Washington and Lee Law Review

Volume 27 | Issue 1 Article 4

Spring 3-1-1970

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CHURCH PROPERTY LITIGATION: A COMMENT ON THE HULL CHURCH CASE

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On January 27, 1969 the Supreme Court rendered its decision in the case of *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church.*[1] The case involved a contest between local churches and higher denominational authorities over the power to control the use to which the local church properties could be put. In this comment, we will look at some of the problems that church property dispute cases pose, and the main trends that judicial solutions exhibit.[2] The object will be to determine what, if anything, the *Hull Church* case may have contributed to our understanding of and solutions to the problem.

THE PROBLEM

In spite of scriptural injunctions to brotherly love and self negation, it is not at all uncommon for members of local churches to become embroiled in factional disputes of such intense hostility as to be irreconcilable. The issues that actually precipitate an irreconcilable conflict of this character often seem very minor to outsiders.[3] To the members of the local church, however, they usually are regarded as matters of profound importance: matters of fundamental faith or

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[1]393 U.S. 440, *on remand,* 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied,* 38 U.S.L.W. 3267 (U.S. Jan. 19, 1970) (mem.). For a discussion of the significance of the final disposition see EPILOGUE *infra.* The case involved two local churches, the Mary Elizabeth Blue Hull Memorial Presbyterian Church and the Eastern Heights Presbyterian Church. The actions were consolidated at trial and on appeal.

[2]*See generally* Casad, *The Establishment Clause and the Ecumenical Movement,* 62 MICH. L. REV. 419 (1964); Note, *Judicial Intervention in Disputes Over the Use of Church Property,* 75 HARV. L. REV. 1142 (1962); Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations,* 74 YALE L.J. 1113 (1965); 54 IOWA L. REV. 99 (1969). For general sources collecting many of the cases see Annots., 15 A.L.R.3d 297 (1967); 70 A.L.R. 75 (1931); 8 A.L.R. 105 (1920); 24 L.R.A. (N.S.) 692 (1910).

[3]*See, e.g.,* Davis v. Scher, 356 Mich. 291, 97 N.W.2d 137 (1959) (allowing the unsegregated seating of males and females at services). *Cf.* Christian Church of Tama v. Carpenter, 108 Iowa 647, 79 N.W. 375 (1899); Parker v. Harper, 295 Ky. 686, 175 S.W.2d 361 (1943) (In both cases one of the major items of dispute concerned the music used at worship. In the Iowa case one faction removed the church organ as being a work of the devil, and put it in a woodshed.)

doctrine concerning which there can be no compromise. Other issues can generally be settled by some fairly amicable arrangement through the normal processes of the local church institution. When internal processes cannot resolve the conflict, the church will usually split and one or both factions may seek to exercise exclusive use of the church name and properties. Shared use is usually not feasible at that point.

Thus, irreconcilable disputes over the use and control of church properties nearly always turn upon some question of religious faith or doctrine which at least one faction considers to be fundamental.[4] When the question of which group should prevail cannot be resolved by the local church, as it often cannot, some outside authority has to be invoked.

That outside authority, however, is not always a court. Those religious denominations that are organized according to the principles of hierarchial (episcopal or presbyterial) polity[5] provide a regular mechanism within the institutional structure of the denomination to resolve such conflicts. The persons who comprise the membership of the bodies in which the authority to resolve controversies is lodged may be elected or appointed by higher church authority, but they are usually individuals who are highly educated and experienced in ecclesiastical affairs. Such a body (or, as it is often called, judicatory) is empowered to render an authoritative official ruling on disputed doctrinal questions, and its decisions are, by denominational rules, binding on the subordinate local churches. To make sure that a judicatory's decisions will be enforceable, denominational rules commonly provide in some specific way that the ultimate power to determine how local church properties shall be used shall belong to some higher authority, not to the local church, even when the members of the local group provided all the properties.[6] The judicatory's decision usually is accepted by the disputing groups. The members of the losing side either accommodate themselves to the doctrinal position that prevails or else they affiliate themselves with other churches.

Not all churches are associated with a hierarchical denomination, however. Churches organized according to congregational principles

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[4]Although the dispute is regarded as concerning issues of fundamental religious faith or doctrine, the controversy often reflects serious differences of political or social philosophy as well, as the *Hull Church* case illustrates. *See* Northside Bible Church v. Goodson, 387 F.2d 534 (5th Cir. 1967); Huber v. Thron, 189 Kan. 631, 371 P.2d 143 (1962).

[5]For discussion of these polity types see Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1143-44 (1962).

[6]*E.g.*, Latin American Council of Christian Churches v. Leal, 57 N.M. 502, 260 P.2d 697 (1953).

of polity[7] generally recognize no human ecclesiastical authority higher than the local church. God's will on questions of faith and doctrine is made known to the local fellowship of believers directly, not through hierarchical officials, such as bishops, elders, or judicatories. This is true even of churches such as the Baptist, Disciples of Christ, some Lutheran churches and others which do associate themselves together with other local churches in a wider organization or denomination. Whether a congregational church be denominational or non-denominational, all ecclesiastical authority is vested in the local church. Official policies are adopted or abandoned, doctrines are interpreted or modified as determined by the will of the prescribed proportion of the official members who vote on the questions. Usually that proportion is a simple majority. When a dispute arises within a congregational church, the group which can marshal the most members to vote on the issue is in a position to determine what the official position of the church shall be. There is no higher ecclesiastical authority to which appeal can be made by the disappointed group.

Although the will of the majority of a congregational church on some doctrinal issue is theoretically conclusive, the disappointed minority may not accept it so readily as a disappointed faction in an episcopal or presbyterian church would accept the decision of a hierarchical judicatory. The individuals who make up the majority of a congregational church need have no such educational or experiential qualifications as are generally held by members of presbyterial or episcopal judicatories, and this means that there is not the same assurance of theological or doctrinal consistency in the decisions they reach.[8] Furthermore, the composition of the majority can change significantly in relatively short periods of time, and may even be subject to manipulation.[9] Moreover, there is the obvious difficulty of having one of the contending factions be the judge of its own case.[10] The majority faction will believe in all sincerity that its position on the doctrinal issue is the true one, and it can claim legitimacy for it under the congregational principle of majority rule. The minority faction, on the other hand, may believe with equal sincerity that the position taken by the

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[7]Note 5 *supra.*

[8]*See* the emphasis placed upon the educational qualifications of the spokesman of the two factions in Holiman v. Dovers, 236 Ark. 211, 366 S.W.2d 197 (1963).

[9]*See, e.g.,* Rush v. Yancey, 233 Ark. 883, 349 S.W.2d 337 (1961); Partin v. Tucker, 126 Fla. 817, 172 So. 89 (1937); Ginossi v. Samatos, 3 Ill. App. 2d 514, 123 N.E.2d 104 (1954); First Regular Baptist Church v. Allison, 304 Pa. 1, 154 A. 913 (1931); Nance v. Busby, 91 Tenn. 303, 18 S.W. 874 (1892); First Baptist Church v. Ward, 290 S.W. 828 (Tex. Civ. App. 1927).

[10]Quotation in text at note 33 *infra.*

majority is wrong. If the majority position is a radical departure from the previously accepted official position of the church, the minority may claim that the members of the majority faction have, by their adherence to the new doctrine, abandoned the church and forfeited their rights to a voice in the control of church properties, leaving the minority faction as the true church. One faction or the other will be in de facto control of the building and other properties, and may seek to exclude the other. Having no recourse to higher tribunals within the denomination, the excluded faction either will have to withdraw from the church and give up its interest in using the church properties, or else it will have to present its claims to the civil courts. Usually no other alternatives are possible at that stage.

The civil courts cannot, consistently with American notions of church-state separation, decide which faction's view on the doctrinal issue is the true one. They do have, however, general jurisdiction over conflicting property claims, and they have not felt that they could simply refuse to hear a case just because the property involved is that of a religious institution. Since the occasion for judicial intrusion in the matter is protection of property rights, the courts have generally assumed that their task is to identify the institution or persons to whom the right of exclusion and control belongs. A few cases might indicate that members of the church as individuals have a protectible property claim.[11] A few have ruled that one group cannot use the properties to the exclusion of the other: they must share the use.[12] But the overwhelming majority of cases assume without question that individuals have no rights in the church properties, and that the legal question involves identifying the institution entitled to exclusive use. The problem is that the institution exists for purposes directly related to religious doctrines, and each faction claims to be the true church institution *because* of its position on the fundamental doctrinal issue. To each group the "church" is identified in terms of the religious doctrines and usages it espouses, and each group claims to be the church. How can a civil court, without considering the underlying issues of religious doctrine, decide which of the factions should be favored with exclusive use of the church properties? This is a dilemma that has troubled American courts since the earliest times and has not been satisfactorily resolved to this day.

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[11]*Cf.* Ferraria v. Vasconcellos, 31 Ill. 25 (1863); Immanuels Gemeinde v. Keil, 61 Kan. 65, 58 P. 973 (1899).

[12]*E.g.*, Huffhines v. Sheriff, 65 Okla. 90, 162 P. 491 (1916). KY. REV. STAT. ANN. § 273.120 (1969) prescribing shared use as a solution has been severely limited by judicial interpretation. *See* Fleming v. Rife, 328 S.W.2d 151 (Ky. 1959); Bunnell v. Creacy, 266 S.W.2d 98 (Ky. 1954).

WATSON v. JONES

In 1871 the Supreme Court of the United States rendered a decision in the case of *Watson v. Jones*[13] which is generally referred to as the leading American case on this question. In it the Court laid down some general guidelines for courts to use in seeking solutions to disputes over church property. The case itself was a contest between two factions in a local Presbyterian church. The local congregation reflected a split over the general issue of slavery and allied matters that had divided the Presbyterian Church at higher levels too. Each faction in the local church considered itself the true church, and claimed the right to exclusive use of the property. After prolonged and bitter litigation the case finally reached the Supreme Court, where it was held under advisement for a year, the Court entertaining the futile hope

> that since the civil commotion which evidently lay at the foundation of the trouble has passed away, that charity, which is so large an element of the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all Christian virtues, would have brought about a reconciliation.[14]

The Court was quite aware of the difficulties attendant upon judicial intervention in church disputes, and the opinion of Mr. Justice Miller indicates that the Court gave much thought to the implications of its decision. The Court clearly realized the shortcomings of civil judges as arbiters of religious doctrine and dogma,[15] and it was also able to see that even if judicial inquiry were limited to questions of the power or jurisdiction of the ecclesiastical bodies to render the challenged rulings, a court's decision would ultimately turn on questions of an essentially religious nature.[16] Moreover the Court saw that the exercise of jurisdiction by civil courts over these church disputes carried some important implications for the idea of religious freedom

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[13]80 U.S. (13 Wall.) 679 (1871).

[14]*Id.* at 735.

[15]Justice Miller noted that review by civil courts of the decisions of ecclesiastical tribunals involved the anomaly of "an appeal from the more learned tribunal in the law which should decide the case, to one which is less so." *Id.* at 729.

[16]Justice Miller stated:

> [I]t is easy to see that if the civil courts are to inquire into these [jurisdictional] matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court.

Id. at 733.

in America. Although he did not refer to religious freedom as a Constitutional principle, Justice Miller plainly treated it as part of the basic law of America.[17]

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiatical cognizance, subject only to such appeals as the organism itself provides for.[18]

The Court then addressed itself to three kinds of cases in which courts might have to decide factional disputes over church property. In cases, such as the *Watson* case itself, where the dispute concerned properties of a church of associated or hierarchical polity, the civil courts are bound to accept as final the decision of the highest church judicatory to which the matter was carried in questions of discipline, faith, and ecclesiastical custom, rule, or law.

In the case of churches of independent or congregational polity, however, the absence of higher judicatories required a somewhat different approach. In the case of such churches,

> 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. If the principle of government in such cases is that the majority rules, then the numerical

[17] *Watson v. Jones* was not in the federal courts because the religious issues raised federal questions under the U.S. Constitution. Federal jurisdiction was predicated on diversity, and the law applied was the pre-*Erie* federal common law.

[18] 80 U.S. (13 Wall.) at 728-9.

majority of members must control the right to the use of the property.[19]

Among the "principles that govern voluntary associations" was the "implied trust" doctrine: the idea that the properties belonging to such an association were impliedly dedicated to uses consistent with the basic purposes of the association, and as such could not be diverted to uses that would constitute a fundamental deviation from those purposes without the unanimous consent of the members.[20] If this principle were to be invoked in the case of congregational churches, whose purposes are defined in terms of religious doctrines or beliefs, it would open the way for judicial review of the decisions of congregational churches on points of faith and doctrine, to see whether or not they constituted fundamental deviations from the basic faith. The Court sought to exclude the implication that civil courts could exercise such power. There can be, the Court said, no inquiry into the religious opinions or views espoused by that majority, for "if such were permitted, a very small minority . . . might be found to be the only faithful supporters of the religious dogmas of the founders of the church."[21] The Court expressly rejected the notion that a civil court should, through the fiction of implied trust, deny the right of control to the majority simply "because they may have changed in some respect their views of religious truth."[22]

The Court also recognized a third category of cases. If the properties were acquired by the church under some instrument, deed or will containing express conditions or terms of trust limiting the uses to which they could be put, the court would have to see that it was not diverted from its intended uses.[23] This would be true, regardless of the form of polity followed by the church, and even if the trust or condition were expressed in terms of a particular religious doctrine, or set of beliefs, or form of worship. The court would have to review the challenged doctrine or practice to see if it were "so far variant as to defeat the declared objects of the trust."[24] It is clear, however, that Justice Miller was referring to express trusts, "definitely and clearly laid down," not implied trusts. If no such express trust or condition appeared, the power to decide how the properties were to be used and

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[19]*Id.* at 725.

[20]*See generally* Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1002-04 (1963).

[21]80 U.S. (13 Wall.) at 725.

[22]*Id.*

[23]*Id.* at 723.

[24]*Id.* at 724.

by whom rested exclusively with whatever body was invested with that power under the organic rules of the church.

The analysis called for by *Watson v. Jones,* then, involves, first the inquiry as to whether the disputed properties are held under an express trust or condition. If not, the court must then determine whether the church is an independent one or a member church in an hierarchial denomination, and award the properties to that group which is recognized by the appropriate decision-making body. This approach seeks to minimize the extent of state interference in the affairs of religious institutions, and the Court's explicit rejection of the implied trust concept seemingly removes what might otherwise be an impediment to the development of religious doctrine: the fear that any significant change in doctrine could provide the basis for a court challenge. Only in cases where the property is subject to an express trust or condition can the civil courts attribute legal consequences to changes in religious doctrine. *Watson v. Jones,* in other words, assumes that potential development and change in religious doctrine is a normal feature of free religious institutions. Those who oppose changes in doctrine (except perhaps a settlor or beneficiary of an express trust) must be content with whatever institutional devices the church provides for presenting their views. The power of courts over property may not be used as a device for inhibiting doctrinal change. The civil courts may concern themselves with the integrity and stability of the institution, but not with stability of doctrine. The properties belong to the "church" defined in institutional terms, not in doctrinal terms.

The Persistence of the Implied Trust Principle

In spite of the thoroughness of the *Watson* opinion and the high authority of the Court that decided it, it would be inaccurate to say that *Watson v. Jones* settled the law on church property disputes. Later cases involving hierarchical churches have generally been decided consistently with *Watson,* but in cases involving congregational churches, most courts have simply been unwilling to accord that finality which the *Watson* dictum indicated was owing to the decisions of the majority. A majority of courts have continued to apply the implied trust doctrine, or some similar concept, and have refused to allow a congregational majority to keep control of the church properties after it has adopted a position that constitutes a "fundamental deviation" or "radical departure" from the basic doctrines, dogmas and usages of the church.[25] This result is not always explained in implied trust terms.

[25]Note, *Judicial Intervention in Disputes over the use of Church Property,*

Sometimes it is described in contract terms[26] (*i.e.*, that the members of the congregation agreed upon the terms of association and lend their support to it on the basis that the terms will not be fundamentally or radically changed), or in jurisdictional terms[27] (*i.e.*, that the power to act as and for the church exists only within the basic doctrinal framework that existed at the time the church was organized, and no effective acts by the church are possible outside that framework). Justice Miller foresaw these arguments and sought to meet them in his opinion in *Watson,* but most Amrican courts, while purporting to follow *Watson v. Jones,* have ignored those parts of the opinion.

The cases have not shown a clear, factually consistent pattern from which a precise definition of "fundamental deviation" or "radical departure" can be formed. The courts usually have not allowed a majority of a denominational congregational church to abandon or change the denomination, at least where belonging to the denomination entails affiliation with other churches in some larger organization.[28] However, the courts have not been entirely clear on what associations of congregational churches are really "denominational."[29] Other than denominational affiliation, not many issues have been held to be "fundamental," but such things as the introduction of mixed seating (males and females sitting together) in an Orthodox Jewish congregation;[30] and the calling of a minister who had been cut off from fellowship by his previous church[31] have been held to be such

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75 HARV. L. REV. 1142, 1167-80 (1962). In an appendix to its supplemental opinion in Holiman v. Dovers, 236 Ark. 460, 366 S.W.2d 203, 206 (1963) the Arkansas court identified 27 states as endorsing this position and only one that had rejected it. A number of cases are collected in Annot., 15 A.L.R.3d 297 (1967).

[26]*E.g.*, Harmon v. Dreker, 17 S.C. Eq. 87 (1893).

[27]"The power of the majority to govern is derivative, and the source of the derivation limits the power.... The power to govern the church gives no power to change the church or the faith and covenants that fix its character." Mt. Zion Baptist Church v. Whitmore, 83 Iowa 138, 49 N.W. 81, 84 (1891).

[28]Casad, *The Establishment Clause and the Ecumenical Movement,* 62 MICH. L. REV. 419, 445-49 (1964). A number of cases are collected in Annot., 15 A.L.R. 3d 297, 309-20 (1967).

[29]The same kind of associational connection may be treated differently in different states. Thus, the American Baptist Convention is treated as a denomination in Kansas, Huber v. Thorn, 189 Kan. 631, 371 P.2d 143 (1962), but as a mere association which the majority can freely terminate in Wisconsin, Anderson v. Byers, 269 Wis. 93, 69 N.W.2d 227 (1955). *Compare* the treatment of the Southern Baptist Convention in North Carolina, Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954) (denomination), *with* the treatment in Tennessee, Beard v. Francis, 43 Tenn. App. 513, 309 S.W.2d 788 (1957).

[30]Davis v. Scher, 356 Mich. 291, 97 N.W.2d 137 (1959). *Contra,* Katz v. Singerman, 241 La. 103, 127 So. 2d 515, *appeal dismissed and cert. denied,* 368 U.S. 15 (1961).

[31]*Cf.* Dix v. Pruitt, 194 N.C. 64, 138 S.E. 412 (1927).

fundamental deviations as to lead the court to award the properties to the minority faction. Also, certain innovations in combination may add up to a fundamental deviation.[32]

The fact that so many American courts have been unwilling to follow *Watson* insofar as congregational churches are concerned clearly indicates that those state courts have given a different relative weight to the interests that appear in conflict in these church property cases than did the Supreme Court in *Watson*. The Supreme Court, aware of its special role in American society, tends to be concerned primarily with the larger, political, Constitutional aspects of the cases it decides and accordingly is likely to give greater weight than the state courts to what it conceives to be the interests of the society at large. The state courts characteristically tend to be more concerned with rendering what they conceive to be justice between the particular litigants. Although recognizing that a "church-state" issue is raised whenever civil courts intrude into the affairs of churches, the state courts have not seen this issue as being sufficiently important to warrant leaving a person or persons, who may have been induced to contribute sacrificially of their energies and moneys to the church on the assumption that it would continue to be essentially the same church, with no remedy except appeal to the very group who perpetrated a radical change. Doctrinal change must be expected, but there are limits. As expressed by the Iowa court in *Mt. Zion Baptist Church v. Whitmore:*

> Consider the majority of a particular Baptist Church as guilty of the grossest violations of and the widest departure from the church covenants and faith. Being accused by the minority, the accused sit in judgment, which it declares in its favor, and then pleads the judgment it declares as conclusive of its innocence, because no other man or body of men has authority to interfere. However, such a rule may serve in purely ecclesiastical relations, we unhesitatingly say the civil law will not adhere to it where the result is to divert [implied] trust property from its proper channel.[33]

The Constitutional "church-state" issue has not seemed to these state courts to be so clear or so important as the need to protect the minority against unfairness and over-reaching by the majority. As a Pennsylvania court picturesquely put it: "The guarantee of religious freedom . . . does not guarantee freedom to steal churches."[34]

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[32] *Cf., e.g.,* Christian Church of Tama v. Carpenter, 108 Iowa 647, 79 N.W. 375 (1889); Parker v. Harper, 295 Ky. 686, 175 S.W.2d 361 (1943); Holiman v. Dovers, 236 Ark. 211, 366 S.W.2d 197, *supp. opinion,* 236 Ark. 460, 366 S.W.2d 203 (1963).

[33] 83 Iowa 138, 49 N.W. 81, 85 (1891).

[34] Schnorr's Appeal, 67 Pa. 138 (1871).

After all, the Supreme Court did not base its decision in *Watson* on constitutional grounds. In any event, what the Court said there about congregational churches was dictum, and the Court did not actually say that majority rule is the only valid basis for deciding disputes within congregational churches. In a given case some other institutional principle—perhaps denominational affiliation—may be a more appropriate guide for judicial action. Moreover, *Watson* recognized that in some circumstances, civil courts could properly review even decisions on doctrinal matters made by ecclesiastical bodies. If the property was held by the church under express trust, the Court said it was the "obvious duty of the court . . . to see that the property so dedicated is not diverted from the trust. . . ."[35] While insisting that the trust be an express one insofar as its purposes were concerned, the Court's dictum suggested that the power to enforce the trust was not limited to the person expressly named as settlor, but could be exercised by any "persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication. . . ."[36] The "property" interests of these unspecified individuals were regarded, even by Justice Miller, as clearly paramount in this context to the interest of churches in being free from state interference in the development of their doctrines and practices, and to the interest of society as a whole in maintaining the principle of church-state separation. If individuals whose only connection with the trust consisted of their membership in the church and their allegiance to the principles the trust sought to foster had legally recognized "property" rights, what about those who had themselves contributed money or property, without any express reservation or trust limitation but in clear reliance upon the church's continued adherence to the fundamentals of faith and doctrine it represented itself as holding? Is not the right of such persons as worthy of legal protection as that of the "beneficiaries" of the express trust? If a court can examine the actions of a church to see whether they deviate from fundamental principles in an express trust case, can it not undertake a similar inquiry to protect the reasonable reliance of church members? Most courts have felt, in the case of congregational churches, that it can. Modifications and alterations in the church's doctrinal position must be expected, but not a "fundamental deviation" or "radical departure."

There is another area in which the doctrine of *Watson v. Jones* permits courts to engage in inquiries concerning what is, from the

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[35]80 U.S. (13 Wall.) at 723 (1871).
[36]*Id.*

standpoint of the litigants at least, religious doctrine. The matter of church polity or organization is essentially a question of religious doctrine in most churches. A certain form of polity is adopted, not merely for purposes of expediency, but in response to what the founders of the church believed were the applicable scriptural directions.[37] The principles announced by Justice Miller are premised on the idea that there are two clearly distinguishable types of church polity: those we have referred to as the congregational and the hierarchical. Actually, it is not always easy to determine whether a local church is an independent congregation or a member of a larger body.[38] Moreover, it is possible that a local church may be subject to hierarchical authority in matters of doctrine and faith, while retaining within the local congregation complete control of its properties.[39] Or conversely, the local congregation may be completely autonomous in matters of faith, but still be subject to some restrictions insofar as property use is concerned. In some cases the question of what the true polity of the church is may be one of the main issues of fundamental doctrine that produced the litigation. The *Watson* approach not only permits but requires a court to decide this issue. In making the form of polity a criterion for judicial decision *Watson* turns an issue that is initially religious into a legal one.

It is perhaps not surprising that the state courts did not follow *Watson v. Jones* rigorously in congregational church cases. However, some courts even found occasions to review the decisions of hierarchical tribunals as well. The *Watson* rule with respect to disputes within hierarchical churches required deference to the appropriate hierarchical tribunal. The identity of that tribunal sometimes was a contested issue, especially where the controversy within the local church was a reflection of a controversy at a higher level, as where the denomina-

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[37]Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1160 & n.91 (1962).

[38]*Cf.* cases cited note 29 *supra*. This problem is rather thoroughly discussed in Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1158-64 (1962).

[39]The local churches, in fact, argued that this was their true relationship with the Presbyterian Church in the U.S. in their briefs in the *Hull Church* case. The same argument was urged successfully in Maryland & Virginia Eldership v. Church of God, 249 Md. 650, 241 A.2d 691 (1968), *vacated and remanded for reconsideration in light of the Hull Church decision*, 393 U.S. 528 (1969). On remand the Maryland court held that although the local churches were members of a presbyterial denomination, the rights of control of church properties, under Maryland laws, belonged to the local congregation. 254 Md. 162, 254 A.2d 162 (1969), *appeal dismissed*, 90 S. Ct. 499 (1970) (per curiam); EPILOGUE *infra; see* Comment, 54 IOWA L. REV. 899, 906 (1969).

tion itself had split or merged with another.[40] In such cases each of the disputing local factions might claim to be supported by the appropriate judicatory, and the question of which one is the true one would have to be resolved by the civil court. The kinds of issues which can precipitate a denominational schism are often similar to those that may divide a local church. One group may assert that the other—the controlling group—has wrought some fundamental departure from basic denominational doctrines, and will declare itself to be the remnant of the true church and as such entitled to exercise the denominational power of control over properties. A court may be asked to decide if the controlling group exceeded its authority or violated its trust or otherwise was guilty of a basic doctrinal deviation of sufficient seriousness to have forfeited its position.

A similar situation is presented when a local church group seeks to be relieved of its subordination to the larger church because of fundamental doctrinal deviations at the denominational level.[41] If minority factions of local congregational churches could acquire the properties as against the majority when the majority had committed a radical departure, the same reasoning would suggest that an otherwise subordinate local church could acquire independence from hierarchical control over its properties when the general church committed a radical departure from the doctrines that led the local church to affiliate with it. This argument was not accepted in most states, but in some, including Georgia,[42] it was.

In 1952 in *Kedroff v. St. Nicholas Cathedral*,[43] the Supreme Court purported to raise the *Watson* principle to the constitutional level, treating it is an aspect of free exercise under the first amendment (applicable to the states through the fourteenth). That case and a companion case, *Kreshik v. St. Nicholas Cathedral*,[44] decided in 1960, concerned the properties of the Russian Orthodox cathedral in New York City, and accordingly involved only the "hierarchical branch" of

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[40]*E.g.*, Ryszko v. Kaimakan, 108 N.J. Eq. 34, 153 A. 651 (1931); Krecker v. Shirley, 163 Pa. 534, 30 A. 440 (1894). A great many cases reached the courts as a result of the schisms at the national level in the Church of the United Brethren and the Evangelical Association of America, and as a result of the merger of the Cumberland Presbyterian Church with the Presbyterian Church in the United States. C. ZOLLMAN, AMERICAN CHURCH LAW 203-18 (1933).

[41]*See, e.g.*, Northside Bible Church v. Goodson 387 F.2d 534 (5th Cir. 1967); Kelly v. McIntire, 123 N.J. Eq. 351, 197 A. 736 (1938); Presbytery of Bismarck v. Allen, 74 N.D. 400, 22 N.W.2d 625 (1946); Nagle v. Miller, 275 Pa. 157, 118 A. 670 (1922); Schlichter v. Keiter, 156 Pa. 119, 27 A. 45 (1893).

[42]*See* Mack v. Kime, 129 Ga. 1, 58 S.E. 184 (1907).

[43]344 U.S. 94 (1952).

[44]363 U.S. 190 (1960).

the *Watson* doctrine. The Russian Orthodox Church in America had been reorganized after the Bolshevik revolution. The Russian hierarchy was not in a position to function, and an American hierarchy was established to take its place. Later the Russian hierarchy reasserted its rights of control. New York had held that the American group was the true church. The Supreme Court reversed, holding the Russian group to be the true church. The rationale of the Court's decision in favor of the Russian group was not stated, except to say it had never relinquished control. The only thing the cases made clear was that the states are not entirely free to decide which of two competing hierarchies has the right to control the property. They are bound to decide the cases in accordance with the first amendment, and that involves, to some extent, the doctrine of *Watson v. Jones*. The Court did not address itself in the *Kedroff* and *Kreshik* cases to any of the difficulties that had grown up around the *Watson* doctrine, and so it was uncertain whether the "implied trust—fundamental deviation" notion continued to be valid. Most state courts have continued to apply it in congregational church disputes.[45]

The Hull Church Case

The members of two Presbyterian congregations in Savannah, Georgia voted to withdraw from affiliation with the Presbyterian Church in the United States (the "general church") and from its Savannah Presbytery (the next level above the local church in the denominational hierarchy). The reasons given for withdrawal were that the general church had violated its constitution and had departed radically in various ways from the faith and practices prevailing when the local churches first affiliated with the general church. The departures charged included such things as ordaining women; making pronouncements and recommendations on civil, economic, social and political issues; supporting the removal of Bible reading and prayer in public schools; teaching "neo-orthodoxy alien to the Confession of Faith and Catechisms"; and, probably most significantly, publishing literature and adopting a formal resolution condoning "civil disobedience" in some circumstances.[46] By such actions, the local

[45]*E.g.*, Holiman v. Dovers, 236 Ark. 211, 366 S.W.2d 197, *supp. opinion*, 236 Ark. 460, 366 S.W.2d 203 (1963); Sorrenson v. Logan, 32 Ill. App. 2d 294, 177 N.E.2d 713 (1961); Huber v. Thorn, 189 Kan. 631, 371 P.2d 143 (1962); *cf.* Baber v. Caldwell, 207 Va. 694, 152 S.E.2d 23 (1967).

[46]Presbyterian Church in the United States v. Eastern Heights Presbyterian Church, 224 Ga. 61, 159 S.E.2d 690, 692 (1968). This case is the companion case to and is consolidated with *Hull Church*.

churches charged, the general church had abandoned the basic tenets of Presbyterianism and had forfeited its authority over those local churches that remained true to the original faith.

A commission of the Savannah Presbytery attempted to assert the denomination's right to control the use of the local church properties. To prevent this, the local churches both sought injunctions in the Georgia Superior Court.

The Georgia Supreme Court had previously declared in *Mack v. Kime*[47] that courts could and should take cognizance of church property dispute cases even though the church was one of hierarchical polity, "to protect the members . . . who adhere to the tenets and doctrines which the organization was organized to promulgate" and to prevent diversion of the property to "purposes utterly foreign. . . ."[48] This language is slightly different from that employed in most implied trust cases from other jurisdictions, which generally refer to "fundamental deviations" or "radical departures." It suggested that courts could not intrude except in cases involving the most basic kind of change: a complete abandonment of the former doctrines and practices. However, later cases[49] had indicated that the Georgia standard was not really much different from that of other states. In the present case, the trial court specifically ruled that the deviation need not be to purposes "utterly foreign." A "complete abandonment" is not necessary in order to warrant judicial relief: a "substantial abandonment" is enough. The trial court instructed the jury accordingly, and the jury found that a "substantial abandonment" had occurred. The injunction was granted.

The general church then appealed to the Georgia Supreme Court, claiming that civil courts have no jurisdiction to determine such questions as were raised by the petitions of the local churches. Furthermore, it claimed, even if the courts had some power to act in ecclesiastical disputes, that power could be exercised, according to *Mack v. Kime,* only in cases of "complete abandonment" of the faith, doctrines and usages of the church. These contentions were rejected by the Georgia Supreme Court, which upheld the trial court's decree and expressly overruled so much of *Mack v. Kime* as would require a showing of more than "substantial abandonment" to support such an order.[50]

The general church then moved for a rehearing, raising clearly for

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[47]129 Ga. 1, 58 S.E. 184 (1907).
[48]58 S.E. at 185.
[49]*See, e.g.,* Chatfield v. Dennington, 206 Ga. 762, 58 S.E.2d 842 (1950).
[50]159 S.E.2d at 696.

the first time the argument that the actions of the Georgia courts were an unconstitutional interference with free exercise of religion and also violated the no-establishment principle. The rehearing was denied,[51] whereupon the general church sought review of these constitutional questions in the U.S. Supreme Court. Certiorari was granted.[52]

The Supreme Court reversed. The first amendment forbids civil courts from deciding church property dispute cases on any basis that requires the court to weigh and interpret church doctrine, as the Georgia "substantial abandonment" tests does.

The opinion, written by Justice Brennan, starts with reference to *Watson v. Jones* quoting the famous passage set out above.[53] "The logic of this language," the Court noted, "leaves the civil courts *no* role in determining ecclesiastical questions. . . ."[54] That does not mean, the Court acknowledged, that the decisions of an ecclesiastical body are totally immune from civil court review. *Gonzalez v. Roman Catholic Archbishop of Manila*[55] had recognized that the actions of ecclesiastical tribunals could be reviewed in civil courts for "fraud, collusion or arbitrariness." But except for such "marginal review," the decisions of the "proper church tribunals" on "ecclesiastical matters," must be accepted as conclusive by the civil courts. The Court then noted that "the principle of *Watson* as qualified by *Gonzalez*" had been "converted . . . into a constitutional rule" by the *Kedroff* and *Kreshik cases*.[56] Civil courts do not violate this rule when church property dispute cases are decided by applying "neutral principles of law, developed for use in all property disputes." But, the Court said, "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."[57] When courts undertake to do that, "the hazards are ever present of inhibiting the free development of religious doctrine. . . ."[58] The rulings of the Georgia courts were found to be in clear violation of the first amendment and were therefore reversed. Notice was given to Georgia and to all other "States, religious organizations and individuals" that they "must structure relationships

[51] *Id.* at 701.
[52] 392 U.S. 903 (1968).
[53] Text accompanying note 18 *supra*.
[54] 393 U.S. at 447.
[55] 280 U.S. 1 (1929).
[56] 393 U.S. at 447.
[57] *Id.* at 449.
[58] *Id.*

involving church property so as not to require civil courts to resolve ecclesiastical questions."[59]

The decision of the court in the *Hull Church* case does not seem to turn on Georgia's apparent relaxation of the "complete abandonment" or "fundamental deviation" principle. Nor does the fact that the Georgia court submitted the issue of "substantial abandonment" to a lay jury receive any particular emphasis in the opinion. The *Hull Church* case seems to find two closely related but identifiable elements of unconstitutionality in the Georgia approach. The first is the underlying policy premise: that promoting or protecting the stability of religious doctrine is a legitimate objective for state action. The second is the fact that the Georgia rule called for the employment of an agency of the state for an essentially religious purpose. The implication of the case is that the Georgia rulings would have been just as unconstitutional if the supposedly more rigorous "fundamental deviation" standard had been employed, or if the state having adopted that substantive standard, had delegated the functions of fact-finding and application of the standard to the facts to some tribunal other than a jury—even an ecclesiastical tribunal.[60]

The *Hull Church* case, like *Kedroff* and *Kreshik,* asserted broadly that "the *Watson* principle" now has constitutional status. It must be remembered, however, that the *Watson* case actually announced three different principles: one for hierarchical churches, one for congregational churches and one for express trusts. The principle actually involved in the holdings in all three cases—*Watson, Kedroff* and *Hull Church*—was the hierarchical branch of the *Watson* doctrine. Whether the Court in *Hull Church* intended also to endorse the congregational and express trust branches is not clear.[61]

Insofar as the express trust branch of the *Watson* doctrine is concerned, it probably must be regarded at least as limited by the rationale and dicta expressed in *Hull.* In an express trust case, of course, the inhibition upon the free development of religious doctrine is created by private decision-making not by state law-making. However, state intervention may be required if the inhibition is to be enforced. This may involve the state in an unconstitutional activity: the employment of civil courts to weigh and interpret religious doctrines. Twice in the course of the opinion Justice Brennan used the phrase "*no* role" (italics his) to describe the scope of a civil court's power to decide questions of religious doctrine in property dispute cases. It

[59] *Id.*
[60] *Id.* at 451.
[61] EPILOGUE *infra.*

would seem that a court would be cast in that forbidden role just as surely in a case where property had been expressly deeded in trust for the promotion of stated doctrines as it would in implied trust cases, like *Hull Church*. And it may be noted that Justice Brennan included "individuals" along with "States and religious organizations" in the group to whom he addressed his cryptic warning to "structure relationships involving church property so as not to require civil courts to decide ecclesiastical questions." This would suggest that settlors can no longer expect courts to enforce their directives limiting the uses to which donated property can be put if the limitation relates to religious doctrines or practices.

Justice Harlan, concurring separately, addressed himself specifically to the matter of express trusts. He declared that the fourteenth amendment does not forbid civil courts from "enforcing a deed or will which expressly and clearly lays down conditions limiting a religious organization's use of the property which is granted."[62] If Justice Harlan is right, it must mean that the "first amendment values" that are "jeopardized" when courts decide religious controversies are outweighed by the values represented by the property interests created by the express trust. It should be noted, however, that Justice Harlan seemed concerned only with protection of the rights of the donor of the property, and his right to get "his money back if the condition is not fulfilled."[63] Perhaps even he would consider the jeopardy to first amendment rights too serious to warrant judicial review of doctrinal disputes where the express trust is phrased in broad terms or where the interest of the party seeking to enforce it is not so immediate as that of the donor himself. All in all, it seems unlikely that the Court, including Justice Harlan, will permit courts to engage in the practice seemingly permitted by the *Watson* dictum; *i.e.*, reviewing deviations from religious doctrine in order to enforce express trusts or conditions at the suit of individuals whose only connection to the donor or settlor is their adherence to the doctrinal position he intended to foster. In this respect, the *Hull Church* case seems to limit the "express trust" branch of the *Watson* doctrine, as it has generally been understood, if it has not abandoned it altogether.

And what about the congregational branch of the *Watson* doctrine? Does that survive, and if so, does the "implied trust—fundamental deviation" notion that most state courts have read into it survive as well? To the extent that the "fundamental deviation" qualification allowed

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[62] *Id.* at 452.
[63] *Id.*

courts to weigh and interpret religious doctrine, it surely must be regarded as of no further validity. But, as was noted earlier, the most significant function of that qualification was to permit courts to award the church properties to a minority faction when the majority of a denominational congregational church sought to change or abandon the denominational connection. Whether courts still may be able to review denominational changes is a question that cannot be answered until some of the uncertainties left by *Hull Church* are clarified in later cases. Factors other than mere departures from doctrine may be involved in such cases which the courts have not yet articulated. So long as the "fundamental deviation" qualification was considered proper, courts could review denominational changes on the same basis as doctrinal departures, and so they did not have to consider whether a change of denomination was significantly different from any other radical change. However, the fact that courts have been so willing to turn the church properties over to minority factions in such cases—in the face of the *Watson* dictum— and so reluctant to do so in other cases, certainly suggests that denominational abandonment may have some special importance. There are obviously some more concrete interests involved in such cases than in pure departure from doctrine cases. For one thing the representation of denominational affiliation is normally explicit and unmistakable—usually in the church name itself, whereas particular doctrines and usages may be visible only in the acts or activities of the church, or in technical statements, such as creeds, resolutions, constitutions, or charters, which may well be susceptible to some latitude of interpretation. If protection of reliance interests of individuals is the real reason for the implied trust fiction, then a denominational change may be of special importance. It would be far easier for a minority faction to convince a court that they relied on the representation of denominational affiliation than upon the continuation of any specific doctrines or practices. Of course, the majority faction could claim to have justifiably relied on the principle of majority rule, thus offsetting the minority's claim. However, the denominational organization and other member churches may have interests that deserve consideration. Is the principle of majority rule more important than the denominational affiliation in such cases? If so, why? How can a court answer that question without "weighing and interpreting religious doctrine?" Is that an "ecclesiastical question" which courts, Justice Brennan said, must avoid? Or a legal question which they must decide?

Generally the word "ecclesiastical" refers not just to religious mat-

ters, but more specifically to matters relating to religious institutions or organizations. Clearly the Court did not mean to preclude the consideration of all questions relating to the organization of churches. Questions relating to polity, at least insofar as they are determinative of the power to control use of church property, often may have to be decided, as we have seen. And in the case of a denominational congregational church, a court may have to decide whether majority rule is the critical institutional principle, or whether denominational affiliation may be of primary importance. The determination must be made, however, by resort to some objective "neutral principles," not by reference to matters of faith or doctrine. The *Hull Church* case offers little guidance as to what sort of criteria might be used for this purpose.[64]

If all churches will follow Justice Brennan's direction to "structure relationships" so as not to require courts to engage in weighing religious doctrine, and draw up formal documents clearly defining the criteria to be used in settling property disputes, then courts could resolve such controversies as come before them by the familiar process of interpreting the language of documents in the light of the meaning reasonable men might attach to it. But if the members of a given religious group cannot or will not, or in any event do not agree to any such statement, the difficult questions will remain. How can a court determine the appropriate polity or identify the authoritative control group in cases where those very questions are the matters in dispute unless it engages in weighing and interpreting the underlying religious doctrines? The law ought not to impose upon a religious body a form of polity that is contrary to the beliefs of that body, or to recognize as the authoritative principle for property control purposes a different one than that which would be regarded as authoritative under the religious principles or usages of the body. And yet, the law cannot look to conformity to religious principles or usages as the basis for decision. To resolve the dilemma, the Court must spell out with greater precision just what legal objectives are permissible under the Constitution. Promoting stability of religious doctrine is not permissible, *Hull Church* seems to say. What, then, is?

Two possibilities suggest themselves. The law might be concerned with the reliance interests of individuals. The *Gonzalez* exception seems to point in that direction. The ideas of "fraud, collusion and arbitrariness" presuppose that some action has been taken that is unfair to someone. The law has not, however, generally recognized that

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[64]EPILOGUE *infra*.

individuals have any separate interests in church properties, apart from express provisions. A defrauded person may have a right to get his money back, but it is hard to see how he, singly or by combining with others, could legitimately lay claim to all the church property. If protection of property rights is the basis for judicial interference, there is no readily apparent justification for committing all of the properties to the control of one set of individuals who relied on some things, and denying all to another group who may have relied on something else.

Another, and more likely, possibility would be to consider the law as primarily concerned with protecting the stability of the institution, regardless of what alterations of doctrines or usages may be involved. This seems to have been the unarticulated principle upon which the *Kedroff* and *Kreshik* cases were decided. The Moscow patriarchate was favored with the property in spite of what may have been significant changes in its composition and practices. It bore a closer institutional relation to the patriarchate, as it existed before the schism and was the last body that both factions recognized as authoritative, and to which both claimed to be the successor. The law recognizes religious institutions as entities for many purposes. Institutionalized religion is apparently protected by the Constitution as well as individual religious freedoms. Under an approach which sought to protect institutional stability, a court in determining which faction is the institution entitled to the property could consider such practical objective indicia of institutional continuity as documents, history, identity of officers, and conformity to established rules. To evaluate the evidence, the court would probably have to adopt the standard of a hypothetical person. Perhaps the understanding of an "ordinary lay member" would be sufficiently neutral to provide the means of identifying the proper faction. What would such an ordinary lay member be justified in believing about the character of the institution in the light of the facts he might reasonably be expected to know? This approach has a "congregational" bias. That is, it looks to the local church as the basic religious institution. However, it is not likely that resort to the understanding of the ordinary lay member would be necessary in cases where the local church was clearly a member of a hierarchical denomination. Most such denominations could be expected to have formally "structured" their relationships, as Justice Brennan urged. The standard of the ordinary lay member might be a satisfactory neutral basis for deciding such questions as whether a local church should be regarded as one of hierarchical or of congregational polity, or whether in a given case the principle of majority rule or denominational affiliation is the

dominant institutional characteristic. It would not seem an appropriate standard for use in cases involving schisms at the higher levels of hierarchical churches, but there the likelihood is great that organic documents would be available to assist the court in tracing the most direct line of institutional continuity.

In any event, this approach would direct a court's attention away from forbidden questions of doctrinal stability to issues that do seem to be legitimate subjects of judicial concern: namely, stability of the institution, and, to some extent, protection of reliance. It does pose some hazard of inhibiting free exercise of religion, but so long as the Court is committed to the view that one of the contending factions must be favored to the exclusion of the other in the matter of property control, some hazard is inevitable. Emphasis on institutional stability and continuity at least minimizes the risk.

It is to be hoped that the Court will, at the first opportunity, accept and decide a case in which it can shed some further light on the problems posed by church property disputes. The *Hull Church* case made it reasonably clear that courts can no longer weigh and interpret religious doctrine in deciding such cases, but we need more guidance before we can safely say what courts can do.

EPILOGUE

We know now that the Court did have such an opportunity as that alluded to in the last paragraph. It failed to take advantage of it although Justice Brennan, with the concurrence of Justice Douglas and Marshall, did feel it appropriate to offer some directive comments. Certiorari was denied without comment to the Georgia court's second decision in *Hull Church*.[65] The appeal in *Maryland and Virginia Eldership v. Church of God at Sharpsburg* was dismissed per curiam for want of a substantial federal question.[66] In this epilogue it will be possible only to sketch briefly what was involved in these rulings and to make a preliminary assessment of their meaning.

When the Georgia supreme court reconsidered the *Hull Church* case on remand,[67] it concluded that it could not recognize any implied trust in religious properties without the "substantial deviation" doctrine as protection for the local churches. Accordingly, it held that the sole inquiry in a church property dispute case was the question of

[65]Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 38 U.S.L.W. 3267 (U.S. Jan. 19, 1970) (mem.).

[66]90 S. Ct. 499 (1970) (per curiam).

[67]225 Ga. 259, 167 S.E.2d 658 (1969).

legal title. Finding the title to be in the name of the local churches, the Georgia supreme court again affirmed the trial court's ruling in their favor.

The general church again sought review in the United States Supreme Court by certiorari; that Court, on January 19, 1970, denied certiorari.[68] The significance of this ruling is almost impossible to gauge, since the Court has often insisted that no approval of a state court's ruling can be read into a denial of certiorari. However, the concurring comments of Justice Brennan in the *Maryland and Virginia Eldership* case,[69] discussed below, suggest that the Court in fact is satisfied with an approach to these property dispute cases that resolves the issue solely on the basis of location of the legal title. In fact, Brennan's comments, though appended to the Maryland case, probably must be understood as comments on both that case and the second *Hull Church* case.

The *Maryland and Virginia Eldership* case arose from an attempt by the Eldership (a regional association of churches occupying a position in the denominational structure of the General Churches of God in North America comparable to the position of the Savannah Presbytery in the *Hull Church* controversy) to assert control over the properties of two local churches, a majority of whose memberships had voted to withdraw from the denomination. The reason for the decision of the local churches to withdraw from affiliation concerned the designation of pastors to serve the churches. The report of the case does not indicate any doctrinal dispute, except to the extent that the local churches' refusal to accept the pastor assigned and retention of pastors whose ordination had been revoked by the Eldership could be said to indicate a doctrinal difference.

The Maryland courts held for the local churches, relying primarily on a Maryland statute which vested control of church properties for *all* churches, regardless of whether they would be regarded as "congregational" or "hierarchical," in trustees elected by voting members of the local congregations, except in the case of certain churches for which special statutory provisions were made. Finding no provision in the deeds, the charters of the churches, or the constitution of the Eldership which would indicate a contrary result, the Maryland supreme court held that the statute governed the case.

The Eldership appealed to the United States Supreme Court, charging that the statute upon which the Maryland decision rested was un-

[68]Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 38 U.S.L.W. 3267 (U.S. Jan. 19, 1970) (mem.).

[69]90 S. Ct. at 500.

constitutional as an establishment of religion and a violation of free exercise. Although Maryland had not attempted to interpret or weigh religious doctrine in reaching its conclusion, the Supreme Court remanded the case for further consideration in the light of *Hull*. The Maryland court, on remand, repeated its ruling, finding nothing in the *Hull Church* case that would indicate a contrary result. Appeal from the second Maryland ruling was dismissed for want of a substantial federal question.

The Court noted, per curiam, that the appellants' case essentially argued that the statute, which had been upheld by Maryland, violated the first amendment. The basis for the argument was that the statute "established" congregational principles of polity and also interfered with "free exercise" in the way the New York statute had done in *Kedroff*. Seemingly ignoring that argument, the Court said, "Since, however, the Maryland Court's resolution of the dispute involved no inquiry into religious doctrine, appellees' motion is . . . granted . . . ."[70]

It is hard to tell just what the Court meant. The words seem to say that appellant's contention that the statute "establishes" congregational polity principles is irrelevant. That is to say the only constitutional issue which may be raised in church property dispute cases is the question of whether the process of adjudication involves an inquiry into religious doctrine.

It appears that the Court was testing the Maryland appeal by standards that were wholly inappropriate. True, *Hull* said, "First Amendment values are jeopardized when church property litigation is made to turn on the resolution by civil courts of religious controversies."[71] But *Hull* clearly did *not* say that first amendment values may not also be jeopardized in other situations. There was never any suggestion that the Maryland court had engaged in doctrinal inquiry. The vice sought to be reviewed was something entirely different, namely, whether a statute purporting to impose the features of congregational polity on all churches—congregational or hierarchical—was valid in the light of *Kedroff, Watson* and the cases construing the no-establishment clause. The question raised by the appellant was an important point, and one which the Court will someday have to decide. Perhaps the Court felt that the Maryland case was not a good one for treating that question, since the Eldership's case was very weak on the facts. Perhaps the statute could be constitutional as applied in the Maryland case but unconstitutional as applied in other cases. Since it is not clear why

[70] *Id.*
[71] 393 U.S. 440, 449 (1969).

the Court remanded the Maryland case in the first place, no doctrinal issues having been involved, the Court should have said something in its per curiam opinion to indicate that it had considered the point of the case rather than just the absence of any factors that would have made *Hull* relevant. In the absence of some such clarifying statement, it would probably have been better if the Court had said nothing.

Three justices, as has been noted, felt something more should have been said. In his concurring opinion in the Maryland case, Justice Brennan tries to amplify the *Hull Church* decision so as to supply state courts with some kind of guidance as to permissive grounds for decision. In that opinion we see the first recognition in any Supreme Court opinion of the ambiguity in the statement that "*Watson* is now a constitutional rule." Justice Brennan candidly declares that the *Watson* approach resting on the classification of the religious body into congregational or hierarchial, is *not* the only constitutionally permissible approach: he mentions as equally valid the "formal title" approach (the one Georgia employed in the second *Hull Church* case) and an approach involving passage of special statutes, as Maryland had done. If his remarks can be taken to indicate the Court's position, then the meaning of the phrase "the *Watson* principle is now a constitutional rule" becomes clear. It refers only to the philosophical principle underlying the *Watson* decision: the principle that civil courts should not undertake to decide religious questions. It does not mean that the *Watson* analysis, involving the classification of cases into the categories appropriate to congregational and hierarchial churches, and express trusts, has any special constitutional sanction.

In fact, in his comments concerning the three *Watson* rules, Justice Brennan narrows their scope to such a degree that the cases in which they could provide a valid basis for decision are, for the most part, cases that are not likely to reach the stage of litigation. The cases that reach the courts are those involving a serious dispute over the identity of the faction or body in whom power to control the property is lodged. Justice Brennan's comment apparently excludes the use of the *Watson* approach in such cases, for to classify a church as congregation or hierarchial inevitably involves an inquiry into religious law, usage, doctrine or polity. Unless the relevant governing body can be identified by "neutral principles," (*e.g.*, the "formal title" or "statute" approaches mentioned by Justice Brennan) the *Watson* approach is impermissible. But once the relevant governing body *is* identified, there is no need to resort to the *Watson* standard, for identification of that group is the very purpose of the "congregational" and "hierarchial" classification *Watson* requires.

Only the "express trust" branch of *Watson* would seem to retain any effective vitality, and Justcie Brennan declared that even that, as was suggested in the text of the foregoing article, has no application where the trust is expressed in terms of religious doctrine or usage. The "express trust" notion, then, would seem to have application only in situations where the trust provision would also be enforceable under general principles of property law under the "formal title" doctrine. In overall effect, then, Justice Brennan's comments seem to overrule the *Watson* standards as effective solutions to actual controversies.

One more problem is suggested by the Brennan comments. Although endorsing an approach based on the passage of statutes, like the Maryland statute, he cautions that "such statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine to church governing bodies."[72] *Kedroff v. St. Nicholas Cathedral*[73] is cited as authority for the statement and *Goodson v. Northside Bible Church*[74] is cited as an example. In both the cited cases the statute was declared unconstitutional, so presumably they are referred to as instances where the statute was *not* so carefully drawn. The reasons for distinguishing between those statutes and the Maryland statute are far from obvious. This is yet another matter that will have to be resolved someday.

It seems improbable that a statute vesting property control in a particular faction could be upheld when it clearly conflicts with property control principles which the group itself recognizes on religious grounds. Probably Justice Brennan's comment means that state statutes can be looked to as presumptions, to provide a solution in cases where objective evidence relating to the source of the control is wanting.

The fact that only three of the Justices subscribed to the Brennan comments raises the question of whether the views expressed by Justice Brennan actually do reflect the position of the Court. If they do, why were they not expressed in the *Hull Church* opinion? And why did only two of his colleagues endorse his remarks in the *Maryland* case? These questions confound the meaning of the present rulings.

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[72] 90 S. Ct. at 501.
[73] 344 U.S. 94 (1952).
[74] 261 F. Supp. 99 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967).