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Role of Courts in Church Property Disputes, The

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to prevent death or serious physical injury. A physician may use force to administer treatment he reasonably believes to be in the subject's best interests if the patient consents or one legally competent to consent on his behalf does so. In emergency cases the physician must reasonably believe that no one competent to consent is available, and that such person would consent if available. Finally, the use of force is permitted if necessary to prevent another person from committing suicide or seriously injuring himself. This provision has no counterpart in current law.[69]

JAMES R. BICKEL

THE ROLE OF COURTS IN CHURCH PROPERTY DISPUTES

I. INTRODUCTION

Questions concerning the scope of the religion clauses of the first amendment[1] arise most frequently in the context of legislative infringement. Yet, the courts also have violated the free exercise and establishment clauses by resolving doctrinal questions in controversies over the use of church property. The Supreme Court first recognized such infringement in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[2] wherein the Court restricted the civil judiciary's role in church property disputes by holding that they must be resolved without determining ecclesiastical questions.

Religious societies, though perhaps more insulated from change than other organizations, are certainly not immune from it. A shift in theological doctrine can provoke schisms within a church body. Sometimes doctrinal disputes arise because of internal disagreement over socio-political values.[3] Whatever the cause, the schism often results in vigorous battles for the control of church property, be it country meeting house or cathedral.

This comment deals with the role of the courts in resolving church property disputes. It will examine the approach of the Missouri courts to these controversies[4] and the effect of the *Presbyterian Church Case* on that approach. It will then explore recent cases interpreting the *Presbyterian Church Case*.

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69. PROP. NEW MO. CRIM. CODE § 8.110, Comment (1973).

1. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The first amendment free exercise and establishment clauses are applicable to the states through the fourteenth amendment. Everson v. Board of Education, 330 U.S. 1 (1946); Cantwell v. Connecticut, 310 U.S. 296 (1940).

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

3. *See generally* ZOLLMANN, AMERICAN CHURCH LAW 250-51 (1933).

4. For other discussions of church property disputes in Missouri see Losos, *Courts and the Churches in Missouri: A Survey of Missouri Law on Intra-Church Disputes With Reference to the Political Theory of the Pluralists*, 1956 WASH. U.L.Q. 67; 3 St. L.U.L.J. 310 (1955).

II. Church Polity

A basic understanding of church polity is necessary in evaluating the complex issues that arise in church property litigation. Polity is the church's governmental structure and organs of authority as determined by its organic law.[5] There are two basic types of polity, congregational and hierarchical.[6] The principle of local autonomy controls in a congregational church; the local church is governed by majority vote of the members of the congregation. In contrast to this is hierarchical polity, a system whereby each local church is subject to the control of a higher ecclesiastical authority. There are two subcategories of hierarchical polity, episcopal polity and synodical or connectional polity. With episcopal polity power resides in clerical officers such as bishops or patriarchs. Power in the synodical or connectional polity is vested in lay persons and ministers through an ascending hierarchy of representational bodies. The government of the Presbyterian church exemplifies the latter with its session, presbytery, synod, and general assembly, the supreme judicatory.[7]

The courts have correctly recognized that a congregational church may be affiliated with other churches and still maintain its congregational polity.[8] Church polity is not always easy to classify, however, because an organization may contain elements of both hierarchical and congregational polities.[9] For example, a Missouri court determined the Lutheran Church to be congregational,[10] but a California court held it to be hierarchical.[11]

III. The Implied Trust and Departure-From-Doctrine Standard

A. *Historical Background*

The implied trust rule with its correlative departure-from-doctrine standard has been applied to both congregational and hierarchical churches. The theory of implied trust means, for a congregational church, that a donation for religious purposes is impressed with a trust in favor of the doctrine in effect at the time the contribution is made. Thus, in the event of a schism within the church the property goes to those faithful to the original doctrine.[12] The theory regarding a hierarchical church is that there is an implied trust of local church property in favor of the general church as long as the general church adheres to doctrine in effect when the

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5. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 Sup. Ct. Rev. 347, 353-54.

6. *Id.* at 354. One of the first Missouri cases to recognize this distinction was McRoberts v. Moudy, 19 Mo. App. 26 (K.C. Ct. App. 1885).

7. Presbyterian Church Case, 393 U.S. 440, 442 (1969); *See* Kauper, *supra* note 5; Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 Harv. L. Rev. 1142, 1143-44 (1962).

8. *See* Mills v. Yount, 393 S.W.2d 96 (Spr. Mo. App. 1965); Montgomery v. Snyder, 320 S.W.2d 283 (Spr. Mo. App. 1958).

9. *See* Kauper, *supra* note 5, at 370-72; pt. V, § B of this comment.

10. Mertz v. Schaeffer, 271 S.W.2d 238 (St. L. Mo. App. 1954).

11. First English Evangelical Lutheran Church v. Dysinger, 120 Cal. App. 139, 6 P.2d 552 (1932).

12. McRoberts v. Moudy, 19 Mo. App. 26, 32-34 (K.C. Ct. App. 1885).

local church first affiliated. This rule originated in England[13] and was formerly widely accepted by American courts, most frequently in disputes involving congregational churches.[14]

In the 1872 decision of *Watson v. Jones*,[15] the Supreme Court rejected the departure-from-doctrine element of the implied trust theory.[16] *Jones* involved a schism in the Walnut Street Presbyterian Church of Louisville, Kentucky, engendered by an antislavery declaration of the highest tribunal of the Presbyterian Church. This tribunal, the general assembly, determined that the local group loyal to its antislavery declaration represented the true members of the Louisville church. Subsequently, a state court decided against the loyal group in a suit over title to the church property.[17] The loyalists then sought injunctive relief in federal court based on diversity of citizenship.

The *Jones* Court listed three classes of church property controversies that come before the courts: (1) Those in which property is held subject to an express trust in favor of a specific religious doctrine or belief; (2) those in which property that is not subject to an express trust is held by a congregation that is entirely independent and owes no obligation to a higher authority; and (3) those cases where property that is free of any express trust is held by a local congregation which is subject to the control of a higher authority.[18] The opinion stated that "it seems hardly to admit of rational doubt"[19] that an express trust dedicated to a specific religious belief would be upheld. Indeed, the court said the trust must remain inviolate and that courts must even inquire into doctrine to the extent necessary to insure that the original purpose of the trust is not perverted.[20] *Jones* stated that in the second class of cases dealing with property held by congregational churches, the property was held, if not subject to an express trust,[21] subject to those well-known principles that govern other voluntary associations. The disposition was not to be determined on the basis of whether a group could be found that adhered to the original doctrine,

13. Craigdallie v. Aikman, 1 Dow. 1, 3 Eng. Rep. 601 (H.L. 1813) (Scot.); Attorney Gen. *ex rel.* Mander v. Pearson, 3 Mer. 353, 36 Eng. Rep. 135 (Ch. 1817), *discussed in* Note, *supra* note 7, at 1145-49.

14. Annot., 15 A.L.R.3d 297 (1967); *see generally* ZOLLMANN, *supra* note 3, at 233-61; Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419 (1964); Duesenberg, *Jurisdiction of Civil Courts over Religious Issues*, 20 OHIO ST. L.J. 508 (1959); Note, *supra* note 7; Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113 (1965).

15. 80 U.S. (13 Wall.) 679 (1872).

16. *Id.* at 725. This case was decided under principles of federal common law, although it was later held to be expressive of constitutional principles as well. 393 U.S. 440, 446-47.

17. Watson v. Avery, 3 Ky. Rep. (Bush) 635 (1868).

18. 80 U.S. (13 Wall.) at 722-23.

19. *Id.* at 723.

20. *Id.* at 723-24. A concurring opinion in a later Supreme Court case says that "only express conditions that may be effected *without consideration of doctrine* are civilly enforceable." Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 369 n.2 (1970) (emphasis added).

21. According to *Jones* all property, whether held by a hierarchical church or a congregational one, which is subject to an express trust must be dealt with strictly under the terms of the trust. 80 U.S. (13 Wall.) 723.

but instead the decision of the majority of the congregation would be binding on the court.

In the third class of cases, *Jones* held that the decision of the highest church tribunal as to the disposition of property not subject to an express trust should be binding on the courts. The Court reasoned that this would uphold the integrity of religious associations; further, judges could avoid deciding doctrinal disputes, an area in which they are presumably not as competent as ecclesiastical authorities.[22]

The *Jones* Court determined that the property was within this third category since the Presbyterian Church had a hierarchical polity and the property involved was not subject to an express trust. Accordingly, the court found for the loyal group as designated by the general assembly. Although much of the majority opinion was dictum, its logic has had a continuing influence on the courts.[23]

Gonzalez v. Archbishop,[24] a 1929 Supreme Court decision, basically reaffirmed *Jones*, but indicated that the courts would not acquiesce in a clear abuse of ecclesiastical authority. *Gonzales* asserted the right to a chaplaincy in the Roman Catholic Church under a provision in a will. The Archbishop of Manila refused to appoint him because he did not satisfy Canon Law qualifications. The Supreme Court affirmed a decision dismissing the complaint, stating that the decision of a church tribunal on purely ecclesiastical matters is binding on the civil judiciary, but only "[i]n the absence of fraud, collusion, or arbitrariness."[25]

B. *The Presbyterian Church Case*

In the *Presbyterian Church Case*[26] two congregations in Savannah, Georgia, voted to withdraw from the Presbyterian Church in the United States, an organization the Supreme Court characterized as a "hierarchical general church organization."[27] The local churches claimed that the gen-

22. *Id.* at 726-35. Regarding churches with a hierarchical polity the Court stated:

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. . . . It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Id. at 729. Elsewhere, the Court said:

> Here is no case of property devoted forever by . . . any specific declaration of its owner, to the support of special religious dogmas . . . and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property.

Id. at 726.

23. *See* pt. IV, § B of this comment.

24. 280 U.S. 1 (1929).

25. *Id.* at 16.

26. For commentary on the *Presbyterian Church Case* see Casad, *Church Property Litigation: A Comment on the Hull Church Case*, 27 WASH. & LEE L. REV. 44 (1970); Kauper, *supra* note 5: Comment, *Constitutional Law—Church Property Disputes—First Amendment Prohibits Judicial Examination of Ecclesiastical Matters*, 54 IA. L. REV. 899 (1969).

27. 393 U.S. at 441.

eral church had departed, in several respects, from the doctrine held at the time they had affiliated. The alleged departures included appointment of women as both ministers and ruling elders, support of the removal of prayer from public schools, pronouncements on the Vietnam War, and dissemination of publications denying the Holy Trinity.[28] An administrative tribunal, appointed by the general church through the Presbytery of Savannah, took over the local church property because a compromise could not be reached. Instead of appealing to higher church tribunals, the local churches sued in the Georgia state courts to enjoin the general church from trespassing on the disputed property. The general church filed a motion to dismiss and cross-claimed for an injunction, contending the civil courts were without power to adjudicate whether the general church had departed from original tenets of faith and practice.

The trial court denied the motion to dismiss. The case was submitted to a jury on the theory that Georgia law implies a trust in favor of the church on the condition that it adhere to the doctrine in existence at the time the local churches affiliated. The jury was instructed to find for the local churches if the general church had substantially abandoned its original doctrine. The jury found for the local churches. The Georgia Supreme Court affirmed[29] and the Supreme Court granted certiorari.

The Court held that *Kedroff v. St. Nicholas Cathedral*[30] had the effect of converting "the principle of *Jones* as qualified by *Gonzalez* into a constitutional rule."[31] The *Presbyterian Church Case* stressed that analysis and determination of doctrinal issues by civil courts plainly jeopardized first amendment values. The Court expressed concern that such adjudications inhibit the free development of religion and constitute an invasion by secular interests into religious matters."[32] The Court emphasized that the departure-from-doctrine standard "can play *no* rule in any future judicial proceeding."[33]

The Court was vague as to the scope of review after the *Presbyterian Church Case,* although it made two major points. First, the opinion stated that courts do not violate the free exercise of religion clause by merely hearing church property disputes. In conjunction with this the Court referred to "neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."[34] Second, the Court reaffirmed *Gonzalez* and approved

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28. *Id.* at 442 n. 1.
29. 224 Ga. 61, 159 S.E.2d 690 (1968).
30. 344 U.S. 94 (1952). *Kedroff* held that a statute transferring control of a cathedral from its original Moscow-based hierarchy to the Russian Orthodox Church in America violated the free exercise of religion clause.
31. 393 U.S. at 447. *Kedroff* was later extended by Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (per curiam) to cover judicial action as well. *Kreshik* reversed, on first amendment grounds, a decision of the New York courts that purported to transfer the same cathedral involved in *Kedroff* to the independant American church.
32. 393 U.S. at 449.
33. *Id.* at 450.
34. *Id.* at 449.

the review of ecclesiastical decisions to determine if they were free from fraud, collusion, or arbitrariness.[35]

On remand the general church lost the property anyway. The Georgia Supreme Court held that because the departure-from-doctrine theory was invalid, the implied trust theory in favor of the general church was also. The local churches were deemed the owners of the property because legal title was in their name.[36]

IV. Church Property Disputes in Missouri

A. *In General*

A frequently stated rule in Missouri decisions is that courts have no jurisdiction over matters involving religious beliefs.[37] An exception to this rule has been recognized when the litigation involves property rights.[38] Because the rules involving property and nonproperty disputes have sometimes overlapped, a brief explanation of the treatment of nonproperty disputes involving religious organizations is appropriate.

In general, a court will not exercise jurisdiction to hear the appeal of a deposed minister or excommunicated church member, but will require the aggrieved party to look to church judicatories for relief.[39] Such a judicatory might be the highest church tribunal or, if the church is congregational, its judicatory could be the majority of the congregation. Dismissal of a cause of action for libel where the defendants claimed to be acting in an official ecclesiastical capacity,[40] and dismissal of a case in which the plaintiff sought a mandatory injunction to compel a Jewish court of justice to render a decision,[41] have both been held to be beyond the scope of judicial review. One rationale for this policy of judicial abstention is that when a person joins a religious organization he does so on condition that he will submit to its ecclesiastical jurisdiction.[42] Missouri courts have qualified this rule of judicial laissez-faire in that that they require that a properly constituted tribunal rendered the decision in accordance with the practice, rules, and customs of the church.[43]

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35. *Id.* at 451. The Court said that reviewing for fraud or arbitrariness would not inject the civil courts into "substantial ecclesiastical matters." *Id.* The Court ultimately rejected the departure-from-doctrine standard because it was a creation of state law, as opposed to church law. The Court said that even if a church were to apply the departure-from-doctrine standard itself, this would not be reviewable by a state court. *Id.*

36. 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied,* 396 U.S. 1041 (1970).

37. *See, e.g.,* Watson v. Garvin, 54 Mo. 353, 378 (1873); Stone v. Bogue, 238 Mo. App. 392, 398, 181 S.W.2d 187, 189 (K.C. Ct. App. 1944).

38. Cases cited note 37 *supra.*

39. Boyles v. Roberts, 222 Mo. 613, 644, 121 S.W. 805, 810 (En Banc 1909); Longmeyer v. Payne, 205 S.W.2d 263, 266 (St. L. Mo. App. 1947).

40. Landis v. Campbell, 79 Mo. 433 (1883).

41. Schwartz v. Jacobs, 352 S.W.2d 389 (St. L. Mo. App. 1961).

42. *Id.* at 392.

43. Prickett v. Wells, 117 Mo. 502, 24 S.W. 52 (1893). In Briscoe v. Williams, 192 S.W.2d 643 (St. L. Mo. App. 1946), the court dissolved an injunction restraining defendant from acting as pastor of a Corinthian Missionary Baptist Church because of procedural irregularities in his removal, including the failure of the parties to exhaust the remedies the church provided.

Missouri courts have been willing to intervene when property rights are involved. Many cases apply the now unconstitutional departure-from-doctrine element of the implied trust rule.[44]

The implied trust theory is a legal fiction, premised on the court's duty to uphold the intent of the donor who contributes money or property for a charitable purpose. The court in *McRoberts v. Moudy*[45] stated:

> A charity given for a particular purpose cannot be altered or diverted to any other. It must be accepted and retained upon the same terms upon which it was given, and no concurrence among the donees can operate to transfer or apply it to other purposes.[46]

When church property is acquired as the result of small contributions by many donors the rule is predicated upon a common group intent.[47]

Application of the implied trust theory results in dead-hand control of property based on an assumed intent unless, of course, an express trust is involved. Even if the donor intends that original doctrine be adhered to, a strong argument can be made that he would have preferred that learned theologians decide doctrinal issues instead of the civil judiciary.[48]

Church property is generally held by trustees for the church's use. If the church is incorporated, the corporation has the power to act as trustee and the congregation is the cestui que trust.[49]

The following discussion examines the treatment in Missouri of property disputes involving hierarchical and congregational churches.

B. *Hierarchical Churches*

Watson v. Jones,[50] explicitly relied on language in the Missouri decision of *State ex rel. Watson v. Farris*[51] to support the proposition that, as to churches with a hierarchical polity, decrees of ecclesiastical tribunals should be binding. *Farris* was a quo warranto action involving a dispute over who could act as trustee of Lindenwood College. The corporate charter provided that vacancies were to be filled by the Presbytery of St. Louis, but a schism had developed and two separate Presbyteries claimed to be the legitimate church. The general assembly of the Presbyterian Church dissolved the defendants's Presbytery after the defendants issued a resolution condemning a declaration of the general church. The court ruled that the

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44. *See, e.g.*, Lewis v. Wolfe, 413 S.W.2d 314 (Spr. Mo. App. 1967); Mertz v. Schaeffer, 271 S.W.2d 238 (St. L. Mo. App. 1954).
45. 19 Mo. App. 26 (K.C. Ct. App. 1885).
46. *Id.* at 32.
47. *See* ZOLLMANN, *supra* note 3, at 228-29.
48. *See* Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1024 (1930).
49. *See* Sandusky v. Sandusky, 261 Mo. 351, 168 S.W. 1150 (1914). When suits regarding the proper disposition of church property are brought under the theory of spoilation of trust assets, as is often the case, the proper remedy is injunctive relief. *See, e.g.* Fulbright v. Higginbotham, 133 Mo. 668, 34 S.W. 875 (1896); Clevenger v. McAfee, 237 Mo. App. 1077, 170 S.W.2d 424 (K.C. Ct. App. 1943).
50. 80 U.S. (13 Wall.) 679, 732 (1871).
51. 45 Mo. 183 (1869).

action of the general assembly in dissolving the Presbytery was conclusive and thus defendants had no power to act as trustees.[52]

Farris recognized the broad powers of ecclesiasticial tribunals and acknowledged compelling policy considerations militating against review of ecclesiastical decisions. The court stated:

> It would involve them [the courts] in difficulties and contentions, and impose upon them duties which are not in harmony with their proper functions. Before a court could give an enlightened judgment it would necessarily have to explore the whole range of the doctrine and discipline of the given church, and survey the vast field of the Divine Word.[53]

Although *Farris* did not involve a property dispute, and although it contained dictum to the effect that the result would have been different if it had,[54] one might have expected the Supreme Court's interpretation of it in *Jones* to have been very persuasive when litigation next appeared in Missouri. As it turned out, a year after *Jones* was decided it was harshly criticized by the Missouri Supreme Court in *Watson v. Garvin*.[55]

The controversy in *Garvin* was an extension of the Presbyterian dispute in *Farris*. This time plaintiffs, a group faithful to the Presbyterian general assembly, sought control of church property in the possession of defendants. In ruling for the defendants the court indicated that it was not necessary to decide whether there was an implied trust in favor of the general church or a departure-from-doctrine. Instead, the decision rests on the premise that the general assembly had violated its own rules of procedure by dissolving the presbytery without a trial.[56]

On rehearing the Missouri Supreme Court expressed unqualified disapproval of the principle that civil courts should abdicate jurisdiction in favor of an ecclesiastical judicatory in matters involving property rights. In addition, the Missouri court criticized the Supreme Court's decision to accept jurisdiction in *Jones* after the Kentucky courts had already determined the matter.[57]

Any remaining doubt whether the Missouri courts would apply the departure-from-doctrine standard was resolved in *Russie v. Brazzell*,[58] decided by a unanimous Missouri Supreme Court in 1895. The case grew out of the United Brethren controversy that was the subject of litigation in many state courts around the turn of the century.[59] A split in the Eaglesville Church of the United Brethren of Christ had developed over an amendment to the church constitution. The object of the amendment, as stated by the general conference of the church, was to provide a definitive

52. *Id.* at 198.
53. *Id.*
54. *Id.*
55. 54 Mo. 353 (1873).
56. *See id.* at 357.
57. *Id.* at 369-85.
58. 128 Mo. 93, 30 S.W. 526 (1895).
59. *See e.g.*, Lamb v. Cain, 129 Ind. 517, 29 N.E. 13 (1891), where the court held that this was an ecclesiastical matter and the court was bound by the adjudication of the church government. *See* ZOLLMANN, *supra* note 3, at 205-09, for a discussion of the history of this controversy.

confession of faith and constitution for the church. According to the old constitution no amendment could be adopted without a two-thirds vote of the entire society.

The defendants, who refused to accept the new constitution, contended: (1) That the amendment was invalid because it required ratification by two-thirds of all members, not merely two-thirds of those voting; and (2) that the revised confession was a departure from the fundamental doctrines of the church and thus constituted misuse of the implied trust under which the property was held. The Missouri court overruled the defendants's first contention of procedural irregularity, holding that ratification merely required two-thirds of those voting. In reference to the alleged departure from doctrine the court stated, "However embarrassing it may be, it becomes our duty to determine the question."[60] The court proceeded to compare the new and old confessions following the example of a Pennsylvania court that had previously considered the issue.[61] The court determined that the church's distinctive principles of both polity and creed had been retained. Because no departure from doctrine was found the property was awarded to the plaintiffs.

The Missouri Supreme Court conducted an extensive inquiry into religious doctrine in *Boyles v. Roberts*,[62] decided the same year the St. Louis Court of Appeals indicated it would defer to the decisions of church authorities.[63] In *Boyles* a schism in the Cumberland Presbyterian Church at Warrensburg had arisen as a result of the merger of the Cumberland Presbyterian Church with the Presbyterian Church in the United States. Plaintiffs sued to enjoin those who repudiated the merger from using the property.

The court summarily rejected the contention that it should defer to the adjudications of ecclesiastical courts. It indicated that to do so would be "a flagrant violation of constitutional mandates,"[64] reasoning that ecclesiastical authorities do not have jurisdiction to determine matters involving title to property.

The court compared the confessions of faith of the two churches in detail and ruled that the merger had effectuated a departure from the original tenets and faith of the Cumberland church. Through the attempted merger the Cumberland church had forsaken its separate identity in order to become part of the Presbyterian Church in the United States. This, the court declared, violated the Cumberland church constitution, which required it to form a union with another religious society only by taking the other under its own jurisdiction.[65] Thus, the court not only determined doctrinal questions, but also imposed an interpretation of the Cumberland church constitution contrary to the ecclesiastical tribunal's interpretation. Two dissents stressed the wholesomeness of church merger and concluded that the court was obstructing the road to church unity."[66]

60. 128 Mo. at 113, 30 S.W. at 532.
61. Schlichter v. Keiter, 156 Pa. 119, 27 A. 45 (1893).
62. 222 Mo. 613, 121 S.W. 805 (En Banc 1909).
63. Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. App. 347, 118 S.W. 1171 (St. L. Ct. App. 1909).
64. 222 Mo. at 647, 121 S.W. at 811.
65. *Id.* at 681, 121 S.W. at 823.
66. *See id.* at 696-786, 121 S.W. at 828-58 (dissenting opinions).

A motion to rehear *Boyles* was overruled, but Chief Judge Valliant cast serious doubt on the validity of the rationale:

> [I]n a case involving title to property, if a question arises as to the meaning of certain clauses in the confession of faith of a particular church, and if the parties litigant are all members of the same church, and *if the highest ecclesiastical court of that church has put on the disputed clauses a certain interpretation, this court would adopt that interpretation as conclusive*; but, if the parties litigant on one side were not members of the church, we would have to take the written confession of faith and interpret it as we would any other written instrument.[67]

Hayes v. Manning,[68] decided only five years later on practically identical facts, confirmed this abrupt change in the court's reasoning. *Hayes* involved the congregation of the Cumberland Presbyterian Church at Marshall. The antimerger group had obtained an injunction from the lower court against the pro-merger members using the property. The supreme court reversed, holding that the decisions of the highest church tribunals on ecclesiastical questions were conclusive. The court reasoned that ecclesiastical authorities were in the best position to interpret their organic law and that church members should be bound by their adjudications. In declaring this doctrine of judicial noninterference, the *Hayes* court specifically relied on the reasoning in *Jones, Farris,* and Judge Valliant's language on rehearing in *Boyles*.[69] Also persuasive was the previous repudiation of *Boyles* by the Federal District Court for Western Missouri.[70]

Although *Boyles* has not been explicitly overruled, *Hayes* clearly spelled the demise of the departure-from-doctrine standard in Missouri, at least as applied to churches with a hierarchical polity. Since *Hayes,* it has been accepted that in property disputes involving hierarchical churches the courts would defer to the judgment of a properly constituted church tribunal on ecclesiastical questions.[71]

Even so, the court must determine what bodies can properly be considered "authoritative church tribunals." One Missouri court indicated that if there is no clear statement in a constitution or by-laws, it would look to custom and practice to discern where governing authority is vested.[72] Thus, when two competing hierarchies asserted control of property this court ruled that the group that met in the authorized manner and place in conformity with church law was entitled to the property.[73]

Incorporation of a religious organization does not change its polity.[74]

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67. *Id.* at 696, 121 S.W. at 828 (emphasis added).

68. 263 Mo. 1, 172 S.W. 897 (En Banc 1914).

69. *See* text accompanying note 67 *supra;* 263 Mo. at 38-42, 172 S.W. at 902-05.

70. Barkley v. Hayes, 208 F. 319 (W.D. Mo. 1913), *aff'd sub. nom.* Shephard v. Barkley, 247 U.S. 1 (1917).

71. Marr v. Galbraith, 238 Mo. App. 497, 184 S.W.2d 190 (K.C. Ct. App. 1944); Stone v. Bogue, 238 Mo. App. 392, 181 S.W.2d 187 (K.C. Ct. App. 1944); Olear v. Haniak, 235 Mo. App. 249, 131 S.W.2d 375 (St. L. Ct. App. 1939).

72. Stone v. Bogue, 238 Mo. App. 392, 181 S.W.2d 187 (K.C. Ct. App. 1944).

73. *Id.*

74. Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. App. 347, 118 S.W. 1171 (St. L. Ct. App. 1909). The laws governing incorporation of religious and charitable associations are contained in §§ 352.010-.240, RSMo 1969.

Also, Missouri courts have indicated that complainants must exhaust their ecclesiastical remedies before a case involving a hierarchical church can be considered.[75]

C. *Congregational Churches*

Even though Missouri courts had ceased using the departure-from-doctrine test in cases involving hierarchical churches, they continued to apply it when congregational churches were involved.[76] Only one case, *Clevenger v. McAfee*,[77] has held that the majority of the membership has the right to determine use of church property.

Clevenger involved a controversy in the New Garden Baptist Church in Ray County precipitated by the election, by plaintiff's faction, of a trustee to replace defendant McAfee. Defendant's faction forcibly entered the church and attempted to appropriate it to themselves. Plaintiffs obtained an injunction against this appropriation on the theory that in a voluntary association not subject to the rule of a higher authority the majority may, in a properly authorized meeting, remove an officer at any time.[78] Although the facts do not disclose if there was an underlying doctrinal dispute, arguably this is irrelevant because the court relied on the Supreme Court's language in *Jones* precluding judicial review of majority actions in a congregational church.[79] However, this principle has been rejected in other decisions because of the fear that a temporary majority could come in and divert the property to the use of another faith.[80]

Missouri's version of the departure-from-doctrine standard imposes a strict test. In *Mertz v. Schaeffer*[81] the court stated:

> [T]he majority must evidence a real and definite departure from the basic faith of the church before the minority can successfully maintain that the majority has departed from its doctrine.[82]

Relying on this language, a subsequent decision held that when a Freewill Baptist Church switched its affiliation from the Union Association to the National Association there was no departure from doctrine.[83] Similarly, in

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See Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1179-80 (1962), for a general discussion of the effect of state incorporation laws on church polity.

75. 137 Mo. App. 347, 118 S.W. 1171; Olear v. Haniak, 235 Mo.App. 249, 131 S.W.2d 375 (St. L. Ct. App. 1939).

76. Clemmons v. Smith, 379 S.W.2d 532 (Mo. 1964); Fulbright v. Higginbotham, 133 Mo. 668, 34 S.W. 875 (1896); Lewis v. Wolfe, 413 S.W.2d 314 (Spr. Mo. App. 1967); Mills v. Yount, 393 S.W.2d 96 (Spr. Mo. App. 1965); Montgomery v. Snyder, 320 S.W.2d 283 (Spr. Mo. App. 1958); Mertz v. Schaeffer, 271 S.W.2d 238 (St. L. Mo. App. 1954); Trett v. Lambeth, 195 S.W.2d 524 (Spr. Mo. App. 1946).

77. 237 Mo. App. 1077, 170 S.W.2d 424 (K.C. Ct. App. 1943).

78. *Id.* at 1085-86, 170 S.W.2d at 428.

79. *Id. See* text accompanying note 21 *supra*.

80. Mills v. Yount, 393 S.W.2d 96 (Spr. Mo. App. 1965). The court stated: "[T]he right to religious freedom is not the right to steal churches." *Id.* at 101.

81. 271 S.W.2d 238 (St. L. Mo. App. 1954).

82. *Id.* at 241. The court compared the Common Confession of the Missouri Synod with Orthodox Lutheran doctrine and concluded that no departure had occurred.

83. Montgomery v. Snyder, 320 S.W.2d 283 (Spr. Mo. App. 1958).

a dispute involving members of a Pentecostal Tabernacle in Springfield who voted to affiliate with the Church of God, the court ruled there was no departure from doctrine even though a change in denomination was effected.[84] Although several congregational church cases involve allegations of a departure from doctrine, not once has a Missouri court found that the majority did in fact depart from doctrine.

D. *Procedural Inquiry*

In general, Missouri courts have not hesitated to inquire into alleged procedural defects. The scope of allowable inquiry becomes particularly important in light of the *Presbyterian Church Case.* In terms of organizational procedure, apart from the departure-from-doctrine standard, the Missouri courts have applied the same rules to churches as they would to other voluntary associations.[85] For instance, it has been determined that a member's right to vote may be lost by voluntary withdrawal.[86]

Courts will insure that there was a meeting properly called and properly conducted at which the congregational action[87] in controversy was taken.[88] An example of the application of this rule is *Trett v. Lambeth,*[89] where plaintiffs sought a mandatory injunction to compel defendants to remove a lock placed on the church door that prevented them from using the church. The leader of defendant faction had called a church meeting without notifying most of the congregation. At the meeting he conducted an election in which only five of the 25 or more present voted to withdraw from the Southern Missionary Baptist Convention. No vote was allowed to see how many persons wished to remain within the convention. Those disagreeing with the vote were expelled without notification, contrary to church procedure. The court held the election was illegal and granted plaintiffs relief.

This case would fall within the *Gonzalez* doctrine of fraud, collusion, or arbitrariness. It is not difficult, however, to imagine a case in which the rules of church procedure are not clear, and thus the court would have to resolve doctrinal issues, which is forbidden under the *Presbyterian Church Case.*[90]

E. *Summary*

Since *Hayes,* application of the departure-from-doctrine standard by Missouri courts had been confined to disputes involving congregational churches. It now violates the first amendment, according to the *Presby-*

84. Lewis v. Wolfe, 413 S.W.2d 314 (Spr. Mo. App. 1967); *contra,* Black v. Tackett, 237 S.W.2d 855 (Ky. App. 1951), holding an attempt to switch from the Pentecostal faith to the Church of God was a departure from doctrine.

85. *See* Fulbright v. Higginbotham, 133 Mo. 668, 34 S.W. 875 (1896); Clevenger v. McAfee, 237 Mo. App. 1077, 170 S.W.2d 424 (K.C. Ct. App. 1943).

86. Lewis v. Wolfe, 413 S.W.2d 314, 318 (Spr. Mo. App. 1967).

87. An example of inquiry into hierarchical procedures is contained in Russie v. Brazzell, 128 Mo. 93, 30 S.W. 526 (1895). *See* text following note 59 *supra.*

88. *E.g.,* Montgomery v. Snyder, 320 S.W.2d 283 (Spr. Mo. App. 1958). *See* cases cited note 43 *supra.*

89. 195 S.W.2d 524 (Spr. Mo. App. 1946).

90. *See* Mitchell v. Albanian Orthodox Diocese in America, Inc., 355 Mass. 278, 244 N.E.2d 276 (1969), involving a conflict over whether a bishop was to be elected by church by-laws or by canon law.

terian Church Case.[91] The assumption is that the courts will treat congregational churches as they do other voluntary associations. This will generally result in a majority of the congregation controlling the use of property unless church rules provide for another procedure.[92]

No Missouri cases involving church property disputes in hierarchical churches have been decided since the *Presbyterian Church Case.* It is probable, though of course not certain, that Missouri courts will continue to defer to decisions of ecclesiastical courts in these controversies. Such an approach would be consistent with the *Presbyterian Church Case* and case law prior thereto.[93] A few courts in other jurisdictions have adopted the position that instead of deferring blindly to decisions of ecclesiastical courts, they will award property to whoever holds legal title.[94]

If Missouri adheres to its traditional view of hierarchical churches, then unresolved constitutional question of how much inquiry is permissible in order to identify the church's governing authority could arise. In the *Presbyterian Church Case* the Court was adamant that civil courts have "*no* role in determining ecclesiastical questions in the process of resolving property disputes."[95] When the polity of a church is unclear,[96] or when it is clearly hierarchical but competing hierarchies claim to be the true governing authority,[97] a court may encroach on ecclesiastical questions if it probes too deeply into the structure of a church. Part five of this comment will focus on these issues.

V. Interpreting the Presbyterian Church Case Mandate

In the *Presbyterian Church Case* the Court admonished states, religious societies, and individuals to structure their relationships involving church property so as to make civil judicial inquiry into ecclesiastical questions unnecessary.[98] This is exactly what the Presbyterian Church in the United States had tried, but failed,[99] to do through its basic constitutional document.[100]

Two basic questions will be examined in the following discussion. First, is it constitutionally permissible for a court to defer to the judgment

91. Although the language in the *Presbyterian Church Case* is certainly broad enough to include congregational churches within its holding, the case dealt with a hierarchical church, 393 U.S. 440, 441, as did *Jones, Gonzalez, Kreshik* and *Kedroff,* the cases relied on for the *Presbyterian Church Case* holding.

92. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872); Clevenger v. McAfee, 237 Mo. App. 1077, 170 S.W.2d 424 (K.C. Ct. App. 1943); Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case,* 1969 Sup. Ct. Rev, 347.371-72.

93. *See* cases cited and text accompanying notes 67-71 *supra.*

94. *See* cases cited note 121 *infra.*

95. 393 U.S. at 447.

96. *See* text accompanying notes 9-11 *supra.*

97. *See* case cited and text accompanying note 72 *supra.*

98. 393 U.S. at 449.

99. 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied,* 396 U.S. 1041 (1970).

100. The Book of Church Order of the Presbyterian Church in the United States § 6-3 (1972 ed.), provides in substance that when a church is dissolved by the Presbytery, or otherwise ceases to exist, those holding title to the property shall deliver, convey, and transfer the property to the Presbytery or its authorized agents.

of an ecclesiastical tribunal when the deed to the disputed property contains no reversion or express trust in favor of the general church? Second, does judicial inquiry into church polity violate the establishment clause of the first amendment? In attempting to answer these questions reference will first be made to *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*,[101] a companion case to the *Presbyterian Church Case* decision.

A. *The Sharpsburg Case*

In *Sharpsburg*, plaintiffs, the Maryland and Virginia Eldership of the Churches of God, sought to prevent two local incorporated Churches of God from withdrawing. Determination was also sought concerning which of the two factions in each suit was entitled to church property. The Churches of God have a hierarchical polity. Because of the broad powers given to the local church trustees under the Maryland religious corporation laws,[102] and because the corporate charter conferred ownership on the local churches, the Maryland appellate court held that the majority of each congregation could determine use of the property and had the power to withdraw. The court indicated that a church could have characteristics of a hierarchical polity, yet have a congregational polity regarding use of its property.[103]

Also, the Maryland appellate court asserted that there were only three methods by which a hierarchical church could insure control over local church property: (1) It can require reverter clauses in its favor in the deeds to the property of the local churches; (2) it can provide in its constitution or some other authoritative source for reversion of the local church property to the hierarchical body upon withdrawal by a local congregation; or (3) it can obtain from the General Assembly an act providing for such a result.[104]

Since the Church of God at Sharpsburg had not utilized any of these methods, the property went to the local churches. Referring to the third means of control noted above the court pointed out that four denominations had obtained statutes from the Maryland legislature insuring their right as hierarchical polities to control local church property.[105] These statutes are likely unconstitutional as a violation of the establishment clause if judged according to Justice Black's famous dictum in *Everson v. Board of Education*:[106] "Neither can [a state nor the Federal Government] pass laws which aid one religion, aid all religions, or prefer one religion over an other."[107]

The plaintiffs appealed, contending that the Maryland statute giving control of the property to those holding legal title was a violation of the

101. 249 Md. 650, 241 A.2d 691 (1968), *vacated & remanded*, 393 U.S. 528 (1969), *aff'd*, 254 Md. 162, 254 A.2d 162 (1969), *aff'd per curiam*, 396 U.S. 367 (1970).
102. MD. CODE ANN., art. 23, §§ 256-70 (Repl. Vol. 1966).
103. 249 Md. at 664, 241 A.2d at 699.
104. *Id.* at 663, 241 A.2d at 699.
105. *Id.* at 674, 241 A.2d at 705.
106. 330 U.S. 1 (1947).
107. *Id.* at 15.

free exercise and establishment clauses. The Supreme Court vacated and remanded in light of the *Presbyterian Church Case.*[108] The Maryland court affirmed, insisting it had decided the case under neutral principles of property law as required by the *Presbyterian Church Case.*[109] The Supreme Court affirmed an appeal from this decision holding that because the Maryland court did not inquire into religious doctrine in resolving the dispute there was no substantial federal question.[110] The court avoided deciding the constitutionality of the Maryland statute,[111] which was being challenged as "establishing" a congregational polity for all churches that were not the subject of special legislation.[112]

In 1966, an Alabama statute that permitted a 65 percent majority of the congregation of a local church to withdraw from the parent church and take its property with it was struck down by a federal court as a violation of the establishment clause.[113] This federal court, relying on *Kedroff v. St. Nicholas Cathedral,*[114] reasoned that the legislature had attempted to change established systems of church ownership without regard to the ecclesiastical law and polity of each religious organization. This same issue was involved in *Sharpsburg,* but the court refused to recognize it, and for that reason the opinion is unsatisfactory.

In a concurring opinion to *Sharpsburg*[115] Justice Brennan, joined by two other members of the Court, attempted to clarify the *Presbyterian Church Case* and offer some guidance to the courts. He outlined three approaches a court could take in settling church property disputes. First, they could adopt the early Federal common law approach of *Jones.*[116] In cases involving hierarchical churches this would mean awarding the property according to the instructions of the highest ecclesiastical tribunal. An important qualification to this approach is that the appropriate church governing body must be identified "without the resolution of doctrinal questions and without extensive inquiry into religious polity."[117] This language is important for two reasons. First, it indicates that it is constitutionally permissible for courts to acknowledge the hierarchical authority of a church and defer to it; and second, it suggests that some inquiry, as long as it is not extensive, is allowable.

The second approach offered in Justice Brennan's concurring opinion was resolution according to the neutral principles of law referred to in the *Presbyterian Church Case.*[118] This involves examination of deeds, reverter

108. 393 U.S. 528 (1969).
109. 254 Md. 162, 254 A.2d 162 (1969); *accord,* Smith v. Church of God, 326 F. Supp. 6 (D. Md. 1971).
110. 396 U.S. 367 (1970) (per curiam).
111. *Id.*
112. *See* Casad, *Church Property Litigation: A Comment on the Hull Church Case,* 27 WASH. & LEE L. REV. 44, 66-67 (1970).
113. Goodson v. Northside Bible Church, 261 F. Supp. 99 (S.D. Ala. 1966), *aff'd,* 387 F.2d 534 (5th Cir. 1967); *accord,* Sustar v. Williams, 263 So. 2d 537 (Miss. 1972).
114. 344 U.S. 94 (1952). *See* note 30 *supra.*
115. 396 U.S. at 368.
116. Note that this approach as first outlined in *Jones* was heartily endorsed in the *Presbyterian Church Case,* 393 U.S. at 445-48.
117. 396 U.S. at 370.
118. *Id.*

clauses, and state incorporation laws. Justice Brennan pointed out that this approach is limited insofar as

> general principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues . . . . [P]rovisions in deeds . . . for the reversion of local church property to the general church, if conditioned upon a finding of departure from doctrine, could not be civilly enforced.[119]

The third suggested alternative Justice Brennan referred to was "special statutes governing church property arrangements in a manner that precludes state interference in doctrine."[120] The opinion gave no clear indication of the permissible reach of such a statute, and it is notable that the Maryland statute in dispute was not offered as an example.

Also noteworthy was the concurring opinion's reference to express conditions qualifying a donor's gift of church property. Justice Harlan had concurred in the *Presbyterian Church Case* on the understanding that express conditions in a deed or will limiting a church's use of property would still be enforceable.[121] In *Sharpsburg,* however, Justice Brennan stated that express conditions were unenforceable if they required the court to consider doctrine.[122] It is impossible to know if a majority of the court actually subscribes to this view.

An example of a condition that may be unenforceable is: "To the members of X church so long as they maintain their present confession of faith."[123] Attorneys should advise donors who wish to insert such clauses that the courts may refuse to enforce this type of limitation because it requires a determination of doctrinal issues. Arguably, the principle of *Shelley v. Kraemer*[124]—that racially restrictive covenants are judicially unenforcable—would be applicable if discriminatory conditions were included in a gift of property to a church.

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119. *Id.* In a footnote Justice Brennan says:

> Thus a state that normally resolves disputes over religious property by applying general principles of property law would have to use a different method in cases involving such provisions, perhaps that defined in [*Jones*]. By the same token, States following the [*Jones*] approach would have to find another ground for decision, perhaps the application of general property law, when identification of the relevant church governing body is impossible without immersion in doctrinal issues or extensive inquiry into church polity.

Id. at 370 n.4.

120. *Id.* at 370.

121. 393 U.S. at 452. Justice Harlan said:

> If for example, the donor expressly gives his church some money on the condition that the church never ordain a woman as a minister . . . or never amend certain specified articles of the Confession of Faith, he is entitled to his money back if the condition is not fulfilled.

Id. See Watson v. Jones, 80 U.S. (13 Wall.) at 722-24 (1872).

122. 396 U.S. at 370.

123. *But see* 393 U.S. at 452 (Harlan, J., concurring).

124. 334 U.S. 1 (1948). The scope of the holding in *Shelley* v. *Kraemer* is unclear. In Evans v. Abney, 396 U.S. 435 (1970), the Supreme Court held there was no state action where a trust was terminated and the res distributed to the settlor's heirs when the subject of the trust, a park, could no longer be operated on a racially discriminatory basis.

B. *The Establishment Clause Limitation*

Some state courts have followed the lead of the Georgia Supreme Court in the *Presbyterian Church Case*[125] by holding that there is no implied trust in favor of a general hierarchical church and that the general church will not be awarded the property unless there is an express trust or other provision in the deed to the local church.[126] The rationale for the "formal title" approach is that the role of the courts is limited by the *Presbyterian Church Case* to application of neutral principles of property law.[127] It is also reasoned that this narrow scope of review will prevent the court from having to identify the polity of a given church, which, it is argued, would violate the establishment clauses.[128]

Maryland has continued to adhere to the somewhat more flexible view of the lower court *Sharpsburg* opinion, *i.e.,* that a general church can retain property by providing for a reversion upon the local church's withdrawal.[129] Recently, it awarded property to the Church of God because the minutes of the church's general assembly provided that if a local church ceased to exist, the local trustees would hold the land as trustees for the Church of God generally.[130]

Other decisions have rejected the "formal title" approach, preferring to rely on the notion that inquiry into church constitutions, books of church order, by-laws, corporate charters and other documentary evidence, for the limited purpose of determining whether a dissenting local church is subject to the rule of a higher authority, does not require doctrinal consideration in violation of the first amendment.[131] Justice Brennan's concurring opinion

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125. 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied,* 396 U.S. 1041 (1970).

126. *See* Lowe v. First Presbyterian Church, 9 Ill. App. 3d 415, 292 N.E.2d 211 (1972); Pilgrim Holiness Church v. First Pilgrim Holiness Church, 115 Ill. App. 2d 448, 252 N.E.2d 1 (1969); Merryman v. Price, 259 N.E.2d 883 (Ind. App. 1970), *cert. denied,* 404 U.S. 852 (1971); *but see* Draskovich v. Pasalich, 280 N.E.2d 69 (Ind. App. 1972); United Methodist Church v. St. Louis Crossing Independent Methodist Church, 276 N.E.2d 916 (Ind. App. 1971). *See* Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen, 21 Ohio St. 2d 154, 256 N.E.2d 212 (1970), *cert. denied,* 400 U.S. 827 (1970).

127. *See* Merryman v. Price, 259 N.E.2d 883 (Ind. App. 1970), *cert. denied,* 404 U.S. 852 (1971); Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen, 21 Ohio St. 2d 154, 256 N.E.2d 212 (1970), *cert. denied,* 400 U.S. 827 (1970).

128. *See* cases cited note 127 *supra.*

129. *See* text accompanying note 104 *supra.*

130. Polen v. Cox, 259 Md. 25, 267 A.2d 201 (1970).

131. *See* Draskovich v. Pasalich, 280 N.E.2d 69 (Ind. App. 1972); United Methodist Church v. St. Louis Crossing Independent Methodist Church, 276 N.E.2d 916 (Ind. App. 1971); Macedono-Bulgarian Orthodox Church "Saint Clement Ohridski" v. Macedonian Patriotic Organization "Fatherland", 27 Mich. App. 713, 184 N.W.2d 233 (1970); Wyche v. Alexander, 15 N.C. App. 130, 189 S.E.2d 608 (1972); St. Michael & Archangel Russian Orthodox Greek Catholic Church v. Uhniat, 436 Pa. 222, 259 A.2d 862 (1969), *cert. denied,* 400 U.S. 823 (1970); Pilgrim Holiness Church v. Pilgrim Holiness Church 436 Pa. 239, 259 A.2d 870 (1969); Presbytery, Inc. v. Rohrbaugh, 79 Wash. 2d 367, 485 P.2d 615 (1971), *cert. denied,* 405 U.S. 996 (1972).

in *Sharpsburg* has been cited as supporting this approach in decisions where an implied trust was found in favor of hierarchical churches.[132]

In other cases state courts have interpreted the *Presbyterian Church Case* as expressly approving the approach in *Jones*.[133] The Supreme Court of Pennsylvania has stated:

> The Presbyterian Church decision thus fosters denominational continuity and doctrinal evolution by making the decision of the church tribunal the last word in the settlement of a church dispute arising in a hierarchical church organization.[134]

This language indicates the court's concern with upholding the integrity of the hierarchical organization.

Even courts willing to defer to the decisions of the general church face a substantial problem when one side contends the nature of church government is congregational and the other side alleges it is hierarchical. In his concurring opinion in *Sharpsburg* Justice Brennan stated:

> [W]here the identify of the governing body or bodies within a church is a matter of substantial controversy, civil courts are not to make inquiry into religious law and usage which would be essential to the resolution of the controversy.[135]

The apparent rationale for this is the notion that if a court undertakes to determine the disputed polity of a church it will "establish" a church by conferring a polity on it. Some decisions would arguably fall within the purview of this prohibition. For instance, in one case it was determined that the nature of a Baptist church was congregational, partially based on evidence of church polity given by a professor of church history.[136] In *St. John Chrysostom Greek Catholic Church v. Elko*,[137] members of defendant local church claimed it was congregational while plaintiffs argued that it was hierarchical. Because there was no documentary evidence that conclusively established the church as one or the other, the court referred to what is called the "living relationship test."[138] The court reasoned that the church had a hierarchical polity based on certain actions of the local church. Among these was that all the priests mentioned the Pope in Mass and they always sought redress for grievances through the hierarchical channels of the Uniate church (Uniate Greek Catholic Churches were those

132. Draskovich v. Pasalich, 280 N.E.2d 69 (Ind. App. 1972); United Methodist Church v. St. Louis Crossing Methodist Independent Church, 276 N.E.2d 916 (Ind. App. 1971).

133. St. Michael & Archangel Russian Orthodox Greek Catholic Church v. Uhniat, 436 Pa. 222, 259 A.2d 862 (1969), *cert. denied*, 400 U.S. 823 (1970); Presbytery of Seattle, Inc. v. Rohrbaugh, 79 Wash. 2d 367, 485 P.2d 615 (1971), *cert. denied*, 405 U.S. 996 (1972).

134. St. Michael & Archangel Russian Orthodox Greek Catholic Church v. Uhniat, 436 Pa. 222, 236, 259 A.2d 862, 868 (1969), *cert. denied*, 400 U.S. 823 (1970.)

135. 396 U.S. at 369.

136. Nolynn Ass'n of Separate Baptists in Christ v. Oak Grove Separate Baptist Church, 457 S.W.2d 633 (Ky. App. 1970), *cert. denied*, 401 U.S. 955 (1971).

137. 436 Pa. 243, 259 A.2d 419 (1969), *cert. denied*, Dober v. Elko, 399 U.S. 920 (1970).

138. *See* Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1162 (1962).

under the jurisdiction of Rome). The court stated that the *Presbyterian Church Case* mandate was not violated because the court had not considered the significance and relevance of church doctrine.[139]

Similarly, a New York court was recently asked to ascertain which of two competing hierarchies was entitled to the control of church property.[140] The court held that the Russian Orthodox Greek Catholic Church of America instead of the Synod of Bishops of the Russian Church in Exile was the governing authority in regard to the disputed property. Both in this case and the *Elko* case dissents argued that the courts were violating the first amendment by establishing a polity for the churches.[141]

VI. Conclusion

It is safe to say that in churches with a congregational polity[142] the local congregation may determine the use of its property. However, the cases split on how to resolve property disputes involving hierarchical churches. There are two approaches available: the "formal title" approach involving examination of title documents to determine whether title is held by the local church or by the general church, either directly or through a reversion;[143] and the *Jones* method, by which a court defers to the highest governing authority of a church, accepting its determination of ownership.[144]

The "formal title" approach does not violate the constitution by interfering with free exercise or establishment of religion because in utilizing it a court does not need to consider doctrine.[145] Another advantage of the approach is that it encourages religious societies to title their property clearly.[146]

The *Jones* approach is also permissible under the first amendment unless church polity is disputed. A court does not resolve doctrine or "establish" a church by acknowledging a clearly established church hiararchy. In

139. 436 Pa. at 256, 259 A.2d at 425.

140. Russian Church of Our Lady of Kazan v. Dunkel, 67 Misc. 2d 1032, 326 N.Y.S.2d 727 (1971), *aff'd,* 41 App. Div. 2d 746, 341 N.Y.S.2d 148 (1973).

141. 436 Pa. at 256, 259 A.2d at 425 (dissenting opinion); 41 App. Div. 2d at 747, 341 N.Y.S.2d at 149 (dissenting opinion).

142. Presumably Justice Brennan states the law in this respect when he says:

> States may . . . enforce the property decisions made wthin a church of congregational polity "by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government.

Maryland & Va. Eldership of the Churches of God v. Church of God, Inc., 396 U.S. 367, 368 (1970) (concurring opinion).

143. Maryland & Va. Eldership of the Churches of God v. Church of God, Inc., 396 U.S. 367 (1970) (per curiam); Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen, 21 Ohio St. 2d 154, 256 N.E.2d 212 (1970), *cert. denied,* 400 U.S. 827 (1970).

144. *E.g.,* Hayes v. Manning, 263 Mo. 1, 172 S.W. 897 (En Banc 1914); Marr v. Galbraith, 238 Mo. App. 497, 184 S.W.2d 190 (K.C. Ct. App. 1944).

145. If express conditions require a court to consider doctrine it may be constitutionally impermissible for a court to enforce them. *See* text accompanying notes 121-123 *supra.*

146. Merryman v. Price, 147 Ind. App. 295, 259 N.E.2d 883, 893, *cert. denied,* 404 U.S. 852 (1971).

addition, there was no hint in the *Presbyterian Church Case* that the Supreme Court was overruling the implied trust aspect of *Jones*. Proponents of the *Jones* approach argue that it protects the hierarchical religious system[147] and that the "formal title" approach destroys the hierarchical entity.[148] The rationale behind this policy of protection is inconsistent. The separation of church and state principle should prevent government support of religious organizations as strongly as repression of them.

It is submitted that the strongest policy argument in favor of deferring to authoritative religious bodies is based on equitable considerations. First, in the majority of jurisdictions, at least prior to the *Presbyterian Church Case,* general churches relied on the implied trust doctrine. It would be impractical, if not impossible, for these churches to retitle this property. Second, in hierarchical churches the initial organization and financing of a local church is usually undertaken by a superior church body. Even if a church is built completely out of local funds, it nonetheless receives substantial benefits from participation in the parent body.[149] Indeed, the very name of a church is valuable in attracting members. The argument can be advanced in favor of the implied trust doctrine that the general church has obtained equitable property rights in the local church. Third, the application of the "formal title" doctrine arguably results in a taking of its property without due process of law in violation of the fifth and fourteenth amendments.

Finally, the one obvious lesson that emerges is that religious societies should define their structure and property relationships clearly in deeds and church documents if they wish to insure organizational integrity.

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147. St. Michael & Archangel Russian Orthodox Greek Catholic Church v. Uhniat, 436 Pa. 222, 237, 259 A.2d 862, 869 (1969), *cert. denied,* 400 U.S. 823 (1970).

148. *See* Comment, *supra* note 26, at 914.

149. *See* United Methodist Church v. St. Louis Crossing Independent Methodist Church, 276 N.E.2d 916, 925 (Ind. App. 1971).