not go along with the denomination. Even though it might not otherwise be allowed to dissolve its denominational connection, the local church is free to do so where the denomination no longer represents the traditional tenets and usages. On the other hand, it might be held that in such a situation the new merged denomination is but the continuation of the old ones, and that the local churches cannot abandon the denomination by mere majority vote. The denominational merger, in other words, might not be regarded as a fundamental deviation.<sup>123</sup>

Because the position of the law with respect to hierarchical churches is reasonably clear, cases arising out of hierarchical churches are not so likely to come into the courts, except for cases like *Watson* and *Kreshik* involving a struggle between rival hierarchies. But because of the confused state of the law relating to congregational churches, minority factions of congregational churches are encouraged to seek a judicial hearing before submitting to the majority's will in cases involving basic denominational changes, such as mergers. As the merger movement continues to gain momentum, the volume of church property dispute cases will surely increase. Moreover, the fear of merger or even of loose association with the ecumenical movement may produce conflicts within many local congregations, as it did in *Huber v. Thorn*, that can be presented to the courts in the form of property contests. The courts will have to decide these cases, and the legal principles they have used to decide them in the past are principles resting mainly upon the interest of protecting the *status quo*. If they apply these principles, the courts will be cast into the role of generally opposing the ecumenical movement, at least

<sup>122</sup> See *Cadman Memorial Congregational Soc'y v. Kenyon*, 197 Misc. 124, 95 N.Y.S.2d 133 (Sup. Ct. 1950), *rev'd* 279 App. Div. 1015, 111 N.Y.S.2d 808 (1952), *aff'd*, 306 N.Y. 151, 116 N.E.2d 481 (1953).

<sup>123</sup> *Cf. Spenningsby v. Norwegian Evangelical Lutheran Trinity Congregation*, 152 Minn. 164, 188 N.W. 217 (1922).

insofar as congregationally organized churches are concerned. This may present a serious obstacle to what appears now to be a very basic reorientation of the Christian church away from separatism, which was the prevailing philosophy when our country and Constitution were new, and toward ecumenicity. It is, of course, too early to say that this opposition will seriously frustrate the aspirations of persons and groups engaged in this struggle for reunion and reconciliation. At the present time many religious groups do not accept ecumenicity as a worthy purpose. But the movement seems to be growing in strength and in following. The danger that judicial opposition might seriously thwart it, as it did the labor movement, seems a real one.

How can this result be prevented? The religious groups themselves, of course, can prevent many cases from entering the courts by effectively preparing their people for the merger. Since, however, under the prevailing legal principles even one member of a local congregation can raise the issue of fundamental deviation, it seems clear that educational work by the religious groups themselves will not be enough to solve all the problems.

Legislation, which was effectively used in Canada to prevent much of the litigation that it was predicted would stem from the merger of the three groups that formed the United Church of Canada, does not promise much help in solving the problem in the United States.<sup>124</sup> Canada did not have an establishment of religion clause as we do. Under the decisions of our Supreme Court a law tending to favor one religion over another, as any effective law prescribing the method of disposing of the property probably would have to do in one form or another, is vulnerable to attack on constitutional grounds. However, as has been pointed out, this same sort of preference of one religious persuasion over another inevitably results when courts decide these cases on common-law principles, and if this sort of preference can be done validly by judicial action it is hard to see why it could not be done by legislation. But even if legislation were constitutionally feasible, state legislation would probably not be effective to solve the problem. Denominational mergers are usually nationwide in scope, and one state's law could not control the distribution of property situated in other states under our present conceptions of the interstate effects of state legislation and jurisdiction. And

<sup>124</sup> See SILCOX, *CHURCH UNION IN CANADA* (1933).

even if uniform state or federal legislation could somehow be employed constitutionally, the most difficult question still would remain: what sort of provisions should the law contain? It is doubtful that any law would be effective unless it afforded some freedom to the religious institution to change its formal structure while at the same time providing some protection for the reasonable reliance of the individual church members. No solution that is both practically and constitutionally feasible is immediately apparent. The doctrine of *Watson v. Jones*, without the "implied trust-fundamental deviation" exception, is apparently constitutional and allows sufficient latitude for institutional change, but it does not give the protection to reliance by members of congregational churches that most state courts have felt necessary. Groups vitally affected by this dilemma, such as the National Council of Churches and perhaps even the state legislatures, should devote some serious attention to its solution. The interests of both the ecumenical movement and the administration of justice will be better served if church property disputes can be kept out of the courts.