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Religious Corporations and the Law

Paul G. Kauper
University of Michigan Law School

Stephen C. Ellis

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RELIGIOUS CORPORATIONS AND THE LAW

Paul G. Kauper and Stephen C. Ellis

TABLE OF CONTENTS

I. INTRODUCTION	1500
II. A HISTORY OF CHURCH CORPORATIONS IN THE UNITED STATES	1503
A. <i>Roman and English Antecedents</i>	1503
B. <i>Early Corporate Development in America</i>	1505
C. <i>The Growth of General Incorporation Laws</i>	1509
D. <i>Powers Under Early Statutes</i>	1514
E. <i>Two Case Histories</i>	1516
1. <i>The Mormons</i>	1516
2. <i>The Roman Catholic Church</i>	1520
III. RELIGIOUS CORPORATIONS IN THE UNITED STATES TODAY	1527
A. <i>State Constitutional Provisions</i>	1528
1. <i>General</i>	1528
2. <i>Virginia and West Virginia</i>	1529
B. <i>State Statutory Patterns</i>	1533
1. <i>General</i>	1533
2. <i>Statutes Tailored to Specific Churches</i>	1534
3. <i>Types of Corporations</i>	1538
4. <i>Provisions for Voluntary Associations</i>	1541
C. <i>Analysis of Statutes</i>	1543
1. <i>Formation of Ecclesiastical Corporations</i>	1543
2. <i>Powers of Ecclesiastical Corporations</i>	1545
3. <i>Dissolution Provisions</i>	1549
4. <i>Ability To Merge or Consolidate</i>	1553
5. <i>The Model Non-Profit Corporation Act</i>	1554
IV. CONSTITUTIONAL ASPECTS OF RELIGIOUS CORPORATIONS	1557

RELIGIOUS CORPORATIONS AND THE LAW

Paul G. Kauper* and Stephen C. Ellis**

I. INTRODUCTION

A decisive event in the history of Christianity was the edict of Constantine, which recognized the validity of bequests to the Catholic Church, thereby enabling the Church in its corporate capacity to receive, hold, and accumulate property¹ and laying the foundation for the erection of a legal structure that was to have profound implications for both the church and the state. It is not the purpose of this article to develop at length the history of the church's ownership of land and the reaction against it during the Reformation that often resulted in confiscation of church lands and enactment of mortmain laws limiting the amount of land that churches could hold. The point is simply that the granting of a legal right to churches to acquire, hold, and accumulate property is of prime significance with respect to the place of the church in a secular society.²

Unincorporated associations such as churches face problems of title with respect to the acquisition, use, and disposition of property, particularly real estate.³ At the early common law, a deed of land to an unincorporated association was ineffective.⁴ If the deed were con-

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* Henry M. Butzel Professor of Law, University of Michigan. A.B. 1929, Earlham College; J.D. 1932, University of Michigan.—Ed.

** Member of the Washington Bar. B.A. 1967, University of Washington; J.D. 1970, University of Michigan.—Ed.

1. The edict reads as follows:

The same Augustus to the people.

Each and every one should have, when departing, the freedom to leave what property he has wished to the most holy and venerable council of the Catholic Church.

Decisions should not be void.

There is nothing which is more due to persons than that the writing of their last will, after which they no longer can will anything, should be unrestricted and that their decisions, because it does not return again, should be free.

Posted on 3 July at Rome, Crispus and Constantine Caesars being consuls for the second time.

P. COLEMAN-NORTON, *ROMAN STATE AND CHRISTIAN CHURCH* 85-86 (1966).

2. "Corporate organization represents one of the supreme achievements of highly civilized society. The substantial benefits to be derived from such a legal mechanism have been recognized by Church and State, which in turn have adapted the corporate scheme to their respective needs. The relation between Church and State may be gleaned by an analysis of the position which the State assumes toward the ecclesiastical juristic personality." B. BROWN, *THE CANONICAL JURISTIC PERSONALITY WITH SPECIAL REFERENCE TO ITS STATUS IN THE UNITED STATES OF AMERICA* 1 (1927).

3. For general law and history of unincorporated associations and their legal capacity, see H. FORD, *UNINCORPORATED NON-PROFIT ASSOCIATIONS* (1959); S. WRIGHTINGTON, *THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* (2d ed. 1923); Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916).

4. See 1 R. POWELL, *REAL PROPERTY* 510-17 (1969); Ford, *Dispositions of Property to Unincorporated Non-Profit Associations*, 55 MICH. L. REV. 67, 71-76 (1956).

sidered to be a deed to the individual members of the association as tenants in common, the transfer was effective, but the further disposition of the property and the devolution of individual members' interests created difficulties. Was each member's share his own property interest and thus part of his disposable estate, or was it impressed with some kind of trust for the benefit of the church?

The same questions could be raised if land intended for the benefit of the church were transferred by deed to an officer of a hierarchical church (such as a bishop of the Roman Catholic Church). Did the land pass to the bishop in his personal capacity and become subject, therefore, to disposition by him during his lifetime or at death, or was there an implicit limitation that the property was to be held by him and his successors in office solely for the benefit of the church?

Two legal devices, the trust and the corporation, could be used to deal with the problem of title. A deed to a church officer could be regarded as a transfer in trust, thereby ensuring that the property would be used in perpetuity for the benefit of the church, with the occupant of the office at any given time serving as the trustee. Or the bishop could be regarded as a corporation holding the property for the purposes of the church, and each successor bishop would exercise the corporation's authority over the property. In either case, perpetual ownership of the property for the purpose of the church was assured.

An unincorporated association, with its many members, would raise more difficulties in working out the trust idea, unless it could be said that the deed to the association was a transfer in trust for the benefit of the church generally, that the land would be held in trust for such a purpose, and that the officers of the church could serve as trustees for the further disposition of the property. Clearly, the trust approach became easier if the property were transferred to named persons as trustees to hold for the benefit of the church. Apart from the trust pattern, the association could assert control over the property only if the church or one of its officers had been accorded a corporate status by the state. It is conceivable, of course, that a statute could grant a limited corporate status to a church solely for the purpose of holding and disposing of property without giving it all the aspects of a legally incorporated body.

It is clear from any preliminary discussion of this problem that a close and interesting relation exists between the trust and the corporate concepts as they are used to allow nonprofit associations

to acquire and hold property. Indeed, the end results of the trust device and the incorporation device are virtually the same. This is particularly true when, under a statute that provides for incorporation of a church body, the trustees are both the incorporators and the corporate body, so that the control and disposition of the property is in the hands of the trustees in their corporate capacity and, in turn, any disposition must be made by them. At this point the difference between an explicit conveyance in trust for the benefit of a given group and the incorporation of trustees to achieve the same purpose is even less pronounced.

The availability of the trust device in itself presents an important question. Although originally equity would not enforce a trust without specifically identified beneficiaries, this doctrine was eventually modified by the development of the charitable trust concept, by means of which property could be given to a trustee for a particular use or for the benefit of a group that was not specifically determined, provided the purpose of the trust was educational, charitable, or religious. The extension of the charitable trust doctrine to include trusts set up for religious purposes was a development of prime importance to the churches. Originating in England, the charitable trust doctrine was generally adopted by American courts.⁵

Many of the observations concerning the status of religious societies are equally applicable to other nonprofit associations that are organized for purposes within the charitable trust idea or that come within the range of incorporation statutes. It is only because the granting of special legal privileges may be deemed to raise a peculiar type of constitutional question in terms of church-state relations that the problems of religious associations deserve special attention. This article will attempt to present a picture of the legal status of religious organizations, with particular reference to the enjoyment of the corporate privilege. Necessarily, this will involve at the outset an historical review tracing the development of that status, beginning with the practice of granting special charters to churches and culminating in the now familiar general incorporation statute. Special attention will be paid to distinctive problems that arose in Utah, Pennsylvania, and Virginia concerning corporate status. The historical review is followed by a summary survey of the current state laws relating to the incorporation of churches. The last section deals with questions that the granting and conditioning of corporate status for churches and the applicability of corporation laws to church bodies may raise under the religion clauses of the first amendment.

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5. See, e.g., *Vidal v. Girard's Exrs.*, 43 U.S. (2 How.) 126 (1844).

II. A HISTORY OF CHURCH CORPORATIONS IN THE UNITED STATES

The history of ecclesiastical corporations in the United States is a relatively unknown and unexplored area of law. The text materials available for study are sparse and, for the most part, of considerable vintage.⁶ Therefore, in any attempt to portray this history reliance must be placed primarily on case law, and, to a lesser degree, on the statutes and enactments of the era under review.

A. *Roman and English Antecedents*

The Roman law first conceived of the notion of a body of people with a collective interest acting together as a legally recognized unit to govern its own affairs. Such groups were called *collegia* or *universitates* and were given certain collective powers, such as the power to hold land.⁷ While the edict of Constantine⁸ did not speak directly to the incorporation of individual churches, it implied a corporate capacity for local congregations by allowing them to accept legacies as a unit. The early Roman Catholic Church recognized the usefulness of corporate status and soon adopted the idea into the canon law.⁹ Organizations with the power to hold land could be created simply by the formation of a voluntary association by parties with

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6. C. BARTLETT, *THE TENURE OF PAROCHIAL PROPERTY IN THE UNITED STATES OF AMERICA* (1926); B. BROWN, *THE CANONICAL JURISTIC PERSONALITY WITH SPECIAL REFERENCE TO ITS STATUS IN THE UNITED STATES OF AMERICA* (1927); H. DESMOND, *THE CHURCH AND THE LAW* (1898); P. DIGNAN, *A HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES (1784-1932)* (1935); W. DOHENY, *CHURCH PROPERTY: MODES OF ACQUISITION* (1927); P. GUILDAY, *THE CATHOLIC CHURCH IN VIRGINIA (1815-1822)* (1924); M. HOFFMAN, *ECCLESIASTICAL LAW IN THE STATE OF NEW YORK* (1868); C. HOWELL, *THE CHURCH AND THE CIVIL LAW* (1886); S. HUDSON, *LAW FOR THE CLERGY* (1877); C. LINCOLN, *CIVIL LAW AND THE CHURCH* (1916); D. MCLEISH, *THE LAWS OF THE STATE OF TEXAS AFFECTING CHURCH PROPERTY* (1960); W. STRONG, *TWO LECTURES UPON THE RELATIONS OF CIVIL LAW TO CHURCH POLITY, DISCIPLINE AND PROPERTY* (1875); R. TYLER, *AMERICAN ECCLESIASTICAL LAW: THE LAW OF RELIGIOUS SOCIETIES, CHURCH GOVERNMENT AND CREEDS, DISTURBING RELIGIOUS MEETINGS AND THE LAW OF BURIAL GROUNDS IN THE UNITED STATES* (1866); C. ZOLLMANN, *AMERICAN CHURCH LAW* (1933); Zollmann, *Classes of American Religious Corporations*, 13 MICH. L. REV. 566 (1915); Zollmann, *Powers of American Religious Corporations*, 13 MICH. L. REV. 646 (1915); Zollmann, *Nature of American Religious Corporations*, 14 MICH. L. REV. 37 (1915).

7. 2 J. DAVIS, *CORPORATIONS* 224-25 (1971). It should be noted, however, that the "Roman Law never reached the point in development at which the corporations were included in the category of 'persons.'" *Id.* at 226. For a history of church associations under the civil law, see C. BARTLETT, *supra* note 6, at 6-8, 13-16; B. BROWN, *supra* note 6.

8. For full text of edict, see note 1 *supra*.

9. "The Catholic Church and the Apostolic See have moral personality by divine institution itself; the other inferior moral persons in the Church obtain it either by the very prescription of the law or by special grant of the competent ecclesiastical superior given by formal decree for a religious or charitable purpose." Canon 100, § 1. This English translation is taken from T.L. BOUSCAREN, A. ELLIS, & F. KORTH, *CANON LAW: A TEXT AND COMMENTARY* 89 (4th ed. rev. 1963).

common interests; no prior consent or approval by the state was required for the existence of a viable entity.¹⁰

In England, under the common law, things changed somewhat. The rise of the strong independent sovereign led to the idea that organizations exercising collegiate or corporate powers could exist only with the prior approval of the sovereign. Since many of these bodies had long existed as recognized juristic entities without the express consent of the sovereign or at least without preservation of the record of such approval, a fiction arose that permission had indeed been given by an earlier sovereign and that the charter had subsequently been lost. These organizations are the so-called common law corporations.¹¹

The requirement of prior approval by the state stressed the supremacy of the state over the church, a notion that was at variance with the church's view of itself and with traditional medieval notions of church-state relations. The Catholic Church saw itself as a moral person, founded in divine law, with the power to administer its own property independently of any sovereign.¹² However, the Reformation, at least in England, destroyed any notion that the church existed as a separate spiritual entity immune from rule by the civil authorities. The use of the corporate form was limited to organizations upon which the privilege had been expressly bestowed. The church could no longer reside in England as a recognized entity with the power to take and hold property. It was now reduced to the level of any other voluntary, unincorporated association, dependent upon the state's grant of power.

By the eighteenth century, the device of a charter incorporating a local congregation had been developed. The Church of England itself was not considered to be a corporate unit:

At common law the church of England, in its aggregate description, is not deemed a corporation. It is indeed one of the great estates of the realm; but is no more, on that account, a corporation, than the nobility in their collective capacity. The phrase, "the Church of England," so familiar in our laws and judicial treatises, is nothing more than a compendious expression for the religious establishment of the realm, considered in the aggregate under the superintendence of its spiritual head. In this sense the Church of England is said to have peculiar rights and privileges, not as a corporation, but as an ecclesiastical institution under the patronage of the state.¹³

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10. 2 J. DAVIS, *supra* note 7, at 224-25; R. TYLER, *supra* note 6, at 57-58.

11. See J. ANGELL & S. AMES, *PRIVATE CORPORATIONS* 55-56 (11th ed. 1882).

12. See text accompanying note 96 *infra*.

13. *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292, 325 (1815).

As such, the Church was even more subject to the specific control of the state with respect to temporal affairs. Each unit was to be incorporated separately, since the Church as a whole was not accorded the corporate status. The requirement of separate incorporation for each congregation was substantially mitigated by special laws incorporating ministers as corporations sole and by the granting of other privileges to the Church of England in its role as the established church.¹⁴ However, it is fair to say that English corporate history can be seen, in part, as an attempt by the state to reduce the temporal power of the church along with assertions of political and spiritual power over it on other fronts.

B. *Early Corporate Development in America*

It hath been held (says Mr. Justice Blackstone) that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, jurisdiction of the spiritual courts, and a multitude of other provisions, are neither necessary nor convenient to them, and therefore are not in force.¹⁵

Whether a matter of refinement or necessity, the English notion that a corporation could exist only with the express prior approval of the state was transmitted to the colonies, along with the idea that an unincorporated association could not hold property in its own right but could only prevail upon an individual to take the property in his own name as trustee for the association. The colonies did, however, differ in their treatment of the churches. While the prevailing English pattern of granting special charters to religious bodies meeting with the approval of the king was repeated in most of the colonies, a view of the ecclesiastical organization as a municipal corporation known as the territorial parish was developed in New England, particularly in Massachusetts, Connecticut, and Maine. The territorial parish was charged with the public responsibility of maintaining the

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14. See *Weston v. Hunt*, 2 Mass. 500 (1807).

15. 1 R. BURN, *THE ECCLESIASTICAL LAW* 415*lll* (9th ed. 1842).

spiritual aspects of humanity.¹⁶ Initially, the parish and the town were a single geographic entity, but as time passed the two clearly separated into distinct political entities.¹⁷ Since the parish was a public corporation, membership, acquired by residence within the boundaries of the parish, subjected the citizen to the duties one might expect in a municipality, including the duty to pay taxes. "Such membership carried with it all the consequences, agreeable and disagreeable, which residence in a town or county implied. Residents of a county or town were thus individually liable for its debts. A person who recovered judgment against these public corporations could levy execution against the property of any of their citizens."¹⁸ In essence, the territorial parish was the spiritual arm of the state and, as such, was subject to legislative control.¹⁹

Within the parish, the minister held title in fee simple to all land dedicated as "parsonage lands, or lands granted for the use of the ministry, or of the minister for the time being."²⁰ He held this land as a corporation sole, but "[t]he corporation was thus constituted solely for the purpose of holding property for the parish, and [was] nothing more than a trustee."²¹ The minister could grant an estate for the duration of his term of office, but an alienation for any longer period of time required the consent of the parish.²² During the interim period between ministers, the town or parish was entitled to the custody of the property and the rents and profits from it.²³

16. *See* Second Ecclesiastical Soc. v. First Ecclesiastical Soc., 23 Conn. 254, 277-79 (1854). In this case the court also noted:

Each of these societies, or communities, were considered to be, and were in fact, municipal, public, political corporations. They were governmental instrumentalities, composed of individuals, as component parts of the great community, for the promotion of the general welfare of that community, and in which no person had an interest, or was to derive a benefit, of a character particular or individual to himself merely, but only in connection with, and as he participated in, the welfare of the community generally; and not associations of individuals as such, created for their mere personal or private advantage, like ordinary private corporations; and they were established by the general assembly for the purpose of accomplishing, within their respective limits, the objects for which they were instituted, more conveniently than they could be accomplished, directly, by the general assembly itself. The promotion of these objects was a public duty, enjoined by law on the members of such corporations, which consisted of all the inhabitants residing within their limits, with the exception of certain individuals in ecclesiastical societies, who were, by particular provisions, excused from taxation for the religious objects of the society.

23 Conn. at 273. *See generally* C. ZOLLMANN, *supra* note 6, at 102-07.

17. *See* Sedgwick v. Pierce, 2 Root 432 (Conn. 1796); *Inhabitants of the First Parish v. Dunning*, 7 Mass. 445 (1811).

18. C. ZOLLMANN, *supra* note 6, at 106.

19. *See* Second Ecclesiastical Soc. v. First Ecclesiastical Soc., 23 Conn. 254, 274 (1854).

20. *Inhabitants of the First Parish v. Dunning*, 7 Mass. 445, 447 (1811).

21. C. ZOLLMANN, *supra* note 6, at 108.

22. *See, e.g.*, Weston v. Hunt, 2 Mass. 500 (1807).

23. *See* *Inhabitants of the First Parish v. Dunning*, 7 Mass. 445, 447 (1811); *Weston v. Hunt*, 2 Mass. 500, 502 (1807).

The territorial parish existed until the states disestablished the church. In Connecticut, for example, the power of the legislature to establish such a body was deemed to have been terminated by the adoption of a constitutional amendment that stated that "no person shall, by law, be compelled to join, or support, nor be classed with, or associated to, any congregation, church, or religious association."²⁴

Outside of New England, the other colonies persisted in the use of the special charter, which was granted only on petition to the sovereign and at his discretion.²⁵ Many church bodies found it difficult to secure the corporate privilege because of the feeling of the sovereign that incorporation was to be reserved for the established church. For example, when Presbyterians in New York attempted to secure a charter in July 1767, their request was denied by the Lords of Trade in London, due to an uncertainty over whether such a grant would constitute an impermissible establishment of a dissenting church. The Lords stated, "That is a question of too great importance for us to decide, but we are of opinion, that independent of this objection, it is not expedient, upon principle of general policy, to comply with the prayer of the petition, or to give the Presbyterian Church of New York any other privileges or immunities than it is entitled to by the laws of toleration."²⁶ The practice of granting special charters continued unabated well into the nineteenth century²⁷ and came to an end only after states adopted general incorporation laws that included religious organizations within their scope.

One other aspect of the European heritage bears mentioning. The idea has long persisted, at least in the United States, that there was no such thing as a common law corporation—that is, a corporation that existed without the benefit of a prior grant of the corporate privilege by the sovereign. It is not clear, however, that this was the case. There was a sense in which local churches and ministers of the

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24. *Second Ecclesiastical Soc. v. First Ecclesiastical Soc.*, 23 Conn. 254, 274 (1854).

25. As early as 1696, a charter was given to the Dutch Reformed Church in New York City. It incorporated the members of the Garden Street Church and is fairly representative of the early charters granted to religious societies in the colonies. "[The members] were authorized to have, take, acquire, possess, and purchase lands, tenements, and hereditaments, or goods and chattels, and the same to lease, grant, alien, sell and dispose of at their own will and pleasure, as other our liege people, or any corporation or body politic within our realm of England or this our province, may lawfully do." M. HOFFMAN, *supra* note 6, at 103-04. On May 6, 1697, Trinity Church in New York was incorporated by Governor Fletcher—the power to incorporate still residing at this time with the executive and not the legislature. *Id.* at 295-310.

26. *Id.* at 131.

27. For example, an index to the statutes passed by the General Assembly of Rhode Island up to 1862 shows a total of 288 charters granted to various religious societies, the earliest dating from 1769. INDEX TO THE PRINTED ACTS AND RESOLVES OF, AND OF THE PETITIONS AND REPORTS TO THE GENERAL ASSEMBLY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, FROM THE YEAR 1850 TO 1862 xx-xxviii (1863).

Church of England were deemed to be corporations without the benefit of a specific act granting the use of the corporate privilege. As shown by Mr. Justice Story in *Town of Pawlet v. Clark*²⁸ and *Terrett v. Taylor*,²⁹ local churches of the Episcopalian faith could hold property, and their ministers were seized with title to the various grants in order that they might have a source of income:

At a very early period the religious establishment of England seems to have been adopted in the colony of Virginia; and, of course, the common law upon that subject, so far as it was applicable to the circumstances of that colony. The local division into parishes for ecclesiastical purposes can be very early traced; and the subsequent laws enacted for religious purposes evidently pre-suppose the existence of the Episcopal church with its general rights and authorities growing out of the common law. What those rights and authorities are, need not be minutely stated. It is sufficient that, among other things, the church was capable of receiving endowments of land, and that the minister of the parish was, during his incumbency, seized of the freehold of its inheritable property, as emphatically *persona ecclesiae*, and capable, as a sole corporation, of transmitting that inheritance to his successors. The church wardens, also, were a corporate body clothed with authority and guardianship over the repairs of the church and its personal property; and the other temporal concerns of the parish were submitted to a vestry composed of persons selected for that purpose.³⁰

While it is true that such status did not truly approximate actual incorporation, it is also true that considerably more power accrued to the local churches enjoying this status than was extended to other voluntary associations under the common law.³¹

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28. 13 U.S. (9 Cranch) 292 (1815).

29. 13 U.S. (9 Cranch) 43 (1815).

30. 13 U.S. at 46. The same conclusion is reached in *Town of Pawlet* with respect to the Episcopal church in Vermont.

31. There is, however, evidence that would, at the least, qualify Justice Story's viewpoint. In *Weston v. Hunt*, 2 Mass. 500, 501 (1807), the court mentions an early Massachusetts statute (Act of Feb. 20, 1786, ch. 12, [1783-88] Mass. Acts & Laws 396) that was supposedly modeled after an English provincial statute (28 Geo. II, c. 9 (circa 1754)). The Massachusetts version read:

That the deacons of all the several protestant churches, not being episcopal churches, and the church wardens of the several episcopal churches, are, and shall be deemed so far bodies corporate, as to take in succession all grants and donations, whether real or personal, made either to their several churches, the poor of their churches, or to them and their successors, and to sue and defend in all actions touching the same; and whenever the ministers, elders or vestry, shall in such original grants or donations have been joined with such deacons or church wardens as donees, or grantees in succession, in such cases, such officers and their successors, together with the deacons or church wardens, shall be deemed the corporation for such purposes as aforesaid; and the minister or ministers of the several protestant churches, of whatever denomination, are and shall be deemed capable of taking in succession any parsonage land or lands, granted to the minister and his successors, or to the use of the ministers, and of suing and defending all actions touching the same . . . .

The Catholic Church may well have been accorded a similar status, in limited geographical areas, as a result of the 1819³² and 1898³³ treaties between the United States and Spain. The 1819 treaty involving the cession of Florida has been interpreted as a confirmation by the federal government of the juridical personality of the Catholic Church.³⁴ The 1898 treaty, following the Spanish-American War, repeated this recognition. In subsequent litigation over property allegedly owned by the Church, the Supreme Court held that Spain had vested the Church with a "legal personality" that allowed it to hold property without the necessity of prior incorporation.³⁵ It is not entirely clear that such recognition rested on either treaty; one case involving a property dispute indicated that "[t]he corporate existence of the Roman Catholic Church, as well as the position occupied by the papacy, has always been recognized by the Government of the United States."³⁶

The independent corporate capacity of the Catholic Church was also recognized by the supreme courts of California³⁷ and Texas.³⁸ As recently as 1927, the Florida supreme court stated, "That the common law corporation sole is, under our statute adopting the common law, the law in Florida today . . . there can be no doubt . . ."³⁹

C. *The Growth of General Incorporation Laws*

The difficulties inherent in any system that grants special favors to a few led to the downfall of incorporation by special charter.⁴⁰ It

32. Treaty of Amity, Settlement, and Limits with Spain, Feb. 22, 1819, 8 Stat. 252, T.S. No. 327.

33. Treaty of Peace with Spain, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343.

34. "There can be no doubt of the power of the King of Spain to grant lands in Florida while the province was his; nor of the capacity of the Roman Catholic Church to take by grant. Our treaty with Spain recognises and ratifies all such grants made prior to a certain day." 1 OP. ATTY. GEN. 563-64 (1822).

35. *Santos v. Holy Roman Catholic & Apostolic Church*, 212 U.S. 463 (1909); *Municipality of Ponce v. Roman Catholic Apostolic Church*, 210 U.S. 296 (1908).

36. *Municipality of Ponce v. Roman Catholic Apostolic Church*, 210 U.S. 296, 318 (1908).

37. *Santillan v. Moses*, 1 Cal. 92 (1850). *But see City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 287 P. 475 (1930).

38. *Blanc v. Alsbury*, 63 Tex. 489 (1885); *Blair v. Odin*, 3 Tex. 288 (1848).

39. *Reid v. Barry*, 93 Fla. 849, 887, 112 S. 846, 860 (1927).

40. The method of obtaining corporate capacity by special charters is subject to grave abuse, not so much on the part of church societies, but in regard to other private corporations. Not only was gross favoritism shown to particular persons in granting charters to them, but the ever-increasing demand for such charters threatened to swamp the Legislatures and prevent them from performing their other duties. As a consequence, constitutional amendments were passed in many states prohibiting the Legislature from granting any such special charters and requiring them to pass general incorporation acts not only in regard to corporations for profit, but also in regard to all other corporations.

C. ZOLLMANN, *supra* note 6, at 134-35.

seems probable that the spirit of separation and pluralism that swept the country at the time of the American Revolution lent aid to the enactment of general incorporation laws. The old system of special charters had proven to be a means of establishing favored religious bodies, and states began to enact statutes that granted the corporate form to all bodies that could comply with certain minimal prerequisites. Such incorporated bodies were no longer seen as favorites of the state but as sectarian agencies that had been accorded the benefit of a secular legal form with which they might more effectively achieve their stated goals and purposes. The reasons for this movement away from the special legislative recognition of the established church to the more readily available status of the private corporation were perhaps best expressed in the preamble to the New York Act of April 6, 1784:

Whereas by the thirty-eighth Article of the Constitution of the State of New York, it is ordained, determined and declared, that free capital Exercise and Enjoyment of religious Profession and Worship, without Discrimination or Preference should forever thereafter be allowed within this State to all Mankind, provided that the Liberty of Conscience thereby granted, should not be so construed, as to excuse Acts of Licentiousness, or justify Practices inconsistent with the Peace or Safety of this State.

And whereas, many of the Churches, Congregations, and religious Societies in this State (while it was a Colony) have been put to great Difficulties to support the public Worship of God, by reason of the illiberal and partial Distribution of Charters of Incorporation to religious Societies, whereby many Charitable and well disposed Persons have been prevented from Contributing to the Support of Religion, for want of proper Persons authorized by law to take charge of their pious Donations, and many Estates purchased and given for the Support of religious Societies, now rest in private hands, to the great Insecurity of the Societies for whose Benefit they were purchased or given, and to the no less Disquiet of many of the good People of this State.

And whereas, it is the duty of all Wise, Free and Virtuous Governments to countenance and encourage virtue and religion, and to remove every Lett or Impediment to the Growth and Prosperity of the People, and to enable every religious Denomination to provide for the Decent and Honorable Support of Divine Worship, agreeable to the dictates of Conscience and Judgment . . .⁴¹

41. Ch. 18, preamble, [1784] N.Y. Laws 21. So popular did such acts become, that in 1866 a New York author stated: "Trinity Church, of the city of New York, and a few other Protestant Episcopal Churches of the State, exist under special charters, but most of the churches or societies of this denomination in the State of New York have been organized under the general incorporating acts passed from time to time by the State legislature." R. TYLER, *supra* note 6, at 59-60. The churches incorporated by special charter continued to enjoy the privilege of incorporation. See M. HOFFMAN, *supra* note 6, at 43.

Two principal classes of religious corporations emerged under the new general incorporation acts: the trustee corporation and the membership corporation. Still later, yet a third form, the corporation sole, appeared.⁴²

The trustee form was initially adopted in most eastern states.⁴³ It consisted of a body of trustees, usually elected by the congregation, which was incorporated as a unit. All church property was vested in the corporate body, which held it for the use and benefit of the church, congregation, or society involved.⁴⁴ This form grew out of the common law practice of using trustees to hold property for a voluntary association incapable of taking or holding property in its own name.⁴⁵ By simply incorporating the trustees who already held title to the property, the legislatures of the states that adopted this form granted perpetual succession without the necessity of a transfer of property to some different entity and without a change in existing relationships.⁴⁶

In theory, the use of the trustee form appeared simple and ideal. The trustees would hold the property in trust for the benefit of the congregation, and any deviations from the scope of the trust could be enjoined by a court of equity.⁴⁷ In practice, however, it was precisely the simplicity of the trustee form that created difficult problems of administration for the courts. During the nineteenth century, as disputes began to arise among church members, courts were required to engage in theological discussions and to delve into the mysteries of doctrine in order to determine whether trustees had departed from a principle held to be fundamental to the original faith of the congregation.⁴⁸ As courts sought to determine the proper use of church land, the substantial body of law known as the doctrine of implied trust was developed.⁴⁹

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42. See text accompanying notes 204-12 *infra*. This statutory form is quite different from the earlier common law corporation sole. See generally C. ZOLLMANN, *supra* note 6, at 107-10.

43. See C. ZOLLMANN, *supra* note 6, at 114-15.

44. *Id.*

45. *Id.* Cf. *Hunt v. Adams*, 111 Fla. 165, 149 S. 24 (1933); *I.W. Phillips & Co. v. Hall*, 99 Fla. 1206, 128 S. 635 (1930); *Wilkins v. St. Mark's Protestant Episcopal Church*, 52 Ga. 351 (1874).

46. C. ZOLLMANN, *supra* note 6, at 114-15.

47. See, e.g., *Hanna v. Malick*, 223 Mich. 100, 193 N.W. 798 (1923); *First Church of the Brethren v. Snider*, 367 Pa. 78, 79 A.2d 422 (1951); *Dissolution of Susquehanna Ave. Presbyterian Church*, 31 Pa. D. & C. (C.P. 1938); *Franke v. Mann*, 106 Wis. 118, 81 N.W. 1014 (1900).

48. See, e.g., *Kniskern v. Lutheran Churches*, 1 Sandf. 439 (N.Y. Ch. 1844).

49. Where a divided congregation held property under a trust deed stipulating that the congregation be connected with or subordinate to a general church

To compound matters, the trustees were seen as an entity separate from the congregation.⁵⁰ The trustees were the corporation, and only they could legally bind the church to a contract. The members of the congregation might vote on internal bylaws or give advisory opinions to the trustees, but such decisions were not legally enforceable in the absence of approval by the trustees.⁵¹

As a result of the difficulties inherent in the trustee form, New York, by judicial fiat, in 1854 reinterpreted its Religious Incorporations Act and decided that the Act established the membership, rather than the trustee, corporation.⁵² The membership corporation, as the name implies, incorporated the membership, which could then exercise authority directly without using a trustee. Control of church property was now solely in the hands of the congregation, to be dis-

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organization, the courts did not hesitate to enforce the trust in favor of the party adhering to that organization, and it may have seemed but a small additional step to imply, in the absence of an express trust, a dedication in support of the particular form of ecclesiastical organization to which the congregation had adhered prior to dispute. Many courts thus declared that church property no matter how obtained was impressed with a trust for the maintenance of the forms of ecclesiastical government to which the founders had adhered. Although this rule resembled the English implied-trust doctrine, American courts emphasized continuity of denominational affiliation rather than continuity of religious tenets, and so generally refused to review the decisions of hierarchical church judicatories on matters of doctrine.

Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1149-50 (1962). See generally C. ZOLLMANN, *supra* note 6, at 221-49; 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, *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).

50. The church is the spiritual body of believers over which courts could have no jurisdiction whatsoever; the *society* consists of all those who have associated themselves together and who elect the trustees, whether they are of the church or not; while the *trustees*, under whatever name they might be known, and whether they are members of the church or the society or both or neither, are the corporation, created for the express purpose of holding the property of the society.

C. ZOLLMANN, *supra* note 6, at 117.

51. Each of these may act separately. The efficacy of their respective acts, or how they are to be rendered responsible therefor, or how their respective duties or obligations are to be enforced may sometimes become an important inquiry. The employment of a pastor, may be submitted or allowed to the congregation at large. Or it may be done by the Church, strictly so called. But unless the trustees, as such, are parties to the contract, no action *at law* can be sustained against the society, whatever other remedy may exist. The trustees may refuse their assent to the employment of a pastor whom the Church or congregation may employ. And if they do—no action lies—and the only remedy I can conceive of against them, would be not against them as a corporation, but against them personally, by removal from office, or in some other mode, for a dereliction of personal duty. But it must be borne in mind, that although they as trustees are entitled to the custody of the temporalities of the society; they ought not to act capriciously, or arbitrarily.

Miller v. Trustees of the Baptist Church, 16 N.J.L. 251, 253 (Sup. Ct. 1837) (emphasis original). See also C. ZOLLMANN, *supra* note 6, at 117.

52. Robertson v. Bullions, 11 N.Y. 243 (1854).

posed of in the manner prescribed by the local church's rules, bylaws, charters, or custom. The New York court of appeals saw its decision as a means of avoiding the implied trust doctrine, which it had come to abhor.⁵³ In fact, the court viewed its action as a step forward in the realm of religious freedom:

The act has in truth accomplished what the public sentiment in this country would seem to demand, that is, the entire separation of the functions of the ecclesiastical and temporal judicatories, and has limited the former to their proper sphere of control over the spiritual concerns of the people. If this statute is properly construed, we shall have fewer examples of temporal courts engaged in the inappropriate duty of deciding upon confessions of faith, and shades of religious belief and points of doctrine too subtle for any but ecclesiastical comprehension.⁵⁴

The theory suggested by the court of appeals reached its logical conclusion in *Petty v. Tooker*,⁵⁵ when the trustees and a majority of the membership of a Congregational church were allowed to quit that faith and, far from having to forfeit their interest in the congregational property, were permitted to dedicate the property to the Presbyterian faith.

Not all states followed New York in trying to abolish the implied trust doctrine, although the membership form of corporation began to replace the trustee form in many jurisdictions. In most states, the familiar implied trust doctrine was simply applied to the membership corporation; in fact, courts became increasingly willing to apply the doctrine as the nineteenth century wore on.⁵⁶ In New York, the legislature soon reacted against the court of appeals' extreme construction of the Religious Incorporations Act. In 1875, the Act was amended to require the trustees to administer the property of the congregation according to the "discipline, rules and usages of the denomination to which the church members of the corporation be-

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53. The Court stated:

The church is the body of believers . . . it was the intention of the legislature to place the control of the temporal affairs of these societies in the hands of the majority of the corporators, independent of priest or bishop, presbytery, synod, or other ecclesiastical judicatory. This is the inevitable effect of the provision giving to the majority, without regard to their religious sentiments, the right to elect trustees, and to fix the salary of the minister. The courts clearly cannot disfranchise any corporator who possesses the qualifications prescribed by the statute.

Robertson v. Bullions, 11 N.Y. 243, 263-64 (1854).

54. Robertson v. Bullions, 11 N.Y. 243, 264 (1854).

55. 21 N.Y. 267 (1860).

56. See Note, 75 HARV. L. REV. 1142, *supra* note 49, at 1149-54.

long.”⁵⁷ This change in wording, duly noted and applied by the New York courts, resurrected the old implied trust notions.⁵⁸

As noted above, the theory of the membership corporation rested on a distinction between the corporation and the church—that is, between the temporal and the spiritual. This distinction was the cause of the spectacular decision of the New York court of appeals in *Westminster Presbyterian Church v. Trustees of the Presbytery*.⁵⁹ The plaintiff in this case was a legal religious corporation established in 1889. In 1908, friction between the local congregation and the Presbytery of New York caused the Presbytery to dissolve the local church, pursuant to its rights under the laws of the Presbyterian Church and the New York Religious Corporations Law. Representatives of the Presbytery took possession of the church property, and the plaintiff began suit to recover it. The court of appeals held that the power of dissolution conferred on the Presbytery by the statute involved the power to dissolve the church, “in the spiritual sense,” but not the power to dissolve the religious corporation. The corporation, an entity distinct from the spiritual body of the church, was created by the state, and only the state could dissolve it in the absence of an express statutory power in some other body to do so. The Presbytery could hold the trustees of the corporation to account and require them to administer the property subject to denominational uses, but it could not deprive them of physical possession. Thus, while the corporate shell remained in existence, it had no function, since the congregation of the church had been lawfully dissolved by the Presbytery. In the related case of *Trustees of the Presbytery v. Westminster Presbyterian Church*,⁶⁰ the old trustees were left with the naked legal title to the property in question but were obliged to administer it in favor of a new congregation formed by the Presbytery.

D. Powers Under Early Statutes

A religious corporation may take, either by deed or will, real and personal property to an amount limited by law. The statutes of the States, inheriting the jealousy of large accumulation of property in the hands of ecclesiastical persons and religious houses which was so great an evil in England before, and even subsequent to the Reformation, have in many cases enacted that no religious society shall be

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57. Ch. 79, § 4, [1875] N.Y. Laws 70.

58. See, e.g., *First Reformed Presbyterian Church v. Bowden*, 14 Abb. N. Cas. 356 (Sup. Ct. 1883).

59. 211 N.Y. 214, 105 N.E. 199 (1914).

60. 222 N.Y. 305, 118 N.E. 800 (1918).

incorporated, with power to hold property yielding a greater annual income than a specified sum. Of course, where this is the law of the State, property acquired by such a corporation beyond the sum limited is liable to escheat to the commonwealth. Within that limit there is the same freedom of acquisition which belongs to a natural person. And where property has been held for the use of an unincorporated religious society, it will, upon its subsequent incorporation become vested at once, by force of the law, in that corporate body. No conveyance is necessary. So an agreement with individual members of a society to convey land to them for the site of a church will be enforced after they are incorporated, and a conveyance will be decreed to the corporate body.⁶¹

This statement by Mr. Justice Strong fairly reflects the situation in the nineteenth century in most states that had enacted general incorporation laws. Regulation was the theme in many of these acts. States varied in the scope and severity of the conditions imposed on the exercise of the power to take, hold, lease, mortgage, and sell or otherwise dispose of the corporation's property. Maine, for example, required a prior appraisal by "three discreet persons, under oath, to be elected by ballot at a legal meeting of [the] owners or proprietors" of any property that the corporation wished to sell.⁶² Georgia gave the corporation power to do any act not contrary to Georgia law, but it limited land holdings to an amount "absolutely necessary to carry into effect the objects of the incorporation."⁶³ Michigan placed no limit on the amount of land that could be held, but it required a prior judicial approval of any sale of property.⁶⁴

Such limitations on land holdings remained as vestiges of the English mortmain laws, which were originally inspired by the fear that a corporation with perpetual succession could acquire vast amounts of property and thereby monopolize the soil.⁶⁵ While the early restrictions have generally been abandoned, some states continue to impose various limitations on property holdings.⁶⁶

A further interesting aspect of the nineteenth century incorporation laws was the limitations placed upon the class of incorporators and voting members of the resultant corporation. Many of the statutes required that this class could include only those who were of

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61. W. STRONG, *supra* note 6, at 69-70.

62. Ch. 172, § 2, [1855] Me. Laws 197.

63. Act of Dec. 28, 1843, §§ 1-2, [1842-43] Ga. Acts 108.

64. Act of Feb. 13, 1855, § 19, [1855] Mich. Laws 317.

65. See 3 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 437-38 (1950); C. ZOLLMANN, *supra* note 6, at 164-68; Joslin, "Mortmain" in Canada and the United States: A Comparative Study, 29 CAN. B. REV. 621 (1951).

66. See text accompanying notes 161-64, 242-46 *infra*.

full age.⁶⁷ At least one statute restricted the class even further, to males of full age and to Christians.⁶⁸ Some of these requirements exist to the present day.⁶⁹

E. *Two Case Histories*

The abuses that may result from governmental manipulation of the corporate privilege are strikingly illustrated by the experiences of two churches: the Church of Jesus Christ of Latter-Day Saints (Mormons) and the Roman Catholic Church.

1. *The Mormons*

The early corporate history of the Mormon Church is a prime example of governmental regulation with a vengeance. The federal government effectively stripped the Mormon Church of the use of the corporate privilege primarily because of the Church's advocacy of polygamy, a form of marriage considered by many non-Mormons to be immoral.⁷⁰

67. *E.g.*, ME. REV. STAT. ch. 12, § 1 (1857); Act of Feb. 13, 1855, § 2, [1855] Mich. LAWS 313. See R. TYLER, *supra* note 6.

68. *E.g.*, 1 MD. CODE OF GEN. LAWS art. 26, § 88 (1860). See generally R. TYLER, *supra* note 6.

69. For example, N.Y. RELIG. CORP. LAW § 43(6) (McKinney Supp. 1972) reads as follows:

Male persons of full age belonging to the parish, who have been baptized and are regular attendants at its worship and contributors to its support for at least twelve months prior to such election or special meeting or since the establishment of such parish, shall be qualified voters at any such election or special meeting, and also, whenever so permitted, by the canons of the diocese, women having the like qualifications may vote at the annual elections and special meetings of any parish of such diocese, whenever such parish shall so determine in the manner provided in section forty-six of this chapter.

70. Congress denounced polygamy and enacted a statute making its practice illegal in all United States territories. Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501. This statute was upheld in *Reynolds v. United States*, 98 U.S. 145 (1879). Even today, a person who has been convicted of bigamy is prohibited from voting in territorial elections.

No polygamist, bigamist, or any person cohabitating with more than one woman, and no woman cohabitating with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States has exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory, or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States.

48 U.S.C. § 1461 (1970). This restriction is a carry-over from the period when the United States was actively engaged in the persecution of the Mormon Church and its members. The section was passed in 1882, Act of March 22, 1882, ch. 47, § 8, 22 Stat. 31, twenty years after the Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501 ("An Act to punish and prevent the practice of Polygamy in the Territories of the United States and other Places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah"), and has remained in effect ever since. For a discussion of early decisions against polygamy, see L. PFEFFER, *CHURCH, STATE, AND FREEDOM* 645-50 (rev. ed. 1967).

The Mormon Church was originally incorporated in 1851 by an act of the so-called State of Deseret⁷¹—a provisional government set up by the Mormons in what is now the State of Utah. After the territorial government of Utah was set up by Congress,⁷² the territorial legislature reenacted and specifically approved the original act.⁷³ In 1862, Congress passed an act that annulled this incorporation of the Mormon Church by the Utah territorial legislature.⁷⁴ The federal act did not disenfranchise the Church, but was intended to “annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances.”⁷⁵ The act provided for a mandatory fine and sentence of up to five hundred dollars and five years imprisonment for anyone convicted of bigamy.⁷⁶ The act further provided:

[I]t shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any Territory of the United States during the existence of the territorial government of a greater value than fifty thousand dollars; and all real estate acquired or held by any such corporation or association contrary to the provisions of this act shall be forfeited and escheat to the United States: *Provided*, That existing vested rights in real estate shall not be impaired by the provisions of this section.⁷⁷

The fifty thousand dollar figure was well below the estimated wealth of the Mormon Church.⁷⁸

71. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 3 (1890).

72. Act of Sept. 9, 1850, ch. 51, §§ 1-17, 9 Stat. 453.

73. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 5 (1890). The text of the act may be found in 136 U.S. at 3-4.

74. Act of July 1, 1862, ch. 126, § 2, 12 Stat. 501.

75. Act of July 1, 1862, ch. 126, § 2, 12 Stat. 501.

76. Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501.

77. Act of July 1, 1862, ch. 126, § 3, 12 Stat. 501.

78. In *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 9 (1890), the government contended that the estimated worth of the Church was approximately 3 million dollars. The irony of the entire affair is that, after the Supreme Court upheld the validity of the legislation in question and the appointment of the receiver thereunder, very little property was seized. The United States Attorney for Utah reported in 1890 that the following property had been seized:

4,732 shares of Deseret Telegraph Stock	(no present value)
800 shares of city gas stock, par value \$100	\$ 80,000.00
Cash on hand in various banks	291,812.83
Credits due on sheep	10,000.00
Total	\$381,812.83

1891 ATTY. GEN. ANN. REP. 247.

However, since the act had exempted from its scope all property acquired by the Church under the original incorporation statute,⁷⁹ it apparently did not have the desired effect of limiting the Church's power. Therefore, in 1887, Congress amended the act to provide for termination of the corporate status of the Mormon Church. The Church's property, except for houses of worship, parsonages, and cemeteries,⁸⁰ was to escheat to the United States, and the proceeds thereof were to be applied to the common school fund of the territory.⁸¹ The Attorney General of the United States was given the power to wind up the affairs of the Church and to secure the decrees necessary to effectuate the purpose of the act.⁸² The act also provided that religious organizations located in a territory of the United States could hold only "so much real property for the erection or use of houses of worship, and for such parsonages and burial grounds as shall be necessary for the convenience and use" of the organization and required that such property was to be held in the names of court-appointed trustees.⁸³

In a subsequent action brought by the Attorney General to enforce the act, the supreme court of Utah appointed a receiver to wind up the affairs of the corporation and made findings substantially in favor of the United States.⁸⁴ The church appealed this decision to the Supreme Court of the United States and alleged that the act constituted an impairment of the contract between the Church and the Territory of Utah. The Supreme Court affirmed⁸⁵ in an opinion condemning the Mormons and their practices.⁸⁶ The Court ruled that

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79. Act of July 1, 1862, ch. 126, § 2, 12 Stat. 501.

80. Act of March 3, 1887, ch. 397, § 13, 24 Stat. 635.

81. Act of March 3, 1887, ch. 397, §§ 13, 17, 24 Stat. 635.

82. Act of March 3, 1887, ch. 397, § 17, 24 Stat. 635.

83. Act of March 3, 1887, ch. 397, § 26, 24 Stat. 635.

84. *United States v. Church of Jesus Christ of Latter-Day Saints*, 5 Utah 361, 15 P. 473 (1887).

85. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

86. For example, the Court viewed the issues as follows:

It is distinctly stated in the pleadings and findings of fact, that the property of the said corporation was held for the purpose of religious and charitable uses. But it is also stated in the findings of fact, and is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress—notwithstanding all the efforts made to suppress this barbarous practice—the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine,

charters granted by a territory are subject to the approval of Congress and that, therefore, rights under the Utah charter are subject to congressional divestiture. Congress, in its role as *parens patriae*, has the power to annul the acts of the territorial legislature, to confiscate funds held by the Church under the charter, and to dispense any money so obtained in accordance with the *cy pres* doctrine.⁸⁷

In 1890, the Church submitted to federal law and abolished the practice of polygamy by official decree.⁸⁸ Congress eventually resolved, in 1893, to have the receiver, who had been appointed to hold the confiscated funds, deduct his expenses and return the property to the Church for use in charitable projects.⁸⁹

The entire affair amply documents the idea that the law regards the incorporation process as a state-endowed privilege flowing from the exercise of sovereignty. It also demonstrates that the state can and may utilize the grant or withdrawal of such a privilege to force ideological change or to punish those organizations of which it disapproves.⁹⁰ Although it is true that, except for section 17, which

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and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society.

136 U.S. at 48-49.

87. The Court brushed aside the religious freedom argument on the ground that, since the government had the right to prohibit polygamy in federal territories, a church organization could not claim a right to use its funds for the purpose of promoting and propagating the unlawful practice as an integral part of its religious usages. 136 U.S. at 49-50.

88. The announcement read:

This practice [plural marriage] was established as a result of direct revelation, and many of those who followed the same felt that they were divinely commanded so to do. For ten years after plural marriage had been introduced into Utah as a Church observance, no law was enacted in opposition to the practice. Beginning with 1862, however, Federal statutes were framed declaring the practice unlawful and providing penalties therefor. The Church claimed that these enactments were unconstitutional, and therefore void, inasmuch as they violated the provision in the national Constitution forbidding the government making laws respecting any establishment of religion or prohibiting the free exercise thereof. Many appeals were taken to the national court of final resort, and at last a decision was rendered sustaining the laws as constitutional and therefore binding. The Church, through its President, thereupon discontinued the practice of plural marriage, and announced its action to the world, solemnly placing the responsibility for the change upon the nation by whose laws the renunciation had been forced. This action has been approved and confirmed by the official vote of the Church in conference assembled.

L. PFEFFER, *supra* note 70, at 649.

89. Jt. Res. 11, 53d Cong., 1st Sess., 28 Stat. 980 (1893).

90. While the United States may well have had the power to outlaw the practice of polygamy, this power should not, as the dissent points out, have included the authority

specifically dissolves the Mormon Church,⁹¹ the 1887 act⁹² is phrased in general terms, it is equally true that the act had only one apparent goal.⁹³ Such use of the corporate privilege as a club to enforce ideological conformity demonstrates the wisdom and fairness underlying general incorporation laws.⁹⁴

2. *The Roman Catholic Church*

The experience of the Roman Catholic Church in this country presents an even more fundamental example of potential abuse of the power to grant or deny the corporate privilege. In the case of the Catholic Church, the factor that motivated governmental policy was not that the church advocated what the government considered to be immoral acts, but that it had a hierarchical structure that many found offensive. The same desire for local, democratic control that had helped fan the fires of the American Revolution swept through the Catholic laity in many areas of the country in the early part of the nineteenth century. The fact that the Church had long been attacked, both in England and in the colonies, for its foreign control led many non-Catholics to support such a desire among the Catholic laity. The result was that the Catholic laity and the non-Catholic

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to confiscate the property of the Mormon Church: "Congress has the power to extirpate polygamy in any of the Territories, by the enactment of a criminal code directed to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals, or corporations, without office found, because they may have been guilty of criminal practices." 136 U.S. at 67 (Fuller, C.J., Field, Lamar, JJ., dissenting).

91. Act of March 3, 1887, ch. 397, § 17, 24 Stat. 635.

92. Act of March 3, 1887, ch. 397, 24 Stat. 635.

93. See *France v. Connor*, 161 U.S. 65 (1896), where the Court held that at least section 18 of the Act of March 3, 1887, ch. 397, 24 Stat. 635, applied only to the territory of Utah and not to any of the other territories.

94. The government remained adamant in its antipolygamy stance. In the enabling act authorizing Utah to form a state government, Congress stated:

And said convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State—First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship; *Provided*, That polygamous or plural marriages are forever prohibited. Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107. Utah's Constitution now contains almost identical language. UTAH CONST. art. III, ¶ first. When Grover Cleveland proclaimed Utah a state in 1896, he carefully noted that the requirement of prohibition of polygamous marriages had been fulfilled and ignored the other requirements. Proclamation of Jan. 4, 1896, No. 9, 29 Stat. 876. Subsequently, the enabling acts of Arizona (Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557), New Mexico (Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557), and Oklahoma (Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267) all contained similar provisions. Today, in addition to Utah, five other states prohibit polygamy by constitutional language. They are: Arizona (ARIZ. CONST. art. XX, ¶ second), Idaho (IDAHO CONST. art. 1, § 4), Montana (MONT. CONST. art. III, § 4), New Mexico (N.M. CONST. art. XXI, § 21), and Oklahoma (OKLA. CONST. art. 1, § 2).

majority combined in an attempt to reduce the power of the hierarchy over its American parishioners.⁹⁵ A stranger alliance would be hard to imagine.

To put the problem in perspective, it is first necessary to grasp traditional Catholic views concerning the church as a moral, juridical personality: "The Catholic Church, and the Apostolic See are moral persons by divine law, and have an innate right, independent of any civil power, to acquire, to hold, and to administer temporal goods. Single churches, and any other moral persons possessing juridical personality by ecclesiastical authority have a similar right, governed by the regulations of the sacred canons."⁹⁶ It became apparent that the civil authorities in the United States simply would not accept this viewpoint and that it had to be tempered to fit the prevailing political realities:

It is a foregone conclusion that, if the property rights of the Church are established by divine positive law, it is the will of God that they be recognized in the United States. But, because it is impossible under the Federal and State Constitutions of this country legally to recognize any Church as being divinely established, some other basis of recognition should be sought. This other mode of recognition is to be found in what has already been said about the natural right of men to hold property dedicated to religious purposes. In other words, since the United States does not seem to assume in her legislation that there is any divinely established religion, she should apply the principle which would have been applicable in case no special religion had actually been established by God.⁹⁷

This meant, in practice, that the Church fully intended to see that its property and membership in the United States were under the control of its hierarchy.⁹⁸ To nineteenth-century Americans, this meant government by a foreign sovereign.⁹⁹

The concept of democratic local lay control of the Church began in North Carolina and soon spread to Philadelphia, New York, and Norfolk, Virginia.¹⁰⁰ The advent of the trustee corporation gave laymen their opportunity to seize physical control of the local churches. As legal title to Church property became vested in local members as incorporated trustees, they begin to assert control over the prop-

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95. See generally P. DIGNAN, *supra* note 6; P. GUILDAY, *supra* note 6.

96. C. BARTLETT, *supra* note 6, at 1.

97. *Id.* at 9.

98. See *id.* at 22-23.

99. See, e.g., P. DIGNAN, *supra* note 6, at 192-95.

100. For general histories of the period, see P. DIGNAN, *supra* note 6; P. GUILDAY, *supra* note 6.

erty and used this control as a means of asserting authority over the hierarchy.¹⁰¹

Instead of proving to be a local aberration, the idea of lay control spread. It became a matter of significant concern at the several Councils of Bishops that met from time to time throughout the nineteenth century and the early part of the twentieth.¹⁰² The First Provincial Council, held in 1829, declared: "Since lay trustees have too often abused the power given them by the civil law to the great detriment of religion and not without scandal to the faithful, we very greatly desire that in the future no church shall be built or consecrated, unless it shall have been assigned by written instrument to the bishop in whose diocese it is to be built, wherever this can be done . . . ."¹⁰³ The Fourth Provincial Council, held in 1840, again stressed this solution and passed a decree "insisting upon the necessity of properly securing all movable and immovable property and stating that if this security could be obtained in no other way, then the property was to be handed down by means of last wills and testaments, drawn up according to the provisions of civil law."¹⁰⁴ In 1843, at the Fifth Provincial Council, the earlier decree was modified to require that "[e]ach bishop . . . within three months after his consecration . . . make a will securing the ecclesiastical property in his charge by the laws of his State and . . . deposit a copy of the will with the archbishop."¹⁰⁵ The First and Second Plenary Councils, held in 1852 and 1866, again stressed the importance of holding the title of property in the name of the bishop in whose diocese the property was located.¹⁰⁶ However, by the time of the Third Plenary Council in 1884, worry over the legal complications that could result from adherence

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101. In some instances . . . Catholic laymen of that day carried over into the trustee system the policy and regulations of non-Catholic American congregations, and gradually the fatal tendency of regarding their priests as "servants to perform religious services" became apparent in their attitude. There was, moreover, the belief present among many laymen that the clergy should be relieved of all the worries and anxieties attendant upon the temporal management of church affairs, and having excluded the priests from this material attention, they gradually excluded them from all control of the property incorporated in the name of the congregation. Once this right was claimed, as legally it could be in the courts, the trustees arrogated the further power of dismissing any priest who attacked the system and of selecting the clergymen who were amenable to dictation from themselves. In this way, unworthy priests were intruded into congregations, and when episcopal authority for the good of religion attempted to exercise a restraining and pruning hand upon such restrictions, attack, rebellion, and schism were the inevitable result.

P. GUILDAY, *supra* note 6, at 6-7.

102. See C. BARTLETT, *supra* note 6, at 56-59.

103. C. BARTLETT, *supra* note 6, at 57.

104. P. GUILDAY, A HISTORY OF THE COUNCILS OF BALTIMORE (1791-1884), at 126 (1932).

105. *Id.* at 138.

106. See P. GUILDAY, *supra* note 104, at 180, 208.

to this practice was rampant.¹⁰⁷ The Council declared that, depending on the state's statute, the bishop could hold title to church property under several legal theories, either as a corporation sole, as trustee for the diocese, or as an individual with absolute title in fee simple.¹⁰⁸ Although in the eyes of the Church he would be merely the administrator of the property, under the law he would have all the rights and duties of any other owner of property.¹⁰⁹

Any fear that the Church might have had about legal complications proved to be well-founded. In 1888, the Roman Catholic archbishop of the diocese of Cincinnati was sued on personal debts amounting to some 3.5 million dollars. The debts had actually been incurred by his brother, the vicar-general of the diocese, who had been accepting deposits of money from individual Catholics and lending it out again at interest. The archbishop had assumed all of the debts and made a general assignment of his personally owned property for the benefit of his creditors. The assignee sued the bishop to recover church property held by the bishop in fee simple, alleging that it was included within the scope of the assignment. Denying the requested relief, the trial court found that the church property was, in reality, held in trust for the benefit of the various congregations that had originally purchased or donated it. The supreme court of Ohio affirmed,¹¹⁰ citing canon and civil law to the effect that the bishop had no power to bind church property for his personal debts. Despite this victory, the Church wanted to be certain that there could be no pillage of its property. In 1911, it passed a decree forbidding bishops to hold church property in fee simple.¹¹¹

The entire problem arose because of the lack of incorporation statutes satisfactory to the Church. The Church favored the use of the corporation sole, but the notion of a one-man corporation, with all of its concomitant powers, was not generally acceptable to civil authorities,¹¹² and the Church was generally unsuccessful in its efforts

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107. C. BARTLETT, *supra* note 6, at 23.

108. *See id.*

109. *Id.*

110. *Mannix v. Purcell*, 46 Ohio St. 102, 24 N.E. 595 (1888).

111. "If there is no provision for corporations sole, then the Bishop, may, as a last resort, hold the property as trustee. This trustee tenure is not expressly endorsed in the Document of 1911 but it is by implication, since the only other possibility, fee simple tenure, is abolished." B. BROWN, *supra* note 6, at 145.

112. *See* C. BARTLETT, *supra* note 6, at 79. "A corporation sole, or one composed of one person, is not lawful in Michigan [not true anymore—see note 209 *infra* and accompanying text]. This law is aimed at the 'one man power.' Churches might otherwise be tempted to lodge in some high dignitary unlimited power over property. The Catholic Church avoids the force of this by having the fee simple title of all her property vested in the bishop in his individual name and capacity." C. HOWELL, *supra* note 6, at 8.

to have the corporation sole adopted. The Church was placed on the defensive in some areas, such as Pennsylvania, where statutes were passed that required that the control of church property be vested in the lay members of the various congregations. No better example of the basic misunderstanding between church and state in this regard can be found than in a series of Pennsylvania cases involving the Catholic Church.

The controversy arose in the following manner: In 1896, an unincorporated congregation transferred title to the church property to the bishop of the diocese in trust for use of the congregation. Pennsylvania law required that

[w]hensoever any property, real or personal, shall hereafter be bequeathed, devised or conveyed to any ecclesiastical corporation, bishop, ecclesiastic or other person, for the use of any church, congregation or religious society, for religious worship or sepulture, or the maintenance of either, the same shall not be otherwise taken and held, or inure, than subject to the control and disposition of the laymembers of such church, congregation or religious society, or such constituted officers or representatives thereof . . . .¹¹³

In 1908, acting on a resolution passed by a majority of the congregation, ten lay members brought suit to compel the bishop to reconvey title to them as trustees for the congregation. The bishop defended on the theory that canon law required title to be held in his name, and the trial court agreed and denied the writ. The supreme court of Pennsylvania reversed,¹¹⁴ holding that, since canon law is subordinate to civil law, civil law must be followed when the two conflict.¹¹⁵ Since the bishop was only holding title under a dry, naked trust, the beneficiary could terminate it in the fashion desired.

Following this decision, the congregation split into two opposing factions, each of which held its own congregational meeting. The faction favorable to the bishop purported to convey the church property to him; the faction opposed to the bishop declared that no such reconveyance had been made. The probishop faction began suit to compel the reconveyance of title, and, after holding an in-court election to determine the wishes of a majority of the original congrega-

113. 2 Pa. Digest of Laws 1860 (12th ed. 1895), *as amended*, PA. STAT. ANN. tit. 10, § 81 (1965).

114. *Krauczunas v. Hoban*, 221 Pa. 213, 70 A. 740 (1908).

115. "[E]cclesiastical rules and regulations, . . . except as they are aided by legal conveyance, are ineffectual to divest any owner of his property. . . . [T]he position taken by defendant and sustained by the court, is in direct opposition to the law, whose supremacy, over all ecclesiastical rules and regulations, when rights of property are concerned, is not to be questioned." *Krauczunas v. Hoban*, 221 Pa. 213, 225, 70 A. 740, 745 (1908).

tion, the trial court found in favor of the probishop faction. The supreme court of Pennsylvania again reversed.¹¹⁶ It held that (1) by conducting its own election, the trial court had abdicated its responsibility to determine which side had the authority to convey the property,¹¹⁷ and (2) the plaintiffs had not given their representatives power to bind their group by such an election.¹¹⁸ The court then revealed that it had no concept of the scope of the disagreement between the parties:

Without any disposition to prejudice this case in any of its legal aspects, and certainly not intending so to do, this much may be said which, if it prejudice at all, prejudices equally. If this litigation involves any possible result worth a moment's controversy, it is concealed from our view. This may be a matter which concerns only the parties themselves; but we remark upon it for the reason that the case discloses sufficient to warrant an inference that neither side appreciates the insignificance of the stake for which they are contending. It is difficult to conceive of anyone bearing any relation whatever to a religious body, quite so incapable of intermeddling with the affairs of the congregation, as a trustee who simply holds the legal title to the church property. Such an one [sic] is trustee for no other purpose, and has nothing whatever, by reason of the fact that he holds the legal title, to do with any of the affairs of the congregation, or with the property itself, no matter whether he be prelate or layman. Whoever he be, he holds the title not under or because of any rules or regulation of any ecclesiastical body to which the congregation is affiliated or connected, but under the law of the land which allows the membership to indicate him as trustee.¹¹⁹

The case was remanded to the trial court to determine the matter by proper procedure.

On the third try, the trial court found that the congregation had voted at a lawfully called meeting to reconvey title to the bishop to hold as trustee subject to the laws, rules, and usages of the Catholic Church. Prior to the retrial, the bishop had excommunicated the faction opposed to him and had placed the church under interdict until such time as the property was conveyed to him. The supreme court of Pennsylvania reversed again, finding that title could not be conveyed in this fashion, since the majority had placed canon law above civil law.¹²⁰ The state simply did not recognize the temporal authority of the bishop.

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116. *Mazaika v. Krauczunas*, 229 Pa. 47, 77 A. 1102 (1910).

117. *Mazaika v. Krauczunas*, 229 Pa. 47, 50, 77 A. 1102, 1104 (1910).

118. *Mazaika v. Krauczunas*, 229 Pa. 47, 51, 77 A. 1102, 1104 (1910).

119. *Mazaika v. Krauczunas*, 229 Pa. 47, 52-53, 77 A. 1102, 1104-05 (1910).

120. *Mazaika v. Krauczunas*, 233 Pa. 138, 81 A. 938 (1911).

At this point, the opposition began to call non-Catholic ministers to hold services in the still interdicted church. The faction that was loyal to the bishop began suit to enjoin this activity; the trial court granted relief, only to be reversed yet a fourth time.¹²¹ The supreme court of Pennsylvania found that, since the bishop had refused to recognize civil law and had simply been trying to have his own way by means of the interdict, the decree should not have been granted. The court closed by saying:

[B]ecause the evidence in the case makes it apparent that the purpose of the bill is to accomplish indirectly that which we have repeatedly declared may not be done, the plaintiffs in the bill have no standing to ask equitable relief. If they desire to proceed further, their appeal must be first to the ecclesiastical authority which has forbidden Catholic worship in the church for rescission of the episcopal interdict that inhibits it.¹²²

By this time, six years had passed since the first suit had been instituted. The bishop, feeling further resistance was useless, rescinded the excommunication order, lifted the interdict, and dropped his demand that title be reconveyed to him. He then appointed a new priest, who was subsequently locked out by the opposition faction. The opposition now claimed that the interdict had severed all of the congregation's ties with the Catholic Church and that they were free to use the property as they saw fit. The loyal faction sued to enjoin the use of the property by non-Catholics, and the trial court again awarded it a decree. This time the supreme court of Pennsylvania affirmed.¹²³ The court held that the property had been dedicated to the Catholic Church and that the plaintiffs had a perfect right to prevent diversion from such use. The bishop, said the court, could not sever the ties by decree, as the defendants seemed to argue, since this would give him the power to subvert civil law that the court had consistently denied him.¹²⁴

Thus, the final result was that, while the laity controlled temporal affairs, it could do so only as a Catholic laity. The familiar implied trust doctrine was resorted to despite the language of the statute.

In subsequent litigation, the Pennsylvania supreme court recognized the power of the Catholic Church to extinguish¹²⁵ and to di-

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121. *Novickas v. Krauczunas*, 240 Pa. 248, 87 A. 686 (1913).

122. *Novickas v. Krauczunas*, 240 Pa. 248, 255, 87 A. 686, 688 (1913).

123. *Novicky v. Krauczunas*, 245 Pa. 86, 91 A. 657 (1914).

124. *Novicky v. Krauczunas*, 245 Pa. 86, 92-93, 91 A. 657, 659 (1914).

125. *Canovaro v. Brothers of the Order of Hermits of St. Augustine*, 326 Pa. 76, 191 A. 140 (1937).

vide¹²⁶ its parishes. Thus, the Church was at least marginally recognized as a political entity with the power to create its own geographic subdivisions. Other state courts gave like recognition under various factual circumstances,¹²⁷ while still others denied any temporal authority whatsoever to the Catholic hierarchy.¹²⁸

III. RELIGIOUS CORPORATIONS IN THE UNITED STATES TODAY

In the foregoing section, an effort was made to portray, in at least a summary way, the general history of the extension of the corporate privilege to religious bodies in the United States. It has been a tangled history, and, as experience, particularly in states like Utah and Pennsylvania, has demonstrated, legislative control over granting, withholding, or terminating the corporate privilege could be manipulated as a means of attempting to exert control over a particular church body and its practices.

The long history of religious corporations has culminated in the United States with almost universal granting to church bodies of the privilege of incorporation, in accordance with procedures and limitations defined in the applicable legislation.¹²⁹ The state statutes display great variety in the forms and methods of incorporation allowed and in the powers that may be exercised by religious corporations. Some states have statutes particularly designed for the incorporation of ecclesiastical bodies,¹³⁰ while others allow churches to incorporate under either a general nonprofit corporation act¹³¹ or a general corporation act.¹³² In the survey of the state laws that follows, an attempt is made to give a bird's-eye view of the contemporary statutory pattern and also to give some indication of modern attitudes vis-à-vis ecclesiastical organizations and their powers.

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126. *In re Trustees of St. Casimir's Polish Roman Catholic Church*, 273 Pa. 494, 117 A. 219 (1922).

127. See *Chatard v. O'Donovan*, 80 Ind. 20 (1881); *Klix v. Polish Roman Catholic St. Stanislaus Parish*, 137 Mo. App. 347, 118 S.W. 1171 (Ct. App. 1909). Cf. *Heiss v. Vosburg*, 59 Wis. 532, 18 N.W. 463 (1884).

128. See *Levasseur v. Martin*, 11 La. Ann. 684 (1856); *Congregation of the Roman Catholic Church of St. Francis v. Martin*, 4 La. (4 Rob.) 62 (1843).

129. Only Virginia and West Virginia do not provide some form of corporate status to ecclesiastical organizations. See text accompanying notes 139-72 *infra*.

130. See text accompanying notes 173-93 *infra*.

131. See text accompanying notes 306-27 *infra*.

132. Hawaii, for example, covers all corporations, profit and nonprofit, in one code. HAWAII REV. STAT. ch. 416 (1968), as amended, (Supp. 1971). See also HAWAII REV. STAT. ch. 419 (1968).

A. *State Constitutional Provisions*1. *General*

Provisions in state constitutions relating specifically to religious corporations are rare, beyond those that exempt churches from taxation or guarantee no discrimination between sects or denominations.¹³³ Those states that do refer specifically to religious corporations in their constitutions usually do so for minor reasons.¹³⁴ Often, constitutional guarantees are explicitly included in order to assure continued enjoyment of rights and privileges recognized pursuant to the federal constitution or by decisional law.¹³⁵ In a few rare cases, constitutional provisions serve to define procedures and rules of religious organizations.¹³⁶

The constitutions of two states contain provisions that relate to landholding by ecclesiastical bodies. Kansas provides that title to all property required for church use must be held by trustees elected by the membership; this provision thus gives a preferred position to the trustee form of corporation, at least where property ownership is involved.¹³⁷ Maryland's constitution restricts all sales of realty prior to November 3, 1948, to, or in trust for, any ecclesiastical body to

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133. For a discussion of state constitutional provisions relating to religion, see C. ANTIEAU, P. CARROLL, & T. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* (1965).

134. For example, Alabama's constitution exempts "benevolent, educational, or religious corporations" from the corporate franchise tax. ALA. CONST. art. 12, § 229.

135. For example, Vermont's constitution states:

All religious societies, or bodies of men that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this State shall direct.

Vt. CONST. ch. II, § 64.

136. Massachusetts' constitution, for example, states:

As the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government;—therefore, the several religious societies of this commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses; and all persons belonging to any religious society shall be taken and held to be members, until they shall file with the clerk of such society, a written notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any such grant or contract which may be thereafter made, or entered into by such society;—and all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.

MASS. CONST. pt. 1, art. III.

137. KAN. CONST. art. 12, § 3.

those sales made with the prior or subsequent approval of the legislature.¹³⁸

2. *Virginia and West Virginia*

The constitutions of Virginia¹³⁹ and West Virginia¹⁴⁰ are unique in that they expressly prohibit the granting of a charter of incorporation to any church or religious denomination.¹⁴¹ The West Virginia constitutional provision was carried over from the Virginia constitution. Both provisions reflect the influence of Jefferson and Madison, who were skeptical of all forms of ecclesiastical power and saw the use of the corporate charter as a means of acquiring property to implement such power.¹⁴² Indeed, James Madison, when President, vetoed an act for the incorporation of the Episcopal Church for the District of Columbia on the ground that it would constitute a forbidden establishment of religion.¹⁴³ Since at an earlier time the Anglican Church, as the established church of Virginia and Maryland, enjoyed the status of a public corporation, whereas only local

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138. MD. CONST. Declaration of Rights art. 38. No consent is necessary after November 3, 1948, unless the legislature provides otherwise; so far it has not.

139. VA. CONST. art. IV, § 14:

The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law.

140. W. VA. CONST. art. 6, § 47:

No charter of incorporation shall be granted to any church or religious denomination. Provisions may be made by general laws for securing the title to church property, and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church, or religious denomination.

141. Missouri originally had a similar provision in its constitution of 1820, which stated that "no religious corporation can ever be established in this state." MO. CONST. art. 13, § 5 (1820). The Missouri constitution of 1865 stated:

[N]o religious corporation can be established in this State; except that by a general law, uniform throughout the State, any church, or religious society, or congregation, may become a body corporate, for the sole purpose of acquiring, holding, using, and disposing of so much land as may be required for a house of public worship, a chapel, a parsonage, and a burial ground, and managing the same, and contracting in relation to such land, and the buildings thereon, through a board of trustees selected by themselves; but the quantity of land to be held by any such body corporate, in connection with a house of worship or a parsonage, shall not exceed five acres in the country, or one acre in a town or city.

MO. CONST. art. 1, § 12 (1865).

The constitution of 1875 stated:

[N]o religious corporation can be established in this State, except such as may be created under a general law for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages and cemeteries.

MO. CONST. art. 2, § 8 (1875). The Missouri constitution no longer contains such a provision in any form.

142. See CHURCH AND STATE IN AMERICAN HISTORY 68-87 (J. Wilson ed. 1965).

143. For the full text of the veto message, see note 333 *infra*. For further discussion, see text accompanying note 333 *infra*.

congregations enjoyed a recognized corporate status in regard to the holding of property, it was understandable that Jefferson and Madison would view the extension of the corporate privilege to churches of a particular denomination as a means of restoring special privileges associated with establishment.¹⁴⁴

It is strange, however, that this prohibition on the incorporation of religious bodies has been retained in the Virginia and West Virginia constitutions to this day in view of the over-all movement in this country for permitting the incorporation of church bodies under general laws that are not designed to give a preferred position to any particular church.

Nevertheless, religious bodies in Virginia and West Virginia have not in fact been placed at a disadvantage as a result of the constitutional prohibitions. An explanation of the development in Virginia, however, cannot be commenced without an understanding of the law of charitable trusts in that state. In *Trustees of the Philadelphia Baptist Association v. Hart's Executors*,¹⁴⁵ the United States Supreme Court held that a bequest in trust for an unincorporated religious association was void for vagueness, since the validity of charitable devises was, for indefinite beneficiaries, dependent on the Statute of Elizabeth,¹⁴⁶ which had not been adopted by the Virginia legislature and was therefore not part of Virginia law. The Virginia supreme court subsequently adopted this interpretation in *Gallego's Executors v. Attorney General*,¹⁴⁷ thereby causing the whole development of the charitable trust doctrine in Virginia to be delayed and made dependent on statutory provisions.¹⁴⁸ This is not the occasion to develop at length the further history of the decisional law in Virginia respecting charitable trusts; however, it should be noted that, despite varying and sometimes contradictory statements on the subject,¹⁴⁹ the Virginia court seems to continue to adhere to the *Gallego* doctrine, except to the extent that it has been overruled or modified by

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144. On the Anglican establishment in Virginia and Maryland, see E. GAUSTAD, A RELIGIOUS HISTORY OF AMERICA 36-46, 74-79 (1966).

145. 17 U.S. (4 Wheat.) 1 (1819).

146. 43 Eliz. I, c. 4 (1601).

147. 30 Va. (3 Leigh) 450 (1832).

148. See G. BOGERT, TRUSTS AND TRUSTEES § 322, at 647-49 (2d ed. 1964).

149. The Virginia court, in *Protestant Episcopal Educ. Soc. v. Churchman's Representatives*, 80 Va. 718, 765-66 (1885), held that *Gallego* had been wrongly decided. In *Trustees v. Guthrie*, 86 Va. 125, 151, 10 S.E. 318, 325 (1889), the court declared that the *Churchman* case had shown that *Gallego* was never the "law in this state." In *Fifield v. Van Wyck's Exr.*, 94 Va. 557, 27 S.E. 446 (1897), the court distinguished *Churchman* and *Guthrie* as referring to gifts to corporations only and reverted to the *Gallego* doctrine.

statute.¹⁵⁰ In West Virginia, a statute was deemed to have overruled the *Gallego* doctrine completely, and the use of the charitable trust as a means of acquiring title for religious purposes seems to be fully recognized in that state.¹⁵¹

Quite apart from the charitable trust question, the constitutions of both Virginia and West Virginia recognize the authority of the legislature to adopt legislation to permit the acquisition of title to church property. Both constitutions provide that the state legislatures may, by law, establish standards by which title to church property may be secured.¹⁵² Pursuant to these provisions, legislation in both states in effect authorizes the transfer of property in trust to trustees to be used for religious purposes.¹⁵³ It is hard to perceive a distinction between this use of the trust device and the trustee corporation. Moreover, the constitutional prohibitions against incorporation of churches apply to ecclesiastical societies but not necessarily to other church-related groups.¹⁵⁴ Also, the constitutional prohibition does not bar the recognition of charitable bequests to a church incorporated under the laws of another state.¹⁵⁵

In both Virginia and West Virginia, statutes overcome, at least for certain specified purposes, the common law disability of voluntary associations to receive real property in their own names.¹⁵⁶ The statutes also allow the elected trustees of such organizations to sue and be sued in their own names on behalf of their memberships for damages to property or recovery of a debt.¹⁵⁷ The trustees also have the power to take, hold, and encumber real property.¹⁵⁸ In West Virginia, the death of any or all of the trustees will not abate a suit instituted against a religious body for or on account of real or personal property held or claimed by the trustees or for or on account

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150. As recently as *Maguire v. Lloyd*, 193 Va. 138, 142, 67 S.E.2d 885, 888 (1951), the Virginia supreme court stated that *Gallego* is good law unless modified by statute.

151. *Sands v. Security Trust Co.*, 143 W. Va. 522, 534-35, 102 S.E.2d 733, 741 (1958), citing W. VA. CODE § 35-1-7 (1966), as amended, W. VA. CODE § 35-1-7 (Supp. 1970).

152. VA. CONST. art. IV, § 14; W. VA. CONST. art. 6, § 47.

153. VA. CODE ANN. §§ 57-7 to -8 (1969); W. VA. CODE ANN. §§ 35-1-1, -7 (1966), as amended, W. VA. CODE ANN. § 35-1-7 (Supp. 1970).

154. Compare *Jordan's Admr. v. Richmond Home for Ladies*, 106 Va. 710, 56 S.E. 730 (1907), with *Wilson v. Perry*, 29 W. Va. 169, 1 S.E. 302 (1886).

155. See *Trustees v. Guthrie*, 86 Va. 125, 10 S.E. 318 (1889); *Osenton v. Elliott*, 73 W. Va. 519, 81 S.E. 837 (1914).

156. VA. CODE ANN. § 57-7 (1969); W. VA. CODE ANN. § 35-1-1 (1966).

157. VA. CODE ANN. § 57-11 (1969); W. VA. CODE ANN. § 35-1-7 (1966), as amended, W. VA. CODE ANN. § 35-1-7 (Supp. 1970).

158. VA. CODE ANN. §§ 57-7, -11 (1969); W. VA. CODE ANN. §§ 35-1-7, -9 (1966), as amended, W. VA. CODE ANN. §§ 35-1-7, -9 (Supp. 1970).

of matters relating to the property,¹⁵⁹ and the trustees are held accountable to the organization.¹⁶⁰

Land holdings by trustees are limited to a total of four acres per congregation in an incorporated West Virginia city, town, or village¹⁶¹ and to fifty acres per congregation in a Virginia city or town.¹⁶² Virginia limits congregations outside of towns to two hundred fifty acres of land at any one time,¹⁶³ while West Virginia limits such congregational land holdings to sixty acres.¹⁶⁴ Sales and mortgages of land in Virginia by trustees of a diocese, congregation, church, or religious denomination may be accomplished only according to court order.¹⁶⁵ In West Virginia, sales and mortgages need not be court-approved but there must be prior publication of intent in a county newspaper.¹⁶⁶ Virginia allows a member of the church, in his own name and on behalf of the other members and subject to the approval of the church's governing body, to bring a legal action against the trustees to compel them to sell or mortgage the society's property in accordance with the wishes of the society.¹⁶⁷ West Virginia, on the other hand, allows suit by the congregation whenever the trustees propose to sell or encumber improperly the property of the society.¹⁶⁸

A provision in the Virginia code that allows one individual to hold title to church property in general¹⁶⁹ creates, in effect, a corporation sole for hierarchical churches. The individual may deal with the property as he wishes, so long as he acts within the rules of his own denomination and the laws of Virginia.¹⁷⁰ It is indeed hard to

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159. W. VA. CODE ANN. § 35-1-7 (1966), *as amended*, W. VA. CODE ANN. § 35-1-7 (Supp. 1970).

160. W. VA. CODE ANN. § 35-1-7 (1966), *as amended*, W. VA. CODE ANN. § 35-1-7 (Supp. 1970).

161. W. VA. CODE ANN. § 35-1-8 (1966).

162. VA. CODE ANN. § 57-12 (Supp. 1973). The city or town council may by ordinance authorize up to fifty acres if the land is to be, and actually is, used for certain specified purposes.

163. VA. CODE ANN. § 57-12 (Supp. 1973).

164. W. VA. CODE ANN. § 35-1-8 (1966).

165. VA. CODE ANN. § 57-15 (1969).

166. W. VA. CODE ANN. § 35-1-10 (1966), *as amended*, W. VA. CODE ANN. § 35-1-10 (Supp. 1970). In lieu of such publication, the notice may be read at the principal services of the church, parish, congregation, or branch on at least two separate occasions during a period of two weeks. W. VA. CODE ANN. § 35-1-10 (1966), *as amended*, W. VA. CODE ANN. § 35-1-10 (Supp. 1970).

167. VA. CODE ANN. § 57-14 (1969). *See also* VA. CODE ANN. § 57-13 (1969) (provides for suits in equity against a trustee to compel him to apply any real or personal estate for the use or benefit of the church).

168. W. VA. CODE ANN. § 35-1-11 (1966).

169. VA. CODE ANN. § 57-16 (1969).

170. VA. CODE ANN. § 57-16 (1969).

distinguish this statutory arrangement from the corporation sole as it exists in many American jurisdictions.

West Virginia allows the property of an extinct church to be disposed of according to the terms of the original grant, the congregation's bylaws, or the bylaws of the denomination to which it was attached, upon the suit in a circuit court of any trustee, member of the congregation, or official of the denomination to which it was attached prior to extinction.¹⁷¹ Virginia has no similar provision.¹⁷²

In summary, both Virginia and West Virginia give to their religious bodies powers very similar to those given through the use of the corporate form in other states, even though under the constitutional provisions the former states may not authorize the incorporation of ecclesiastical societies.

B. *State Statutory Patterns*

1. *General*

State legislation granting the privilege of incorporation for religious purposes reveals a great diversity in types of corporations that may be organized by churches, applicability to specific church bodies, and limitations imposed on ecclesiastical corporations. Undoubtedly, a large part of this variety is attributable to the long history of religious corporations and the carry-over of some ideas from the past. For instance, the enactment of a special statute for the incorporation of churches of a particular denomination may be seen as a carry-over of both the practice of granting special corporate charters and the established status of some early churches. In many cases, the present legislation, which reflects, in some instances, a combination of statutes tailored to specific church bodies and general ecclesiastical corporations statutes, shows nothing more, perhaps, than a legislative adaptation to the problem in successive eras and an unwillingness to disturb organizations organized under earlier statutes. The legislation probably also reflects a legislative concern that any attempt to impair corporate privilege and powers under earlier statutes might be held invalid as an impairment of the obligation of contracts. In any event, as pointed out earlier, one cannot understand the kaleidoscopic pattern of religious corporations law in this country without an awareness of history.

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171. W. VA. CODE ANN. § 35-1-12 (1966).

172. Since there are no cases and no statutory provisions relating to disposition of the property of an extinct church, one can only speculate on what a court might do when various people claim such property. Most likely it would award the property in accordance with the *cy pres* doctrine.

It should be noted here that some of the statutes discussed in this paper do not deal only with religious organizations, but also include within their scope charitable, fraternal benefit, or educational organizations. However, the religious element is clearly a major concern in all the statutes. The authors have attempted to distinguish such statutes from those that are genuinely unrestricted (except for the requirement that the corporations formed thereunder be non-profit in scope) in their application. A good example of this latter form is the Model Non-Profit Corporation Act.

2. Statutes Tailored to Specific Churches

Sixteen states¹⁷³ provide specific corporate forms for certain named religious denominations. Most of these states provide specific statutory forms for only one to four denominations.¹⁷⁴ At least three states provide for fourteen or more separate denominations.¹⁷⁵ New York leads the field, with specific provisions for more than thirty-five different denominations of varying degrees of size and reputation.¹⁷⁶ Most of the states that have such specific laws are located east of the Mississippi. Provisions for specified denominations are largely con-

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173. They are Connecticut, Delaware, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, Vermont, and Wisconsin.

174. *E.g.*, CONN. GEN. STAT. ANN. §§ 33-265 to -276, -279 to -281a (1960), *as amended*, CONN. GEN. STAT. ANN. §§ 33-268 to -276, -281a (Supp. 1973); MD. ANN. CODE art. 23, §§ 271-313 (1973).

175. MICH. COMP. LAWS ANN. ch. 458 (1967); N.J. STAT. ANN. tit. 16 (1939), *as amended*, N.J. STAT. ANN. tit. 16 (Supp. 1973); N.Y. RELIG. CORP. LAW (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW (McKinney Supp. 1972).

176. New York has statutory provisions for the following demoninations (all citations are to N.Y. RELIG. CORP. LAW (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW (McKinney Supp. 1972)): American Patriarchal Orthodox Church (§§ 51-a to 54-a); Apostolic Episcopal (§§ 50 to 59-b); Baptist (§§ 130-40); Byelorussian Autocephalic Orthodox Church in America (§§ 336-52); Christian Orthodox Catholic Churches of the Eastern Confession (§§ 95-96); Christian Scientist (§§ 184 to 189-b); Church of Christ (Disciples) (§ 206); Church of the Nazarene (§§ 273-79); Congregational Christian (§§ 160-72); Evangelical United Brethren Church (§ 204-b); Free Baptist (§ 17); Free Churches (§§ 180-83); Free Methodist (§§ 225 to 225-o); General Assembly of Spiritualists (§§ 262-72); Holy Orthodox Church in America (§§ 50-aa to 50-mm); Holy Ukranian Autocephalic Orthodox Church in Exile (§§ 175-79); Independent Associated Spiritualists (§ 210); Jewish (§§ 207-09); National Spiritualist Association (§§ 300-06); Orthodox Church in America (§§ 105-08); Orthodox Greek Catholic (§§ 290-96); Presbyterian (§§ 60-70); Protestant Episcopal (§§ 40-49); Reformed Church in America (§§ 110-16); Reformed Dutch (§§ 110-16); Reformed Lutheran (§§ 110-16); Reformed Presbyterian (§§ 110-16); Religious Society of Friends (§§ 201-a to 203); Roman Catholic (§§ 90-92); Ruthenian Greek Catholic (§§ 100-02); Seventh Day Baptist (§ 17-a); Spiritual Science Mother Church, Inc. (§ 211); Unitarian and Universalist Societies (§§ 400-14); United Church of Christ (§§ 160-72); United Methodist (§§ 320-35); and United Society of Shakers (§ 202).

fined to older jurisdictions,¹⁷⁷ which have a fairly lengthy history with respect to ecclesiastical corporation laws,¹⁷⁸ while newer jurisdictions have concentrated on developing statutes that cover either ecclesiastical corporations in general¹⁷⁹ or nonprofit corporations as a whole.¹⁸⁰ The denominations most commonly provided for by specific state laws are the Protestant Episcopal Church,¹⁸¹ Methodist churches of various kinds,¹⁸² the Roman Catholic Church,¹⁸³ and the Eastern Orthodox Church.¹⁸⁴

Most of the present laws providing for the Eastern Orthodox

177. *E.g.*, N.J. STAT. ANN. §§ 16:6-1 to :6-3, :12-1 to :12-31, :15A-1 to :15A-6 (1939), *as amended*, N.J. STAT. ANN. §§ 16:6-1 to :6-3, :12-1 to :12-31, :15A-1 to :15A-6 (Supp. 1973); N.Y. RELIG. CORP. LAW (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW (McKinney Supp. 1972).

178. *See* text accompanying notes 40-46 *supra*. *See generally* M. HOFFMAN, *supra* note 6.

179. *E.g.*, WYO. STAT. ANN. §§ 17-123 to -137.1, -138 to -154 (1965), *as amended*, WYO. STAT. ANN. §§ 17-123 to -137.1 (Supp. 1973).

180. *E.g.*, WASH. REV. CODE ANN. §§ 24.03.005-.03.905 (Supp. 1972).

181. CONN. GEN. STAT. ANN. §§ 33-265 to -267 (1960); DEL. CODE ANN. tit. 27, § 114 (1953); MD. ANN. CODE art. 23, §§ 274A-312Q (1973); MASS. ANN. LAWS ch. 67, § 39 (1971); MICH. COMP. LAWS ANN. §§ 458.251-273 (1967); MINN. STAT. ANN. §§ 315.17-20 (1969); NEV. REV. STAT. §§ 82.300-390 (1971); N.J. STAT. ANN. §§ 16:12-1 to :12-31 (1939), *as amended*, N.J. STAT. ANN. §§ 16:12-1 to :12-31 (Supp. 1973); N.Y. RELIG. CORP. LAW §§ 40-49 (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW §§ 40-49 (McKinney Supp. 1972); VT. STAT. ANN. tit. 27, §§ 901-05 (1967), *as amended*, VT. STAT. ANN. tit. 27, §§ 901-05 (Supp. 1973); WIS. STAT. ANN. § 187.04 (1957).

182. CONN. GEN. STAT. ANN. §§ 33-268 to -276 (1960), *as amended*, CONN. GEN. STAT. ANN. §§ 33-268 to -276 (Supp. 1973) (Methodist Church); CONN. GEN. STAT. ANN. § 33-281a (Supp. 1973) (United Methodist Churches); MD. ANN. CODE art. 23, § 313 (1973) (Methodist Church); MASS. ANN. LAWS ch. 67, §§ 40-43 (1971), *as amended*, MASS. ANN. LAWS ch. 67, §§ 40-43 (Supp. 1973) (United Methodist Church); MICH. COMP. LAWS ANN. §§ 458.21-.33 (Methodist Episcopal Church), 458.41-.55 (Wesleyan Methodist Church), 458.61-.74 (Methodist Protestant Church), 458.81-.93 (Free Methodist Church) (1967); N.J. STAT. ANN. §§ 16:6-1 to :6-3 (1939) (Free Methodist Church); N.J. STAT. ANN. §§ 16:10A-1 to :10A-15 (Supp. 1973) (United Methodist Churches); N.Y. RELIG. CORP. LAW §§ 225 to 225-o (Free Methodist Church), 320-35 (United Methodist Church) (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW §§ 225 to 225-o, 320-35 (McKinney Supp. 1972); VT. STAT. ANN. tit. 27, §§ 861-66 (1967), *as amended*, VT. STAT. ANN. tit. 27, §§ 861-66 (1967), *as amended*, VT. STAT. ANN. tit. 27, §§ 861-66 (Supp. 1973) (United Methodist Church); WIS. STAT. ANN. § 187.15 (1957) (Methodist Church).

183. CONN. GEN. STAT. ANN. §§ 33-279 to -281 (1960); DEL. CODE ANN. tit. 27, §§ 115-18 (1953); MD. ANN. CODE art. 23, §§ 271-74 (1973); MASS. ANN. LAWS ch. 67, §§ 44-46 (1971); MICH. COMP. LAWS ANN. §§ 458.1-.2 (1967), *as amended*, MICH. COMP. LAWS ANN. §§ 458.1-.2 (Supp. 1973); N.J. STAT. ANN. §§ 16:15-1 to :15-17 (1939), *as amended*, N.J. STAT. ANN. §§ 16:15-1 to :15-17 (Supp. 1973); N.Y. RELIG. CORP. LAW §§ 90-92 (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW §§ 90-92 (McKinney Supp. 1972); [1869] R.I. Acts and Resolves 221, kept in force by R.I. GEN. LAWS § 7-6-1 (1970); WIS. STAT. ANN. § 187.12 (1957).

184. ILL. REV. STAT. ch. 32, § 187 (1971); LA. REV. STAT. ANN. §§ 12:481-483 (1969); MASS. ANN. LAWS ch. 67, § 55 (1971); N.H. REV. STAT. ANN. §§ 292:15-17 (1966); N.J. STAT. ANN. §§ 16:15A-1 to :15A-6 (Supp. 1973); N.Y. RELIG. CORP. LAW §§ 105-08 (McKinney Supp. 1972); WIS. STAT. ANN. § 187.17 (1957).

Church came about as the result of a wave of legislation in the early 1950's. The purpose of the states that enacted such laws seems to have been the protection of Eastern Orthodox property located in the United States from domination and control by Communist governments in the USSR and Eastern Europe.¹⁸⁵

It is understandable that the Roman Catholic Church has often been singled out for specific statutory treatment. In the early history of the country, legislation tended to discriminate against the Catholic Church, since it was feared that, with its hierarchical control, it would accumulate wealth and power incompatible with the American idea of democracy.¹⁸⁶ Earlier reference has been made to the extraordinary history of the Catholic Church under the incorporation laws of Pennsylvania, which, at least as originally designed, were intended to assure the control of a congregation's property by laymen rather than by the church hierarchy.¹⁸⁷ Great changes have occurred since that time. In the first place, a number of states specifically allow the incorporation of bishops of the church as corporations sole.¹⁸⁸ Most of the laws regarding the Roman Catholic Church provide for a mixed lay-clerical government for each parish, but the acts are so drawn as to leave control of the church personal and real property in the hands of the hierarchy.¹⁸⁹

While there does not appear to be any recognizable pattern in the state laws governing the incorporation of Protestant Episcopal

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185. *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church*, 363 U.S. 190 (1960); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952).

186. See text accompanying notes 95-128 *supra*.

187. See text accompanying notes 113-28 *supra*.

188. *E.g.*, ALA. CODE tit. 10, § 115 (1959); CAL. CORP. CODE § 10002 (West 1955). *Cf.* MICH. COMP. LAWS ANN. §§ 458.1-2 (1967), *as amended*, MICH. COMP. LAWS ANN. §§ 458.1-2 (Supp. 1973), which makes the bishop a quasi-corporation sole for the purposes of holding, alienating, and encumbering property.

189. See, *e.g.*, N.Y. RELIG. CORP. LAW § 91 (McKinney 1952), which states that the government of the incorporated church shall be composed of the bishop and vicar-general of the diocese, the rector, and two lay members of the congregation chosen by the clerical trustees. In *St. Nicholas Ruthenian Greek Catholic Church v. Bilanski*, 19 Del. Ch. 49, 162 A. 60 (Ch. 1932), a similar statutory pattern was challenged as "unreasonable and inequitable." The court replied:

I know of no authority by which this court would be justified in rebuilding the corporate structure in the manner prayed. Whether as a matter of policy it is unjust and inequitable for a religious organization's temporal affairs to be controlled by ecclesiastics rather than by the people of the congregation is a matter which would admit of a conflict of views. What any individual's views about it may be is of no importance. The law under which the corporation was created clearly admits of ecclesiastical control, and it would be going a great length indeed for this court to say that such a scheme of control is so unjust and inequitable as to not be permissible, especially when the very congregation in whose behalf the protest is now made assented to such control when the title was conveyed.

19 Del. Ch. at 53-54, 162 A. at 62.

or Methodist Churches, it should be noted that these churches, like the Orthodox and the Catholic Churches, do have a particular hierarchical structure and that whenever the attempt is made to fit corporate law to churches of this type, special and specific types of legislation are required. The congregational types of churches, on the other hand, more readily fit under the general incorporation laws.

Incorporation laws tailored to reflect the internal rules of specific churches present problems that general incorporation laws do not. Once the law of a church becomes codified by a state, the church loses its ability to modify its own rules, for a change in church structure has no legal effect without a corresponding amendment of the statute. Further attention will be paid to this problem later, and some consideration will be given to possible limitations that laws of this type may place on the constitutional freedom of churches to alter their own internal procedures.¹⁹⁰

In some instances, specifically tailored provisions may conflict with state constitutional provisions that prohibit the grant of special charters by the state legislature. The likelihood of a constitutional conflict increases as acts become more and more specific. For example, Nevada recently enacted a statute that incorporated the Episcopal Diocese of Nevada.¹⁹¹ The statute identifies the recipient of the grant quite explicitly. The Nevada constitution contains a provision that requires the use of general incorporation laws, as opposed to grants of special charters:

The Legislature shall pass no Special Act in any manner relating to corporate powers except for Municipal purposes; but corporations may be formed under general laws; and all such laws may from time to time, be altered or repealed.¹⁹²

There appears to be at least one other state—Maryland—that has an arguably similar situation.¹⁹³ The potential problem in Maryland

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190. At least one author has previously questioned the validity of incorporation laws tailored to reflect the internal rules of specific churches. See Casad, *supra* note 49, at 459.

191. NEV. REV. STAT. §§ 82.295-2957 (1971).

192. NEV. CONST. art. 8, § 1.

193. Instead of one law covering the entire Episcopal Church, Maryland has three separate statutory schemes covering: the Diocese of Maryland, MD. ANN. CODE art. 23, § 274A-297 (1973); the Diocese of Eaton, MD. ANN. CODE art. 23, §§ 298-312 (1973); and the Diocese of Washington, MD. ANN. CODE art. 23, §§ 312A-312Q (1973). Art. III, § 48 of the Maryland constitution provides:

Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes and except in cases where no general laws exist, providing for the creation of corporations of the same general character, as the corporation proposed to be created; and any act of incorporation passed in violation of this section shall be void.

seems more severe due to the great detail in which the statutes of that state appear to regulate the day-to-day affairs of the corporations involved.

3. *Types of Corporations*

Three basic types of ecclesiastical corporations are recognized in the United States: (1) the trustee corporation, (2) the membership corporation, and (3) the corporation sole.

A trustee corporation is a form of corporate body made up of elected trustees or other officials with similar powers and duties. The trustees themselves are the corporate body and wield all of the power given thereto except to the extent that a statute limits the scope of exercise of the power or imposes specified duties upon the trustees themselves.¹⁹⁴

The trustee corporation represents the earliest form of ecclesiastical corporation explicitly recognized by statute in the United States.¹⁹⁵ However, its use has been rather severely curtailed in recent years, and today its use is restricted in both scope and geographical area. Some eighteen jurisdictions, fifteen of them east of the Mississippi, recognize a form of the trustee corporation.¹⁹⁶ Of the eighteen, twelve¹⁹⁷ recognize at least one of the other two corporate forms for ecclesiastical bodies, and many of the twelve use the trustee form only sparingly.¹⁹⁸

194. See, e.g., ILL. REV. STAT. ch. 32, § 172 (1971) (makes trustees of religious corporations expressly subject to the members of the congregation); MICH. COMP. LAWS ANN. §§ 458.29, .51, .68, .87, .104, .207, .257, .306, .406, .426, .457, .530 (1967) (several trustee corporations provided for may not sell or mortgage real property without the approval of the membership or a specific portion thereof, or of the hierarchy); NEV. REV. STAT. § 86.130 (1969) (trustees may not sell or mortgage real property without prior court approval).

195. See text accompanying notes 43-60 *supra*. See also C. ZOLLMANN, *supra* note 6, at 113-16.

196. CONN. GEN. STAT. ANN. § 33-279 (1960); DEL. CODE ANN. tit. 27, § 101 (Supp. 1968); DEL. CODE ANN. tit. 27, § 102 (1953); D.C. CODE ANN. §§ 29-502, -507 (1967); ILL. REV. STAT. ch. 32, §§ 172, 182 (1971); MD. ANN. CODE art. 23, §§ 256, 271, 282, 309, 312M (1973); MASS. ANN. LAWS ch. 67, §§ 40-41 (1971); MICH. COMP. LAWS ANN. §§ 450.159, 458.101, .257, .401, .421 (1967); MINN. STAT. ANN. §§ 315.01, .15, .16 (1969); MO. ANN. STAT. 352.060 (1966); NEV. REV. STAT. §§ 82.320, 86.120 (1967); N.H. REV. STAT. ANN. §§ 292:4, 306:4 (1966); N.J. STAT. ANN. §§ 16:1-2, :1-32, :1-34, :1-37, :1-40, :3-3, :11-2, :11-18, :12-2, :13-1, :15-1, :15-9, :16-1, :16-9, :17-1, :17-5 (1939), *as amended*, N.J. STAT. ANN. § 16:11-18 (Supp. 1973); N.Y. RELIG. CORP. LAW §§ 41, 181 (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW § 41 (McKinney Supp. 1972); N.C. GEN. STAT. § 61-2 (1965); OHIO REV. CODE ANN. § 1715.18 (Page 1964); VT. STAT. ANN. tit. 27, §§ 701, 861, 901 (1967), *as amended*, VT. STAT. ANN. tit. 27, § 861 (Supp. 1973); WIS. STAT. ANN. §§ 187.05, .12, .15 (1957); WYO. STAT. ANN. §§ 17-138 to -139, -142 (1965).

197. Connecticut, District of Columbia, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Vermont, Wisconsin and Wyoming.

198. For example, Connecticut limits its use to the Roman Catholic Church. CONN.

The membership corporation, on the other hand, is recognized in the vast majority of American jurisdictions. Some forty-three separate jurisdictions recognize it,¹⁹⁹ thirty-one of them to the exclusion of any other form of ecclesiastical corporation.²⁰⁰ The membership corporation is essentially a corporate body made up of the members of the congregation. The members, collectively, are the corporate body and are akin to the shareholders of a business corporation, save that there are usually no stock certificates issued,²⁰¹ and one need not buy into the corporation in the usual sense to become a voting

GEN. STAT. ANN. § 33-279 (1960). Massachusetts religious corporations are generally membership corporations, MASS. ANN. LAWS ch. 67, §§ 47-49 (1971), but the Methodist Episcopal Church, MASS. ANN. LAWS ch. 67, §§ 40-41 (1971), and the Roman Catholic Church, MASS. ANN. LAWS ch. 67, §§ 44-46 (Supp. 1972), are both trustee corporations. Michigan limits its use to Baptist, MICH. COMP. LAWS ANN. § 458.101 (1967), Evangelical, MICH. COMP. LAWS ANN. § 458.451 (1967), Episcopal, MICH. COMP. LAWS ANN. § 458.257 (1967), and Reformed Protestant churches, MICH. COMP. LAWS ANN. § 458.401 (1967). New York restricts its use to Episcopal, N.Y. RELIG. CORP. LAW § 41 (McKinney Supp. 1972), and Free churches, N.Y. RELIG. LAW CORP § 181 (McKinney 1952).

199. ALA. CODE tit. 10, §§ 124-25 (1959); ALAS. STAT. § 10.20.051 (1968); ARIZ. REV. STAT. ANN. § 10-451 (Supp. 1972); ARK. STAT. ANN. § 64-1914 (1966); CAL. CORP. CODE § 9200 (West 1955); COLO. REV. STAT. ANN. §§ 31-19-1, -20-1, -21-1 (1963); CONN. GEN. STAT. ANN. § 33-264(a) (Supp. 1973); D.C. CODE ANN. §§ 29-1012, -1029 (1967); FLA. STAT. ANN. § 617.013 (Supp. 1972); GA. CODE ANN. § 22-2501 (1970); HAWAII REV. STAT. § 416-20 (1968); IDAHO CODE § 30-1101 (1967); ILL. REV. STAT. ch. 32, § 163a7 (1971); IND. ANN. STAT. § 23-7-1.1-7 (Burns 1972); IOWA CODE ANN. § 504A.11 (Supp. 1972); KAN. STAT. ANN. § 17-1701 (1964); KY. REV. STAT. ANN. § 273.187 (1972); LA. REV. STAT. ANN. § 12:210 (1969); ME. REV. STAT. ANN. tit. 13, §§ 2861, 3021, 3103 (1965); MASS. ANN. LAWS ch. 67, §§ 47-49 (1971); MICH. COMP. LAWS ANN. §§ 450.178, 458.21, .41, .61, .81, .201, .301, .451, .524 (1967); MINN. STAT. ANN. §§ 315.17, .21, .23, 317.07 (1969); MISS. CODE ANN. § 5310.1 (Supp. 1972); MONT. REV. CODE ANN. § 15-2311 (1967); NEB. REV. STAT. §§ 21-1910, -1927 to -1929 (1970); N.J. STAT. ANN. §§ 16:2-2, :2-17, :5-20, :10A-3, :10A-4, :12-18, :15A-2 (1939), *as amended*, N.J. STAT. ANN. §§ 16:2-2 to :15A-2 (Supp. 1973); N.Y. RELIG. CORP. LAW §§ 50-ee, 53-a, 63, 90, 95, 100, 106, 112, 132, 162, 177, 187, 201-a, 210, 211, 225-c, 265, 274, 294, 304, 323, 341, 403 (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW §§ 63, 106, 117, 201-a, 225-c, 323, 341, 403 (McKinney Supp. 1972); N.C. GEN. STAT. § 55A-29 (1965); N.D. CENT. CODE ANN. § 10-24-11 (1960); OHIO REV. CODE ANN. § 1702.04 (Page 1964), *as amended*, OHIO REV. CODE ANN. § 1702.04 (Page Supp. 1972); OKLA. STAT. ANN. tit. 18, §§ 541, 562 (1953); ORE. REV. STAT. ANN. § 61.091 (1971); PA. STAT. ANN. tit. 15, § 7751 (Special Supp. 1972); R.I. GEN. LAWS ANN. § 7-6-2 (1969); S.C. CODE ANN. § 12-751 (Supp. 1971); S.D. COMP. LAWS ANN. § 47-23-1 (1967); TENN. CODE ANN. § 48-601 (Supp. 1972); TEX. REV. CIV. STAT. ANN. § 1396-2.08 (1962); UTAH CODE ANN. § 16-6-26 (1953); VT. STAT. ANN. §§ 2358, 2401 (1973); WASH. REV. CODE ANN. § 24.03.065 (Supp. 1972); WIS. STAT. ANN. §§ 187.01, .10 (1957), *as amended*, WIS. STAT. ANN. §§ 187.01, .10 (Supp. 1973); WYO. STAT. ANN. § 17-123 (1965).

200. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, and Washington. *See* note 197 *supra* for a list of those jurisdictions that use both forms.

201. Colorado does allow a form of joint stock religious corporation, COLO. REV. STAT. ANN. §§ 31-21-1 to -21-13 (1963); congregations may so incorporate, COLO. REV. STAT. ANN. § 31-21-12 (1963), and may issue stock of a value between ten and one hundred dollars, COLO. REV. STAT. ANN. § 31-21-6 (1963). Some states do allow stock issuance under general nonprofit corporation acts. *E.g.*, ALAS. STAT. § 10.30.051(a) (1968); IOWA CODE ANN. § 504A.11 (Supp. 1972).

participant in corporate matters. Questions of membership qualifications are generally left to the congregational bylaws or constitution.

It is probable that widespread use of the membership form has been influenced by legislative familiarity with the form of the modern business corporation, which is invariably a membership corporation. Since the membership has a voice in corporate affairs, this form is also more democratic than the trustee corporation and, accordingly, has a greater appeal to the American psyche and sense of history. In those states that provide specific corporate forms for certain church bodies, the trustee form is generally reserved for hierarchical church bodies²⁰² and is only occasionally used for churches capable of being designated as congregational.²⁰³ The use of the trustee form necessarily concentrates power in the hands of the few—often the representatives of the church hierarchy.

The third form, the corporation sole, is exactly what its name implies—a one-man corporation. The corporation sole envisages the incorporation of an office, with corporate privileges granted to the individual lawfully holding the office.²⁰⁴ As a result, the corporate name of the entity is generally the same as that of the office itself. It is generally required that an officeholder be elected or appointed according to the constitution or bylaws of the denomination to which he belongs.²⁰⁵ Most likely, this requirement is inserted to ensure that the corporate entity, with its concomitant powers and privileges, is limited to parties officially recognized by the denomination in question. In practice, it would seem that the corporation sole should be limited to hierarchical churches; this follows from the very nature of the institution.²⁰⁶ However, most of the acts allowing its use contain nothing that would so restrict its operation.²⁰⁷

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202. Those hierarchical churches provided with the trustee form include: Christian Reformed, *e.g.*, MICH. COMP. LAWS ANN. § 458.451 (1967); Episcopal, *e.g.*, MICH. COMP. LAWS ANN. § 458.257 (1967); Methodist, *e.g.*, MD. ANN. CODE art. 23, § 313 (1973); Reformed Protestant, *e.g.*, MICH. COMP. LAWS ANN. § 458.401 (1967); Roman Catholic, *e.g.*, CONN. GEN. STAT. ANN. § 33-279 (1960); and Ruthenian Catholic, *e.g.*, N.J. STAT. ANN. § 16:16-1 (1939).

203. Those congregations that can be labeled congregational and are provided with the trustee form include: Baptist, *e.g.*, MICH. COMP. LAWS ANN. § 458.101 (1967); Christian Scientist, *e.g.*, N.J. STAT. ANN. § 16:3-3 (1939); and Spiritualist, N.J. STAT. ANN. § 16:17-1 (1939).

204. *E.g.*, WASH. REV. CODE ANN. § 24.12.010 (1958).

205. *E.g.*, ALAS. STAT. § 10.40.020 (1962); WASH. REV. CODE ANN § 24.12.010 (1958).

206. The corporation sole is particularly suited to hierarchical denominations due to the ability of the latter to identify officials in power. Denominations with a congregational polity do not, by their very nature, have the ability to identify one person with the requisite authority to fulfill the office.

207. Some of the acts, however, do so restrict their operation. The Alabama statute, ALA. CODE tit. 10, § 116 (1958), implies the existence of a hierarchy. The Hawaii statute,

Although the corporation sole was once looked upon with hostility in many parts of the country,²⁰⁸ in recent years it has begun to win wider acceptance, especially in states west of the Mississippi. Today, it exists in some form in at least seventeen states.²⁰⁹ At least one other state allows for trust succession in the name of one office,²¹⁰ and one state specifically prohibits such trust succession.²¹¹ The corporation sole is allowed as an additional corporate form by some of the jurisdictions that have adopted the Model Non-Profit Corporation Act.²¹²

4. Provisions for Voluntary Associations

Besides providing for incorporated religious entities, some twenty-five jurisdictions have statutes that recognize unincorporated voluntary religious associations.²¹³ The provisions in question vary in scope

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HAWAII REV. STAT. § 419-1 (1968), speaks of incorporating a bishop or presiding elder to administer the temporal affairs of his district. Michigan limits its use to the Roman Catholic Church, MICH. COMP. LAWS ANN. §§ 458.1-2 (1967), *as amended*, MICH. COMP. LAWS ANN. §§ 458.1-2 (Supp. 1973), and the Episcopal Church, MICH. COMP. LAWS ANN. § 458.271 (1967). Montana, MONT. REV. CODES ANN. § 15-2404 (1967), requires evidence of hierarchical authority before incorporation. North Carolina, N.C. GEN. STAT. § 61-5 (1965), limits the privilege to bishops and other officers.

208. See text accompanying note 112 *supra*.

209. ALA. CODE tit. 10, §§ 115-23 (1959); ALAS. STAT. §§ 10.40.010-120 (1968); ARIZ. REV. STAT. ANN. §§ 421-27 (1956); CAL. CORP. CODE §§ 10000-15 (West 1955); D.C. CODE ANN. § 29-501 (1967); HAWAII REV. STAT. §§ 419-1 to -9 (1968); IDAHO CODE §§ 30-1201 to -1209 (1967); MICH. COMP. LAWS ANN. §§ 458.1-536 (Supp. 1973); MONT. REV. CODES ANN. §§ 15-2401 to -2413 (1947); NEV. REV. STAT. §§ 84.010-080 (1967); N.H. REV. STAT. ANN. § 306:4 (1966) (not clear that such a corporation could be formed in New Hampshire, but nothing says otherwise); N.C. GEN. STAT. § 61-5 (1965); ORE. REV. STAT. § 61.055 (1969); S.C. CODE ANN. § 12-762 (1962); UTAH CODE ANN. §§ 16-7-1 to -11 (1953); WASH. REV. CODE §§ 24.12.010-040 (1958); WYO. STAT. ANN. §§ 17-146 to -154 (1965).

210. OKLA. STAT. ANN. tit. 18, § 563 (1953).

211. VT. STAT. ANN. tit. 27, § 703 (1967).

212. ALAS. STAT. §§ 10.40.010-120 (1968); D.C. CODE ANN. § 29-501 (1967); MONT. REV. CODES ANN. §§ 15-2401 to -2403 (1967); ORE. REV. STAT. § 61.055 (1971); UTAH CODE ANN. §§ 16-7-1 to -11 (1973); WASH. REV. CODE ANN. §§ 24.12.010-040 (1958). For a complete list of states that have enacted the Model Non-Profit Corporation Act, see note 306 *infra*.

213. ALAS. STAT. § 10.40.120 (1968); ARK. STAT. ANN. §§ 50-201 to -202 (1971); CONN. GEN. STAT. ANN. §§ 33-264a to -281 (Supp. 1973); D.C. CODE ANN. §§ 29-501 to -516 (1967), *as amended*, D.C. CODE ANN. §§ 29-501 to -516 (Supp. 1972); FLA. STAT. ANN. §§ 617.12-13 (Supp. 1973); GA. CODE ANN. §§ 22-5504 to -5512 (1970); KAN. STAT. ANN. §§ 17-1711 to -1726 (1964), *as amended*, KAN. STAT. ANN. §§ 17-1711 to -1726 (Supp. 1972); KY. REV. STAT. ANN. §§ 273.010-150 (1972); ME. REV. STAT. ANN. tit. 13, § 2986 (1964); MASS. ANN. LAWS ch. 67, §§ 1-55 (1971), *as amended*, MASS. ANN. LAWS ch. 67, §§ 1-55 (Supp. 1972); MISS. CODE ANN. §§ 5350-51 (1957); NEB. REV. STAT. §§ 21-1993 to -1995 (1970); N.H. REV. STAT. ANN. §§ 306:1 to :12 (1966); N.J. STAT. ANN. § 16:1-39 (1939); N.C. GEN. STAT. §§ 61-1 to -6 (1965); OHIO REV. CODE ANN. §§ 1715.02-22 (Page 1965), *as amended*, OHIO REV. CODE ANN. §§ 1715.02-22 (Page Supp. 1972); OKLA. STAT. ANN. tit. 18, §§ 561-564.5 (1953); PA. STAT. ANN. tit. 10, § 21 (1965), *repealed as to religious nonprofit corporations*, PA. STAT. ANN. tit. 10, § 21 (Supp. 1973); TENN. CODE

and purpose, but many of them deal with the common law disability of a voluntary association to hold real property in its own name.²¹⁴ Statutes that give voluntary associations the right to take and hold real property have two general forms: (1) recognition of the common law device of granting the land to trustees to hold for the benefit of a religious entity,²¹⁵ and (2) outright abolition of the disability by conferring the power to hold land on the association itself.

Among the states that recognize the power of the trustees, some simply provide for the vesting of title to property in the trustees and their successors in office.²¹⁶ Others go further and provide that the association shall organize formally and appoint trustees to hold its property and perform other proprietary functions on its behalf.²¹⁷ Still other states recognize the duly appointed or elected trustees of such associations as bodies corporate in and of themselves, even though they have not gone through formal incorporation procedures.²¹⁸ Other states simply recognize the right of the successors of the original trustees to take and hold the property held in trust and deny any right of the heirs of the original grantors to the property.²¹⁹

States that allow the association to take and hold real property in its own name are far fewer in number.²²⁰ These states generally re-

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ANN. §§ 64-203 to -205 (1955), *as amended*, TENN. CODE ANN. §§ 64-203 to -205 (Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 2293a (1971); UTAH CODE ANN. § 16-7-10 (1973); VT. STAT. ANN. tit. 27, §§ 781-944 (1967), *as amended*, VT. STAT. ANN. tit. 27, §§ 781-944 (Supp. 1973); VA. CODE ANN. §§ 57-1 to -17 (1969), *as amended*, VA. CODE ANN. §§ 57-1 to -17 (Supp. 1973); W. VA. CODE ANN. §§ 35-1-1 to -13 (1966), *as amended*, W. VA. CODE ANN. §§ 35-1-1 to -13 (Supp. 1970); WIS. STAT. ANN. § 187.07 (1957); WYO. STAT. ANN. §§ 1-955 to -956 (1959).

214. For examples of the common law disability of a voluntary association to hold real property in its own name, see *Britton v. Jackson*, 31 Ariz. 97, 250 P. 763 (1926); *Lael v. Crook*, 192 Ark. 1115, 97 S.W.2d 436 (1936); *Miller Lumber Co. v. Oliver*, 65 Mo. App. 435 (1896).

215. For an example of this device, see *Bartlet v. King*, 12 Mass. 537, 7 Am. Dec. 99 (1815).

216. *E.g.*, UTAH CODE ANN. § 16-7-10 (1973); WIS. STAT. ANN. § 187.07 (1957).

217. CONN. GEN. STAT. ANN. §§ 33-264a to -281a (Supp. 1973); D.C. CODE ANN. §§ 29-501 to -516 (1967), *as amended*, D.C. CODE ANN. §§ 29-501 to -516 (Supp. 1972); KY. REV. STAT. ANN. §§ 273.100, .110 (1972).

218. *E.g.*, MASS ANN. LAWS ch. 68, § 1 (Supp. 1972); N.H. REV. STAT. ANN. §§ 306:1 to :7 (1966); N.C. GEN. STAT. §§ 61-1 to -4 (1965). These provisions allow church officials to act as a body corporate. Their power is subject to approval by the congregation in major matters affecting the property itself. The New Hampshire provisions specifically allow the Religious Society of Friends (Quakers) to act as bodies corporate.

219. *E.g.*, ALAS. STAT. § 10.40.120 (1968); OHIO REV. CODE ANN. § 1715.16 (Page 1964); UTAH CODE ANN. § 16-7-10 (1973); WYO. STAT. ANN. § 17-154 (1965).

220. At the present time, only Mississippi and Pennsylvania so provide. MISS. CODE ANN. § 21:5350 (1957); PA. STAT. ANN. tit. 10, § 21 (1965), *repealed as to religious non-profit corporations*, PA. STAT. ANN. tit. 10, § 21 (Supp. 1973). See also text accompanying note 216 *supra*.

quire the congregation to organize, and the resultant legal entity is granted rather limited corporate powers.²²¹

Nine states provide for the passing of the property of unincorporated religious bodies in the event of dissolution of the local congregation or abandonment of its property.²²² Generally, the property is to go to the denomination to which the unit was attached at the time of its demise.²²³ Some states, however, give power to the trustees of the local unit to apply to the local circuit or superior court for a determination of the proper disposition of the property.²²⁴

The last significant provision relating to unincorporated religious associations deals with the use of the property following schism within the congregation. One provision allows each faction to use the property in proportion to its membership.²²⁵ Others give the majority of the congregation at the time of schism the right to take the property and exclude the minority.²²⁶

C. *Analysis of Statutes*

1. *Formation of Ecclesiastical Corporations*

There are few, if any, special requirements for the incorporation of ecclesiastical organizations; normally, ecclesiastical corporations

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221. Mississippi, for example, has a provision that allows religious societies to "organize." MISS. CODE ANN. § 5350 (1942). This provision is in addition to provisions that specifically allow incorporation, MISS. CODE ANN. § 21:5310.1 (Supp. 1972), and establishes an entirely different procedure. A separate institution is created with the power to sue and hold real property in its own name. MISS. CODE ANN. § 5350 (1942). Pennsylvania applies mortmain provisions to such bodies, PA. STAT. ANN. tit. 10, §§ 31-33 (1965), *as amended*, PA. STAT. ANN. tit. 10, §§ 31-33 (Supp. 1973), and requires the property to be held according to the discipline of the faith to which the body is attached. PA. STAT. ANN. tit. 10, § 21 (1965), *as amended*, PA. STAT. ANN. tit. 10, § 21 (Supp. 1973).

222. FLA. STAT. ANN. §§ 617.12-.13 (Supp. 1972); KAN. STAT. ANN. §§ 17-1711, -1713a, -1714, -1716a, -1716e, -1732, -1735 (1964), *as amended*, KAN. STAT. ANN. §§ 17-1714, -1732, -1735 (Supp. 1972); KY. REV. STAT. §§ 273.120-.130 (1972); NEB. REV. STAT. §§ 21-1993 to -1994 (1970); OHIO REV. CODE ANN. § 1715.05 (Page 1964); PA. STAT. ANN. tit. 10, §§ 103-04 (1965); TEX. REV. CIV. STAT. ANN. art. 2293a (1971); VT. STAT. ANN. tit. 27, §§ 782-83, 821-25, 864-65, 904-05, 941-43 (1967).

223. *E.g.*, FLA. STAT. ANN. § 617.12 (Supp. 1972).

224. *E.g.*, OHIO REV. CODE ANN. § 1715.05 (Page 1964).

225. KY. REV. STAT. ANN. § 23.120 (1972).

226. ALA. CODE tit. 10, §§ 104-13 (Supp. 1971); GA. CODE ANN. § 22-5504 (1970); MISS. CODE ANN. § 1273-01 (Supp. 1972). Alabama's statute, popularly known as the Dumas Act, was held constitutionally invalid in *Goodsen v. Northside Bible Church*, 261 F. Supp. 99 (S.D. Ala. 1966), *aff'd.*, 387 F.2d 534 (5th Cir. 1967). It was also declared unconstitutional in *First Methodist Church v. Scott*, 284 Ala. 571, 226 S.2d 632 (1969). Mississippi's statute was held to violate the first amendment in *Sustar v. Williams*, 263 S.2d 537 (Miss. 1972).

and regular business corporations are formed in a similar fashion. The Model Non-Profit Corporation Act provides a typical procedure for incorporation. Under this Act, one or more parties may serve as incorporators²²⁷ and must sign articles of incorporation containing the name of the corporation, its period of duration, its purpose, the address of its initial registered office, the name of the original registered agent, and the number, names, and addresses of the initial board of directors and the incorporators.²²⁸ Duplicate originals of these articles are filed with the secretary of state, who endorses them, files one, and returns the other with a certificate of incorporation.²²⁹ An organizational meeting for the corporation must be called on three days' notice following the issuance of the certificate of incorporation.²³⁰

A popular variant of the above method is for the members of the organization to pass a resolution signifying an intention to incorporate and then to elect trustees who will go through the process of incorporation.²³¹ This method is generally used for trustee corporations,²³² but it may also be used for membership corporations.²³³

Some states require that the articles be submitted to the local district or superior court rather than to the secretary of state for final approval.²³⁴ In such cases, the articles must generally be filed with the county in which the property is located, as well as with a state-wide agency, usually the secretary of state.²³⁵

Many states require that certain meeting and notice requirements be fulfilled prior to any actual incorporation of an ecclesiastical organization. Maine, for example, requires a meeting, for which notice has been given,²³⁶ to determine whether the congregation or organization shall incorporate, and incorporation is allowed only upon the

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227. MODEL NON-PROFIT CORPORATION ACT § 28 (rev. ed. 1964).

228. MODEL NON-PROFIT CORPORATION ACT § 29 (rev. ed. 1964).

229. MODEL NON-PROFIT CORPORATION ACT § 30 (rev. ed. 1964).

230. MODEL NON-PROFIT CORPORATION ACT § 32 (rev. ed. 1964).

231. *E.g.*, ALA. CODE tit. 10, §§ 124-25 (1958). *See* DEL. CODE ANN. tit. 27, § 101 (Supp. 1968).

232. *E.g.*, DEL. CODE ANN. tit. 27, § 101 (Supp. 1968); D.C. CODE ANN. § 29-505 (1967); MD. ANN. CODE art. 23, § 256 (1973).

233. *See* Williams v. Jones, 258 Ala. 59, 61 S.2d 101 (1952).

234. *E.g.*, ALA. CODE tit. 10, § 125 (1958); ARK. STAT. ANN. § 64-1905 (1966).

235. *E.g.*, MO. ANN. STAT. § 352.062 (1966); N.Y. RELIG. CORP. LAW § 180 (McKinney 1952).

236. Seven days' written notice of the meeting to elect incorporators and the initial board of directors must be given by posting the notice at the church. ME. REV. STAT. ANN. tit. 13, § 2982 (1964), *as amended*, ME. REV. STAT. ANN. tit. 13, § 2982 (Supp. 1972).

favorable vote of the members.²³⁷ A further requirement found in states that allow separate corporate forms for specific denominations is the prior approval of an official of the church hierarchy (if the congregation is affiliated with a hierarchical denomination) before the articles can be filed with the state.²³⁸

Many states add a procedural requirement for the formation of the corporation sole—namely, a listing of the estimated value of the property of the corporation upon application for use of the corporate form.²³⁹ Succession to the corporate powers is accomplished for the most part by the filing of a certificate of appointment or election with an appropriate state or county official.²⁴⁰ The problem of interim management of the corporation between the death of one official and the certification of the next is not dealt with by any statute.

2. *Powers of Ecclesiastical Corporations*

The powers granted by statute to ecclesiastical corporations are fairly standardized throughout the United States and are not radically different from powers given to regular business corporations. The most basic power—the right to hold, manage, and dispose of real property—is universally granted to religious organizations, even in those jurisdictions where churches are not allowed to incorporate.²⁴¹ Even so, this power is by no means unqualified in every jurisdiction. Many states limit the amount of property that a religious organization may hold at any one time.²⁴² The forms of limitation vary from

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237. ME. REV. STAT. ANN. tit. 13, §§ 2861-62 (1964), *as amended*, ME. REV. STAT. ANN. tit. 13, § 2861 (Supp. 1972).

238. *E.g.*, MICH. COMP. LAWS ANN. § 458.21 (1967) (Methodist Episcopal Church); N.J. STAT. ANN. § 16:15A-2 (Supp. 1973) (Russian Orthodox Church); N.Y. RELIG. CORP. LAW §§ 50-aa, 50-ee (McKinney 1952) (Holy Orthodox Church).

239. *E.g.*, ALAS. STAT. § 10.40.040 (1968); WYO. STAT. ANN. § 17-148 (1965).

240. *E.g.*, ALAS. STAT. § 10.40.110 (1968); WYO. STAT. ANN. § 17-153 (1965).

241. *See* VA. CODE ANN. § 57-7 (1969); W. VA. CODE ANN. § 35-1-1 (1966). *See* text accompanying notes 139-41 *supra*.

242. *See* ARIZ. REV. STAT. ANN. § 10-454 (1956); CONN. GEN. STAT. ANN. § 33-272 (Supp. 1973) (Methodist Church only); D.C. CODE ANN. § 29-501 (1967); IDAHO CODE § 30-1106 (1967); ME. REV. STAT. ANN. §§ 2863, 2983 (1964); MASS ANN. LAWS ch. 67, §§ 21 (religious societies), 25 (meeting house), 41 (Methodist Episcopal), 46 (Roman Catholic) (1971); MICH. COMP. LAWS ANN. §§ 548.27 (Methodist Episcopal), 458.49 (Wesleyan Methodist), 458.67 (Methodist Protestant), 458.87 (Free Methodist), 458.205 (Presbyterian), 458.257 (Episcopal), 458.307 (Congregational), 458.425 (Christian Reformed), 458.457 (Evangelical), 458.529 (United Missionary) (1967); MISS. CODE ANN. § 5351 (1942); MO. ANN. STAT. § 352.130 (1966); NEV. REV. STAT. § 86.160 (1969) (religious associations); NEV. REV. STAT. § 82.360 (1971) (Episcopal); N.H. REV. STAT. ANN. §§ 295:7 (voluntary corporations), 306:10 (religious societies), 306.11 (Quakers) (1966); OKLA. STAT. ANN. § 543 (1953); R.I. GEN. LAWS ANN. § 7-6-8 (Supp. 1972); S.C. CODE ANN. § 12-758 (Supp. 1971); WYO. STAT. ANN. § 17-125 (1965). New York does not seem to have any limitations at present, although it does have a provision that allows the state

restrictions on the total dollar value of the property that the organization may hold,²⁴³ to restrictions on the total acreage it may hold,²⁴⁴ to a general restriction that such organizations may not hold more property than is "reasonably necessary" for their purposes.²⁴⁵ A few states also spell out specifically the kinds of property that may be held by a religious body.²⁴⁶

The methods by which a church may alienate or encumber its property are also restricted in many states.²⁴⁷ The purpose of such

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to investigate whether the amount of property held by one religious corporation "exceeds the amount authorized by law." N.Y. RELIG. CORP. LAW § 14 (McKinney 1952).

243. Such provisions take two forms. Some restrict the total value that can be held: Massachusetts limits the Roman Catholic Church to 100,000 dollars worth of property per congregational corporation, MASS. ANN. LAWS ch. 67, § 46 (1971), and the Methodist Episcopal Church to 50,000 dollars total assets, MASS. ANN. LAWS ch. 67, § 41 (1971); Rhode Island limits all churches to 150,000 dollars total assets, R.I. GEN. LAWS ANN. § 7-6-8 (Supp. 1972). Others restrict yearly income from real and personal property: Connecticut limits the annual income of the Methodist church to 15,000 dollars, CONN. GEN. STAT. ANN. § 33-272 (Supp. 1973); Maine limits the yearly income of incorporated parishes to 3,000 dollars, ME. REV. STAT. ANN. tit. 13, § 2863 (1964); New Hampshire limits the annual income of religious associations to 7,500 dollars, N.H. REV. STAT. ANN. § 306:10 (1966), and the annual income of Quaker monthly meetings to 10,000 dollars, N.H. REV. STAT. ANN. § 306:11 (1966). The constitutional validity of limiting certain churches and not others—as is the case in Connecticut, Maine, and Nevada, among other states—appears highly questionable.

244. For example, Nevada restricts religious associations to one block of real property if located in a city or to ten acres if located in the country. NEV. REV. STAT. § 86.160 (1967). The District of Columbia limits religious societies to one acre. D.C. CODE ANN. § 29-501 (1967).

245. ARIZ. REV. STAT. ANN. § 10-454 (1956); IDAHO CODE § 30-1106 (1967); MASS. ANN. LAWS ch. 67, §§ 21, 23, 41, 46 (1971); MICH. COMP. LAWS ANN. §§ 458.27, .49, .67, .87, .205, .257, .307, .425, .457, .529 (1967); MO. ANN. STAT. § 352.130 (1966); N.H. REV. STAT. ANN. §§ 295:7, 306:10, :11 (1966); OKLA. STAT. ANN. § 543 (1953); S.C. CODE ANN. § 12-758 (Supp. 1971).

246. Mississippi limits church holdings to the following: the church and a reasonable quantity of ground thereunder; schools and parish houses, and a reasonable quantity of ground thereunder; the minister's house and the ground thereunder; hospitals and grounds; colleges and grounds; orphan asylums and grounds; camp facilities and grounds; cemetery lands; and denominational headquarters and grounds. MISS. CODE ANN. § 5351 (1942). Missouri limits churches to a reasonable quantity of land for assembly, libraries, laboratories, and other rooms. MO. ANN. STAT. § 352.130 (1966).

247. ALA. CODE tit. 10, §§ 128-29 (1958); D.C. CODE ANN. §§ 29-509 to -510 (1967); ILL. REV. STAT. ch. 32, §§ 172, 180 (1970); LA. REV. STAT. ANN. § 12:207D (1969); ME. REV. STAT. ANN. tit. 13, §§ 2982, 2984 (1964), *as amended*, ME. REV. STAT. ANN. tit. 13, §§ 2982, 2984 (Supp. 1973); MD. CODE ANN. art. 23, §§ 290, 309e, 312n (1973); MICH. COMP. LAWS ANN. §§ 450.162 (church trustee corporations), 458.29 (Methodist Episcopal), 458.51 (Wesleyan Methodist), 458.68 (Methodist Protestant), 458.89 (Free Methodist), 458.104 (Baptist), 458.207 (Presbyterian), 458.257 (Episcopal), 458.306 (Congregational), 458.406 (Reformed Protestant), 458.426 (Christian Reformed), 458.457 (Evangelical), 458.530-531 (United Missionary) (1967); MINN. STAT. ANN. §§ 315.12 (religious associations—trustee corporations), 315.17 (Episcopal), 315.20 (Episcopal cathedrals), 315.24 (religious associations—synods), 317.26 (nonprofit corporations) (1969); NEV. REV. STAT. § 86.130 (1969); N.H. REV. STAT. ANN. §§ 306:7 to :8 (1966); N.J. STAT. ANN. §§ 16:1-6 (general), 16:2-8 (Baptist), 16:3-4 (Christian Scientist), 16:5-22 (Evangelical Lutheran), 16:10A-11 (United Methodist), 16:11-3 (Presbyterian), 16:12-4 (Episcopal), 16:13-2 (Reformed), 16:15-5 (Roman Catholic Congregation), 16:15-4 (Roman Catholic Diocese),

restrictions is to protect the membership from hasty or unwise decisions by boards of directors or from diversion of property from its intended use. Accordingly, the limitations take the form of requirements of specific percentages of voter approval that must be met before property may be sold or encumbered,²⁴⁸ or at least prior approval by an unspecified percentage before any action can be taken.²⁴⁹ Some jurisdictions even require the prior approval of a local court before a sale becomes valid.²⁵⁰ In some states, congregations affiliated with a hierarchical church must have the prior approval of the hierarchy before a sale or mortgage can be consummated.²⁵¹

A second group of powers, the powers to contract and to incur debts, are widely recognized by the states.²⁵² Again, it should be mentioned that these powers are not given without some restrictions. As noted above,²⁵³ debt-contracting schemes are often subject to prior congregational approval before they become valid.

Other powers given to ecclesiastical corporations generally include the right to maintain and alter a seal,²⁵⁴ the right to dissolve

16:16-7 (Ruthenian Greek Catholic), 16:17-6 (Spiritualist) (1939), *as amended*, N.J. STAT. ANN. §§ 16:1-6 to :17-6 (Supp. 1973); N.Y. RELIG. CORP. LAW §§ 12(1) (general), 12(2) (Episcopal), 12(3) (Roman Catholic), 12(4) (Ruthenian Greek Catholic), 12(5-a) (Presbyterian), 225-l (Free Methodist), 333 (Methodist), 351 (Byelorussian Orthodox), 411 (Unitarian and Universalist) (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW §§ 12(1)-411 (McKinney Supp. 1972); OHIO REV. CODE ANN. § 1702.39 (Page 1964); PA. STAT. ANN. tit. 15, § 7547 (Special Supp. 1972); WIS. STAT. ANN. § 187.12(5) (1957). *See also* text accompanying note 311 *infra*.

248. *See, e.g.*, MICH. COMP. LAWS ANN. § 458.51 (1967), which requires approval by two thirds of the members present and voting at a meeting of a Wesleyan Methodist Church called for the purpose of considering the proposed sale or encumbrance. The Model Non-Profit Corporation Act requires approval by a two-thirds majority for a sale of all or substantially all of the assets of the corporation. MODEL NON-PROFIT CORPORATION ACT § 44 (rev. ed. 1964).

249. *See, e.g.*, LA. REV. STAT. ANN. § 12:207D (1969).

250. *E.g.*, NEV. REV. STAT. § 86.130 (1969); N.Y. RELIG. CORP. LAW § 12(1) (McKinney Supp. 1972) (if a lease or mortgage is to be for more than five years' duration).

251. *E.g.*, MICH. COMP. LAWS ANN. § 458.257 (1967) (Episcopal); N.J. STAT. ANN. § 16:10A-11 (Supp. 1973) (United Methodist); N.Y. RELIG. CORP. LAW § 12(2) (McKinney 1952).

252. All jurisdictions, with the possible exception of Mississippi, grant these powers specifically or impliedly. *See, e.g.*, COLO. REV. STAT. ANN. § 31-19-2 (1963); FLA. STAT. ANN. § 617.021 (Supp. 1972). Mississippi gives religious corporations only such powers as are specified in the articles of incorporation and are "reasonably necessary to accomplish the stated purpose." MISS. CODE ANN. § 5310.1 (Supp. 1972).

253. *See* note 247 *supra* and accompanying text.

254. COLO. REV. STAT. ANN. §§ 31-19-2, -20-1 (1963); FLA. STAT. ANN. § 617.021 (Supp. 1972); HAWAII REV. STAT. § 416-26 (1968); ILL. REV. STAT. ch. 32, § 180 (1971); IND. ANN. STAT. § 23-7-1.1-4(b) (1972); IOWA CODE ANN. § 504A.4 (Supp. 1973); LA. REV. STAT. ANN. § 12:207 (1969); ME. REV. STAT. ANN. tit. 13, § 931 (Supp. 1972); MICH. COMP. LAWS ANN. § 450.183 (1967); MINN. STAT. ANN. § 315.04 (1969); MONT. REV. CODES ANN. § 15-2305 (1947); NEV. REV. STAT. § 86.120 (1967); N.H. REV. STAT. ANN. § 295:3 (1966); N.J. STAT. ANN. § 16:1-4 (1939); N.M. STAT. ANN. § 51-14-30 (1953); OHIO REV. CODE ANN. § 1702.12 (Page Supp. 1972); PA. STAT. ANN. tit. 15, § 7502 (Special Supp.

and distribute the corporation's assets,²⁵⁵ the right to merge with foreign or domestic ecclesiastical corporations,²⁵⁶ the right to perpetual duration,²⁵⁷ the right to a limited duration should the organization so desire,²⁵⁸ the right to sue,²⁵⁹ the right to borrow money,²⁶⁰ the right to give security for the corporation's own borrowing,²⁶¹ and the right to improve any real property the corporation may own.²⁶²

Ecclesiastical corporations generally have the power to regulate their own internal affairs without outside restrictions. However, while the power to administer internal affairs has been thought to be a constitutionally protected right of religious organizations,²⁶³ many states do endeavor to establish standards or requirements to promote procedural safeguards in order to protect minority rights. Such procedural regulation often takes the form of notice requirements for meetings²⁶⁴ and elections,²⁶⁵ annual meeting requirements,²⁶⁶ methods for the removal of boards of directors or trustees,²⁶⁷ requirements

1972); R.I. GEN. LAWS ANN. § 7-6-7 (1969); S.C. CODE ANN. § 12-753 (Supp. 1971); S.D. COMP. LAWS ANN. § 47-22-54 (1967); WIS. STAT. ANN. § 187.12 (1957); WYO. STAT. ANN. § 17-150 (1965). See also MODEL NON-PROFIT CORPORATION ACT § 5(c) (rev. ed. 1964).

255. See notes 270-96 *infra* and accompanying text.

256. See notes 297-305 *infra* and accompanying text.

257. *E.g.*, ALAS. STAT. § 10.20.011 (1968); WASH. REV. CODE ANN. § 24.03.035 (Supp. 1972). *Cf.* ALA CODE tit. 10, § 118 (1958). This is a fairly standard power, although some states are silent on the point. See, *e.g.*, ARIZ. REV. STAT. ANN. § 10-453 (1956).

258. The typical provision states that the corporation shall have perpetual duration unless otherwise specified in the articles of incorporation. *E.g.*, D.C. CODE ANN. § 29-1005 (1967); ME. REV. STAT. ANN. tit. 13, § 931 (Supp. 1972); WASH. REV. CODE ANN. § 24.03.035 (Supp. 1972). New Mexico limits the over-all duration of nonprofit corporations to 100 years. N.M. STAT. ANN. § 51-14-30 (1953).

259. *E.g.*, NEV. REV. STAT. § 84.050 (1967); OHIO REV. CODE ANN. § 1702.12 (Page Supp. 1972). In a few states the power must be considered to be granted by implication only. See, *e.g.*, ARIZ. REV. STAT. ANN. § 10-454 (1956).

260. *E.g.*, ALA. CODE tit. 10, § 118 (1958); ALAS. STAT. § 10.40.070 (1968); ARIZ. REV. STAT. ANN. § 10-423 (1956); FLA. STAT. ANN. § 617.021 (Supp. 1972). A few states appear not to grant this power. See, *e.g.*, COLO. REV. STAT. ANN. § 31-20-7 (1963); MO. STAT. ANN. § 352.130 (1966).

261. *E.g.*, DEL. CODE ANN. tit. 27, § 102 (1953); MONT. CODES ANN. § 15-2406 (1967); N.C. GEN. STAT. § 55A-15 (Supp. 1971).

262. MODEL NON-PROFIT CORPORATION ACT § 5(d) (1964 rev. ed.). For a list of states that have adopted this Act, see note 306 *infra*.

263. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

264. *E.g.*, LA. REV. STAT. ANN. § 12:230 (1969) (requires ten to sixty days' written notice of all meetings).

265. *E.g.*, DEL. CODE ANN. tit. 27, § 105 (1953) (requires ten days' notice prior to election of trustees).

266. *E.g.*, N.C. GEN. STAT. § 55A-30 (1965) (requires an annual meeting of members); MODEL NON-PROFIT CORPORATION ACT § 13 (rev. ed. 1964).

267. *E.g.*, D.C. CODE ANN. § 29-504 (1967); ILL. REV. STAT. ch. 32, § 169 (1971); ORE. REV. STAT. § 61.127 (1971).

concerning the eligibility of an individual to be an incorporator,²⁶⁸ or requirements for voter eligibility.²⁶⁹

3. *Dissolution Provisions*

Nearly all states have statutory provisions for dissolution procedures, either voluntary or involuntary, for ecclesiastical corporations.²⁷⁰ The provisions display great variety, running the gamut from those that seem to be almost an afterthought to those that are highly sophisticated and patterned after similar sections in many business corporation acts. There are four principal procedures for dissolving an ecclesiastical corporation: (1) involuntary dissolution initiated by officers or members of the corporation, (2) involuntary dissolution initiated by the state attorney general or other public official, (3) voluntary dissolution upon vote of the membership of the corporation itself, and (4) dissolution by church officials upon extinction of the local corporate unit. Five states also allow dissolution when a creditor of a congregation has reduced a claim to judgment and the claim remains unsatisfied.²⁷¹

Involuntary dissolution initiated by members or officers of the corporation is generally allowed if a deadlock among the members or directors of the corporation has prevented the corporation from functioning, or if the corporation has committed an ultra vires act or has otherwise failed in accomplishing its stated purposes.²⁷² This type of dissolution procedure is a refinement borrowed from regular business corporation acts and has been adopted in slightly less than half the jurisdictions.²⁷³

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268. For example, Maryland requires that the trustees who incorporate be elected by members over 21 years of age. MD. ANN. CODE art. 23, §§ 256, 262-63 (1973). New Hampshire requires five or more persons of "lawful age" to be incorporators. N.H. REV. STAT. ANN. § 292:1 (Supp. 1972).

269. For example, New York limits voters to those of "full age" unless otherwise fixed by statute or in the articles of incorporation. In no event, however, may the voting age be fixed at less than 16 years. N.Y. RELIG. CORP. LAW § 4a (McKinney Supp. 1972). Note that New York requires Episcopal Church voters to be male, of full age, and regular contributors to the parish. N.Y. RELIG. CORP. LAW § 43(6) (McKinney Supp. 1972), *quoted in* note 69 *supra*.

270. The states that have no such provisions are Alabama, Arizona, Delaware, Idaho, Massachusetts, Mississippi, Nevada, and New Mexico.

271. LA. REV. STAT. ANN. § 12:251 (1969); N.C. GEN. STAT. § 55A-53 (1965); OHIO REV. CODE ANN. § 1702.50 (Page 1964); PA. STAT. ANN. tit. 15, § 7982 (Special Supp. 1972); S.D. COMP. LAWS ANN. § 47-26-23 (1967). *See also* MODEL NON-PROFIT CORPORATION ACT § 54 (rev. ed. 1964).

272. *E.g.*, HAWAII REV. STAT. § 416-128 (1968); LA. REV. STAT. § 12:251 (1969).

273. HAWAII REV. STAT. § 416-128 (1968); LA. REV. STAT. ANN. § 12:251 (1969); MINN. STAT. ANN. § 315.38 (1969); N.C. GEN. STAT. § 55A-53 (1965); PA. STAT. ANN. tit. 15, § 7981 (Special Supp. 1972); S.D. COMP. LAWS ANN. § 47-26-22 (1967). In addition, those

Involuntary dissolution initiated by the state attorney general or other public official is a widely used method.²⁷⁴ Generally, the grounds for allowing dissolution on this basis are fraud in the procuring of the corporate franchise, abuse of the use of the corporate privilege, failure to file an annual report with the secretary of state or other designated public official, termination of the period of duration specified in the articles of incorporation, and general abuse of state law or violation of the public interest.²⁷⁵ As an outgrowth of his powers to oversee charities—a carry-over from the common law²⁷⁶—the attorney general of the state is usually given the power to institute dissolution proceedings.²⁷⁷ Some states give this power to the prosecuting attorneys of the county in which the property of the corporation is located²⁷⁸ or to the state official charged with overseeing corporations within the state.²⁷⁹

Voluntary dissolution upon a vote of the members of the corporation is generally allowed for any reason deemed proper by the members. In some states such dissolution may go forward without a court order of any kind,²⁸⁰ while other states require court intervention to ensure the payment of all creditors and to oversee the proper distribution of the corporate assets.²⁸¹ The majority of members re-

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jurisdictions that have adopted all or parts of MODEL NON-PROFIT CORPORATION ACT § 54(a) (rev. ed. 1964) (all states, except Arkansas, listed in note 306 *infra*) have such a provision.

274. ARK. STAT. ANN. § 64-1918 (1966); CONN. GEN. STAT. ANN. § 33-264f (Supp. 1973); HAWAII REV. STAT. § 416-122 (1968); ILL. REV. STAT. ch. 32, § 190 (1971); IND. ANN. STAT. § 23-7-1.1-66 (1972); MICH. COMP. LAWS ANN. § 450.180 (1967); MINN. STAT. ANN. § 317.62 (1969); MO. ANN. STAT. § 352.240 (1966); N.C. GEN. STAT. § 55A-50 (1965); S.D. COMP. LAWS § 47-26-16 (1967).

275. See, e.g., IND. ANN. STAT. § 23-7-1.1-66 (1972).

276. For a discussion of the attorney general's role with respect to charitable trusts, see 4 A. SCOTT, THE LAW OF TRUSTS § 391 (3d ed. 1967).

277. All states, except Hawaii, listed in note 274 *supra* allow the attorney general to act in this manner.

278. ARK. STAT. ANN. § 64-1918 (1966); MO. ANN. STAT. § 352.240 (1966). In both cases, the attorney general also has the power of dissolution.

279. HAWAII REV. STAT. § 416-122 (1968) (director of regulatory agencies).

280. COLO. REV. STAT. ANN. § 31-19-7 (1963); CONN. GEN. STAT. ANN. § 33-264e (Supp. 1973); HAWAII REV. STAT. § 416-121 (1968); IND. ANN. STAT. § 23-7-1.1-33 (1972); N.H. REV. STAT. ANN. §§ 308:1-6 (1966); N.J. STAT. ANN. § 16:2-16 (1939); N.C. GEN. STAT. §§ 55A-44 to -49 (1965); OHIO REV. CODE ANN. § 1702.47 (Page Supp. 1972); PA. STAT. ANN. tit. 15, § 7961 (Special Supp. 1972); S.C. CODE ANN. § 12-763 (1962); S.D. COMP. LAWS ANN. §§ 47-26-1 to -11 (1967). In addition, all the states that have adopted all or parts of MODEL NON-PROFIT CORPORATION ACT § 49 (rev. ed. 1964) (all states, except Arkansas, listed in note 306 *infra*) have a provision of this sort. See also MINN. STAT. ANN. § 317.45 (1969).

281. FLA. STAT. ANN. § 617.05 (Supp. 1972); LA. REV. STAT. ANN. § 12:250 (1969); MINN. STAT. ANN. § 317.47 (1969); MO. ANN. STAT. § 352.190 (1966); N.Y. RELIG. CORP. LAW § 18 (McKinney 1952); TEX. REV. CIV. STAT. ANN. § 2293(a) (1971). See also OKLA. STAT. ANN. tit. 18, § 564.3 (1953).

quired for a dissolution vote varies from simple²⁸² to two-thirds²⁸³ to three-fourths.²⁸⁴ It would seem likely that the relatively high percentages required are intended to ensure that the threat of dissolution will not arise upon every disagreement or controversy within the corporate unit.

Dissolution by hierarchical officials upon extinction of the church or abandonment of the church premises is allowed in several states.²⁸⁵ Most likely, the purposes of such laws are twofold: (1) to protect abandoned property from deterioration through exposure and neglect, and (2) to ensure the hierarchy that the property will be preserved for the use of other members of the same denomination.

Generally, all dissolutions of ecclesiastical corporations are accomplished by petition to a court of specified jurisdiction—usually the court of the county wherein the bulk of the corporate property is located.²⁸⁶ Most states require notice to creditors of the soon-to-be-defunct corporation and satisfaction of all outstanding debts before the remaining corporate assets may be distributed.²⁸⁷ Only after payment of debts and formal court approval of the plan of distribution will the court order the dissolution or the secretary of state grant a certificate of dissolution.²⁸⁸

Perhaps the plan of distribution is the most crucial question. Many states allow the trial court to make all determinations concerning the distribution of property.²⁸⁹ In such cases, it would seem logical for courts, having no statutory guidelines, to rely upon plans presented to them by the parties and upon traditional notions of cy

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282. *E.g.*, OHIO REV. CODE ANN. § 1702.47(D) (Page Supp. 1972).

283. *E.g.*, ILL. REV. STAT. ch. 32, § 163a43 (1971).

284. HAWAII REV. STAT. § 416-121 (1968).

285. IOWA CODE ANN. § 504.11 (1949); KAN. STAT. ANN. §§ 17-1713, -1713(c), -1716, -1716(c), -1716(e) (1964), *as amended*, KAN. STAT. ANN. § 17-1716 (Supp. 1972); KAN. STAT. ANN. §§ 17-1716(h), -1734, -1737 (Supp. 1972); MICH. COMP. LAWS ANN. §§ 458.29, .47, .69, .89, .107, .209, .308, .532 (1967); N.J. STAT. ANN. §§ 16:2-21, :5-26, :6-3, :10A-14, :12-16, :13-16 (1939), *as amended*, N.J. STAT. ANN. §§ 16:2-21 to :13-16 (Supp. 1973); OKLA. STAT. ANN. tit. 18, § 564.2 (1953); VT. STAT. ANN. tit. 27, §§ 782, 822, 865, 905, 942 (1967), *as amended*, VT. STAT. ANN. tit. 27, §§ 865, 905 (Supp. 1972); WIS. STAT. ANN. §§ 187.08, .10, .15(4) (1957).

286. *E.g.*, FLA. STAT. ANN. § 617.05 (Supp. 1972); KAN. STAT. ANN. §§ 17-1712, -1713(b), -1716(b) (1964); KAN. STAT. ANN. § 17-1715 (Supp. 1972); VT. STAT. ANN. tit. 27, § 782 (1967); WASH. REV. CODE ANN. § 24.03.260 (Supp. 1972).

287. *See, e.g.*, D.C. CODE ANN. § 29-1051 (1967); IND. ANN. STAT. § 23-7-1.1-33 (1972); PA. STAT. ANN. tit. 15, § 7961 (Special Supp. 1972).

288. *See, e.g.*, S.D. COMP. LAWS ANN. § 47-26-10 (1967); WASH. REV. CODE ANN. § 24.03.245 (Supp. 1972).

289. *E.g.*, ARK. STAT. ANN. § 64-1918 (1966); FLA. STAT. ANN. § 617.05 (Supp. 1972); HAWAII REV. STAT. §§ 416-121 to -125 (1968).

pres.²⁹⁰ One state provides that the property will escheat to the state,²⁹¹ while at least one other jurisdiction gives the property to the heirs of the original donors.²⁹² Neither of the latter two solutions seems perfectly satisfactory.

At the other extreme are the jurisdictions that specify that, upon the demise of a local congregation, the property will go to specified denominational organizations.²⁹³ Denominations with a congregational polity are specified more often than those with an hierarchical polity.²⁹⁴ These provisions have the advantage of providing security for the denominations affected, although problems could arise in the event of a name change or a merger unless such contingencies were

290. For a discussion of the evolution of the cy pres rule in the United States, see E. FISCH, *THE CY PRES DOCTRINE IN THE UNITED STATES* (1950). In Maryland, the court is instructed by statute to employ the cy pres doctrine. MD. ANN. CODE art. 16, § 127 (1973).

291. MICH. COMP. LAWS ANN. § 450.180 (1967).

292. D.C. CODE ANN. § 29-511 (1967).

293. KAN. STAT. ANN. §§ 17-1711 (Baptist, to Kansas Baptist Convention), 17-1713a (Colored Baptist, to Missionary Baptist State Convention), 17-1714 (Church of Christ, to Kansas Christian Missionary Society), 17-1716a (Congregational, to Kansas Congregational and Christian Conference), 17-1716d (United Brethren in Christ, to Kansas Annual Conference of United Brethren in Christ) (1964), *as amended*, KAN. STAT. ANN. § 17-1714 (Supp. 1972); KAN. STAT. ANN. §§ 17-1732 (German Baptist Brethren, to Church of the Brethren, District of Kansas), 17-1735 (Church of Nazarene, to District Advisory Board of the Church of the Nazarene) (Supp. 1972); MICH. COMP. LAWS ANN. §§ 458.29 (Methodist Episcopal, to Annual Conference), 458.47 (Wesleyan Methodist, to Annual Conference), 458.69 (Methodist Protestant, to Annual Conference), 458.89 (Free Methodist, to Annual Conference), 458.107 (Baptist, to Baptist Convention), 458.209 (Presbyterian, to Presbytery), 458.308 (Congregational, to Michigan Congregational Conference), 458.532 (United Missionary, to Annual Conference) (1967); N.J. STAT. ANN. §§ 16:2-19 (Baptist, to New Jersey Baptist Missionary Corporation), 16:2-21 (Seventh-Day Baptist, to Seventh-Day Baptist Missionary Society), 16:5-26 (Lutheran, to Synod), 16:6-1 to :16-3 (Free Methodist, to New York Conference of the Free Methodist Church), 16:10A-14 (United Methodist, to Annual Conference), 16:12-16 (Episcopal, to Annual Convention), 16:13-14 to :13-17 (Reformed, to Classis) (1939), *as amended*, N.J. STAT. ANN. §§ 16:2-21, :5-26, :10A-14 to :13-17 (Supp. 1973); N.Y. RELIG. CORP. LAW §§ 16 (Episcopal, to Bishop), 17 (Free Will Baptist, to Central Association of Free Will Baptists), 17-a (Seventh Day Baptist, to Seventh Day Baptist Missionary Society), 59-b (Apostolic Episcopal, to Metropolitan Synod of the Apostolic Episcopal Church), 50-MM (Holy Orthodox, to Metropolitan Synod of the Holy Orthodox Church in America), 206 (Church of Christ, to New York Christian Missionary Society), 225-M (Free Methodist, to Annual Conference), 352 (Byelorussian Orthodox, to Diocesan Council) (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW §§ 16, 352 (McKinney Supp. 1972); VT. STAT. ANN. §§ 781-85 (Baptist, to Vermont Baptist State Convention), 821-29 (Congregational, to Vermont Domestic Missionary Society), 864-66 (Methodist, to Troy Annual Conference of Methodist Church), 941-44 (Universalist, to Vermont & Quebec Universalist-Unitarian Convention) (1967), *as amended*, VT. STAT. ANN. §§ 864-65 (Supp. 1972); VT. STAT. ANN. §§ 904-05 (Episcopal, to Protestant Episcopal Diocese of Vermont) (Supp. 1972); WIS. STAT. ANN. §§ 187.10 (Congregational, to Wisconsin Congregational Association), 187.12(10)-(11) (Catholic, to Bishop), 187.15(4) (Methodist, to Annual Conference) (1957).

294. A probable explanation for this situation is that no statutes are really necessary to determine where the property of a local congregation that belonged to a hierarchical polity should go upon the demise of the congregation.

foreseen when the legislation was drafted. Some states have avoided this problem by simply stating that the property is to be administered by the denomination to which the congregation was attached,²⁹⁵ or by a similar religious group.²⁹⁶

4. *Ability To Merge or Consolidate*

In many jurisdictions, ecclesiastical corporations are allowed to merge or consolidate with other ecclesiastical corporations.²⁹⁷ Procedure varies from state to state, but the over-all pattern is very similar. Generally, the plan of merger must be approved by the board of directors or trustees of the corporation and then submitted to a vote of the membership. A favorable vote by the percentage of the membership specified by the statute is necessary to effectuate the merger.²⁹⁸

There are variants to this pattern, which tend to rob the membership of its power to reject a proposed merger or consolidation.²⁹⁹ For example, Maine requires only that the board of directors of each non-profit corporation approve the plan of merger and submit it to the state attorney general for approval.³⁰⁰ This procedure is basically undemocratic, despite the fact that the attorney general is supposed to represent the public interest. It is doubtful that a proposal for merger would be closely scrutinized by a public official busy with what he undoubtedly considers to be more important matters of state. At least one state allows religious hierarchies to order the consolidation of parishes or congregations.³⁰¹ Other jurisdictions require the ap-

295. IOWA CODE ANN. § 504.11 (1949); NEB. REV. STAT. § 21-1993 (1970); N.H. REV. STAT. ANN. § 308.9 (1966).

296. *E.g.*, LA. REV. STAT. ANN. § 12:249B (1969); OKLA. STAT. ANN. § 564.3 (1953).

297. Merger is not specifically allowed in the following states: Alabama, Arkansas, Connecticut, Delaware, Idaho, Kansas, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, and Rhode Island.

298. *E.g.*, OHIO REV. CODE ANN. §§ 1702.41-.42 (Page 1964) (requires endorsement by trustees of a plan of merger, notice to members of a meeting to approve the plan, and majority approval by membership of the plan). Most states require a two-thirds membership approval. *See, e.g.*, MODEL NON-PROFIT CORPORATION ACT § 40 (rev. ed. 1964).

299. Several states use procedures that do not require membership approval prior to an effective merger. New York requires supreme court approval. N.Y. RELIG. CORP. LAW § 13 (McKinney Supp. 1972). New Jersey and New Mexico require only the approval of the board of directors. N.J. STAT. ANN. § 16:1-20 (1939); N.M. STAT. ANN. § 51-14-35 (1953). Missouri has a unique system, which requires a plan of merger, approval by the membership, and submission to a local circuit court for approval. The circuit court may call upon an independent, competent person to give an opinion on the desirability of the merger. Once the circuit court gives approval, articles of merger must be filed in the county wherein the property is located and with the secretary of state. MO. ANN. STAT. § 352.150 (1966).

300. ME. REV. STAT. ANN. tit. 13, § 961 (1964).

301. MD. ANN. CODE art. 23, §§ 293, 312p (1973). Some states have granted the power impliedly by case law. *See, e.g.*, *Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. R. 782 (1881); *Klix v. Roman Catholic Parish*, 137 Mo. App. 347, 118 S.W. 1171 (1909).

proval of hierarchical officials before the merger or consolidation becomes effective.³⁰²

Most jurisdictions require that notice of a merger or consolidation be filed in the county where the property of the merged corporation is principally located³⁰³ or with a designated state official.³⁰⁴ The filing requirement is essentially a method of giving notice to prior and prospective creditors and others interested in the affairs of the corporation. Prior creditors are also protected in almost every jurisdiction by the statutory requirement that the successor corporation succeed to all liabilities and assets of the merging or consolidating corporations.³⁰⁵

5. *The Model Non-Profit Corporation Act*

The Model Non-Profit Corporation Act (MNPCA), propounded by the Committee on Corporate Laws of the American Bar Association, has been adopted in whole or in part in eighteen separate jurisdictions in the United States,³⁰⁶ and one can probably safely predict that other states will adopt it in due course. Many of the states that have adopted it are clustered in the Midwest and West, although there is no clear-cut pattern as to its adoption. A few jurisdictions that have adopted the MNPCA have also retained older acts covering ecclesiastical corporations.³⁰⁷

302. *E.g.*, N.Y. RELIG. CORP. LAW § 13 (McKinney Supp. 1972) (Episcopal).

303. *E.g.*, MINN. STAT. ANN. § 315.365 (1969); MO. ANN. STAT. § 352.150 (1966).

304. *E.g.*, HAWAII REV. STAT. § 417-57 (1968).

305. *E.g.*, MODEL NON-PROFIT CORPORATION ACT § 42 (rev. ed. 1964).

306. ALAS. STAT. ANN. §§ 10.20.005-.725 (1968); ARK. STAT. ANN. §§ 64-1901 to -1921 (1966) (highly modified version); D.C. CODE ANN. §§ 29-1001 to -1099(l) (1967), *as amended*, D.C. CODE ANN. §§ 29-1002, -1055, -1094 (Supp. 1972); D.C. CODE ANN. § 29-1030(a) (Supp. V 1972); GA. CODE ANN. §§ 22-2101 to -3601 (1970) (modified version); IND. ANN. STAT. §§ 23-7-1.1-1 to .1-66 (1972); IOWA CODE ANN. §§ 504A.1-101 (Supp. 1972); KY. REV. STAT. ANN. §§ 273.161-.390 (1972); MO. ANN. STAT. §§ 355.010-.520 (1966), *as amended*, MO. ANN. STAT. § 355.025 (Supp. 1973); MONT. REV. CODES ANN. §§ 15-2301 to -2397 (1967), *as amended*, MONT. REV. CODES ANN. §§ 15-2354, -2359, -2383 to 84 (Supp. 1971); NEB. REV. STAT. §§ 21-1901 to -19, 106 (1970); N.D. CENT. CODE §§ 10-24-01 to -24-28 (1960), *as amended*, N.D. CENT. CODE §§ 10-24-05, -24-23 (Supp. 1973); ORE. REV. STAT. §§ 61.005-.950 (1971); TENN. CODE ANN. §§ 48-101 to -2007 (Supp. 1972) (sections of MNPCA scattered throughout these sections); TEX. REV. CIV. STAT. ANN. arts. 1396-1.01 to -11.01 (1962), *as amended*, TEX. REV. CIV. STAT. arts. 1396-2.06, -2.14, -2.17, -2.18, -2.27, -3.02, -7.01, -7.02, -7.12, -8.08, -9.02 (Supp. 1972); UTAH CODE ANN. §§ 16-6-18 to -6-53 (1973); VT. STAT. ANN. tit. 11, §§ 2301-806 (1973); WASH. REV. CODE ANN. §§ 24.03.005-.925 (Supp. 1972); WIS. STAT. ANN. §§ 181.01-.76 (1957), *as amended*, WIS. STAT. ANN. §§ 181.04, .15, .175, .37, .56, .68, .76 (Supp. 1973). Illinois' General Not for Profit Corporation Act, ILL. REV. STAT. ch. 32, §§ 163a-163a100 (1972), although older, is quite similar to the MNPCA.

307. ALAS. STAT. §§ 10.40.010-.120 (1968); D.C. CODE ANN. §§ 29-501 to -516, -601 to -606 (1967), *as amended*, D.C. CODE ANN. §§ 29-501 to -516 (Supp. 1972); GA. CODE ANN. §§ 22-5501 to -5512 (1970); IOWA CODE ANN. §§ 504.1-29 (1949), *as amended*, IOWA

The MNPCA provides basically for a membership form of corporation.³⁰⁸ It allows for the incorporation of any level of ecclesiastical organization, be it a congregation, a national denomination, or some level of the hierarchy of a given denomination.³⁰⁹ It should be remembered that the MNPCA applies also to all other forms of non-profit corporations, as well as to the religious or ecclesiastical corporation.

The formation of a corporation under the MNPCA is similar to the formation of a corporation under the Model Business Corporation Act, which has been described previously.³¹⁰

A corporation is given more powers under the MNPCA than under most state ecclesiastical corporation laws. Under section five of the Act the following powers are granted to the corporation: to have perpetual succession; to sue; to have a corporate seal; to purchase, hold, lease, take by gift, or improve real and personal property or any interest therein, wherever situated; to sell, convey, mortgage, pledge, lease, or otherwise encumber its property; to lend to employees other than directors or officers; to deal in securities or obligations of any company or governmental unit in the United States; to make contracts, borrow, issue notes or bonds, or give security; to lend for corporate purposes, take security, and invest funds; to conduct its affairs in any state or foreign country; to elect or appoint officers or agents and fix their salaries; to make or alter bylaws; to make donations for public welfare or charities; to indemnify any officer for the expenses of any suit resulting from his acting as a director of another corporation at his own corporation's request; to cease activities and dissolve; and to exercise all necessary and convenient powers to effect its purposes. The power of the board of directors in exercising the above powers is limited only by the fact that they are elected and by a specific requirement that in order to sell or encumber all or substantially all of the corporate assets, two thirds of the membership must give its prior approval.³¹¹

The MNPCA provides for voluntary and involuntary dissolution procedures. Voluntary dissolution takes place after approval by the

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CODE ANN. §§ 504.1-29 (Supp. 1972); MONT. REV. CODES ANN. §§ 15-2401 to -2413 (1967); ORE. REV. STAT. § 61.055 (1971); UTAH CODE ANN. §§ 16-7-1 to -11 (1973); VT. STAT. ANN. tit. 27, §§ 701-06 (1967); WASH. REV. CODE ANN. §§ 24.12.010-.40 (1972); WIS. STAT. ANN. §§ 187.01-.17 (1957), *as amended*, WIS. STAT. ANN. §§ 187.01-.17 (Supp. 1972).

308. It is possible, however, to form a corporation under the MNPCA without members. MODEL NON-PROFIT CORPORATION ACT § 11 (rev. ed. 1964).

309. See MODEL NON-PROFIT CORPORATION ACT §§ 28-31 (rev. ed. 1964).

310. See text accompanying notes 227-30 *supra*.

311. MODEL NON-PROFIT CORPORATION ACT § 44 (rev. ed. 1964).

board of directors and two thirds of those members present and voting at a meeting properly called to consider the issue.³¹² Upon approval as outlined above, the corporation ceases operation and sends notice to all creditors.³¹³ Assets go first to creditors, then to those contributors who specified the return of assets contributed in such an event, then to another corporation with similar purposes if the assets are in fact held in trust for a particular purpose, and finally to the members or other persons entitled to their possession according to the articles or bylaws.³¹⁴ When all of the assets are distributed, the president and secretary execute and verify articles of dissolution³¹⁵ and file duplicates with the secretary of state, who files one, returns one, and issues a certificate of dissolution.³¹⁶

Involuntary dissolution may be initiated by a member or director when the directors are in deadlock, the members cannot break the deadlock and irreparable injury to the corporation is suffered or threatened; when acts of the directors are illegal, oppressive, or fraudulent; or when assets are being misapplied or wasted.³¹⁷ A creditor may initiate a suit for dissolution if (1) he has a claim reduced to judgment, a return *nulla bona* has been made, and the corporation is insolvent, or (2) the corporation admits to his claim in writing and is shown to be insolvent.³¹⁸ Such dissolution is accomplished by filing a suit in a court of equity. The court then appoints a liquidating receiver³¹⁹ with the power to distribute assets in the order described previously.³²⁰ When all the assets are distributed, the court issues a decree of dissolution,³²¹ which must be filed with the secretary of state.³²²

A corporation organized under the MNPCA may merge or consolidate with one or more other domestic corporations.³²³ An alternative section of the MNPCA allows merger or consolidation with foreign nonprofit corporations.³²⁴ The MNPCA follows the pattern

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312. MODEL NON-PROFIT CORPORATION ACT § 45 (rev. ed. 1964).

313. MODEL NON-PROFIT CORPORATION ACT § 45 (rev. ed. 1964).

314. MODEL NON-PROFIT CORPORATION ACT § 46 (rev. ed. 1964).

315. MODEL NON-PROFIT CORPORATION ACT § 49 (rev. ed. 1964).

316. MODEL NON-PROFIT CORPORATION ACT § 50 (rev. ed. 1964).

317. MODEL NON-PROFIT CORPORATION ACT § 54(a) (rev. ed. 1964).

318. MODEL NON-PROFIT CORPORATION ACT § 54(b) (rev. ed. 1964).

319. MODEL NON-PROFIT CORPORATION ACT § 55 (rev. ed. 1964).

320. MODEL NON-PROFIT CORPORATION ACT § 55 (rev. ed. 1964).

321. MODEL NON-PROFIT CORPORATION ACT § 59 (rev. ed. 1964).

322. MODEL NON-PROFIT CORPORATION ACT § 60 (rev. ed. 1964).

323. MODEL NON-PROFIT CORPORATION ACT §§ 38-39 (rev. ed. 1964).

324. MODEL NON-PROFIT CORPORATION ACT § 43 (rev. ed. 1964).

prevalent in the United States in requiring a plan of merger or consolidation to be adopted first by the board of directors and then by two thirds of those present and voting at a meeting properly called to consider the issue.³²⁵ Articles of merger must be adopted and duplicates filed with the secretary of state, who then files one, returns one, and issues a certificate of merger.³²⁶ The new corporation so formed succeeds to all rights and liabilities of the predecessor corporations.³²⁷

IV. CONSTITUTIONAL ASPECTS OF RELIGIOUS CORPORATIONS

The problems relating to incorporation of religious societies have had a long history in this country. The major developments in this history occurred prior to the United States Supreme Court's extensive and highly significant interpretations of the religion clauses of the first amendment, which have been extended to the states via the fourteenth amendment.³²⁸ Although matters concerning the powers and limitations of ecclesiastical corporations, as well as questions about the intervention of civil courts in the internal affairs of churches, have traditionally been handled by state courts on the basis of statutes and state case law,³²⁹ the imposing body of recent decisions on the meaning and application of the first amendment³³⁰ warrant a closer look at some constitutional aspects of the church corporation problem.

The initial and basic question is whether a state grant of the corporate privilege to societies organized for a religious purpose is consistent with the proscriptions of the establishment clause of the first amendment.³³¹ While it may appear highly academic or perhaps

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325. MODEL NON-PROFIT CORPORATION ACT § 40(a) (rev. ed. 1964).

326. MODEL NON-PROFIT CORPORATION ACT § 41 (rev. ed. 1964).

327. MODEL NON-PROFIT CORPORATION ACT § 42 (rev. ed. 1964).

328. *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

329. *E.g.*, *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). See note 49 *supra* and accompanying text.

330. See, *inter alia*, *Lemon v. Kurtzman*, 403 U.S. 1318 (1971); *Walz v. Tax Commn.*, 397 U.S. 664, 669 (1970); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

331. In *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 48-49 (1815), Justice Story delivered perhaps the only direct Supreme Court remark on the subject:

It is conceded on all sides that, at the revolution, the Episcopal church no longer retained its character as an exclusive religious establishment. And there can be no doubt that it was competent to the people and to the legislature to deprive it of its superiority over other religious sects, and to withhold from it any support by public taxation. But, although it may be true that "religion can be directed only by reason and conviction, not by force and violence," and that "all men are equally entitled to the free exercise of religion according to the dictates of conscience," as the bill of rights of Virginia declares, yet it is difficult to per-

even frivolous to raise this issue today, there is some precedent that may suggest the importance of the question. In the famous case of *Everson v. Board of Education*³³² the Supreme Court stated that the establishment clause was designed to prohibit any form of aid to any and all religions and to ordain the separation of church and state. If the no-aid language is literally construed, a formidable case can be made against the validity of any statute that grants to religious bodies a legal device that is immensely useful, not only in carrying on routine business, but also in acquiring and accumulating property. The same can be said of the application of the charitable trust doctrine, whereby courts recognize and enforce trusts for the benefit of religious societies and in aid of religious purposes. The great value to churches of these benefits secured by law is readily apparent. Perhaps it is safe to say that the recognition of the power of religious groups to acquire and own property and enter into contracts, to be the beneficiaries of charitable trusts, and to enjoy the protection afforded by the laws of the state in carrying out their religious functions are among the chief forms of aid given by the state to religious societies.

The argument that the no-aid interpretation requires the invalidation of laws permitting the incorporation of religious societies derives some force from President Madison's veto of a bill to incorporate the Episcopal Church for the District of Columbia.³³³ He said that

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ceive how it follows as a consequence that the legislature may not enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. Consistent with the Constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations.

332. 330 U.S. 1 (1947).

333. The following is the complete text of his veto message:

To the House of Representatives of the United States:

Having examined and considered the bill, entitled "An Act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia," I now return the bill to the House of Representatives, in which it originated, with the following objections:

Because the bill exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that "Congress shall make no law respecting a religious establishment."

the bill would amount to an establishment of religion forbidden by the first amendment. In assessing the significance of Madison's veto, it must be remembered that this corporation was chartered by special law and that the incorporation of only one church was subject to the charge that it was unduly preferred over others.³³⁴ Also, the grant of corporate status could well be viewed as an attempt to restore some special privileges lost when the Episcopal Church was disestablished in Virginia and Maryland.³³⁵ Moreover, as stressed by Madison in his veto message, the bill, by adopting the rules for the governance of the Episcopal Church, intruded into religious matters, since it gave a legal sanction to matters reserved for the determination of the church and would prevent the church from making changes in its internal law. Madison regarded this as an establishment of religion. In confining his criticism to features of this special charter, Madison did not necessarily take the view that a general law that permitted the incorporation of churches and did not attempt to prescribe the organizations' internal law would be unconstitutional. But the fact that Virginia, strongly influenced by Madison in these matters, adopted a constitutional provision prohibiting the incorporation of societies for religious purposes³³⁶ strongly suggests that Madison feared that the incorporation of churches would be a means for the enlargement

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The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the Minister of the same; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises. This particular church, therefore, would so far be a religious establishment by law; a legal force and sanction being given to certain articles in its constitution and administration. Nor can it be considered, that the articles thus established are to be taken as the descriptive criteria only of the corporate identity of the society, inasmuch as this identity must depend on other characteristics; as the regulations established are generally unessential, and alterable according to the principles and canons, by which churches of that denomination govern themselves; and as the injunctions and prohibitions contained in the regulations, would be enforced by the penal consequences applicable to a violation of them according to the local law:

Because the bill vests in the said incorporated church an authority to provide for the support of the poor, and the education of poor children of the same; an authority which being altogether superfluous, if the provision is to be the result of pious charity, would be a precedent for giving to religious societies, as such, a legal agency in carrying into effect a public and civil duty.

24 ANNALS OF CONG. 982-83 (1853) [11th Cong., 3d Sess. (1810-11)]. The text is also reproduced in M. HOWE, CASES ON CHURCH AND STATE IN THE UNITED STATES 85 (1952).

334. See the *Presbyterian Protest Against Incorporation of Churches*, which was directed against the bill in the Virginia legislature that would have authorized the incorporation of Protestant Episcopal churches in each parish. The protest is reproduced in M. HOWE, *supra* note 333, at 13-14.

335. For a history of the early Virginia statutes relating to establishment, disestablishment, and incorporation of churches, see *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815).

336. VA. CONSR. art. IV, § 14. See text accompanying notes 139-72 *supra*.

of ecclesiastical power and would lead to abuse, including ecclesiastical intervention in matters of state.³³⁷

Despite Madison's view, the whole history of religious corporations, culminating in contemporary statutes that permit the easy incorporation of religious societies, supports the power of the state to grant the corporate privilege for religious purposes. That is, the argument can be made in the context of corporation laws, as was made in the *Walz* case³³⁸—where the Court relied in substantial part on history to sustain state property tax exemptions for property held for religious purposes—that the constitutionality of these laws is upheld by the fact that they have existed for so long. This viewpoint accords with Justice Holmes' aphorism that a page of history is worth a volume of logic.³³⁹

But reliance need not be placed solely or primarily on the historical argument to support the incorporation of church bodies. In the first place, the no-aid proscription has not been taken literally by the Supreme Court. Instead, the Constitution has been interpreted to prohibit those forms of assistance that are distinctively in aid of religious purposes and are not required in the interest of guaranteeing religious liberty.³⁴⁰ A complementary proposition is that the establishment clause does not prohibit laws or programs that are directed to appropriate secular ends, even though such laws or programs result in incidental aid to religion.³⁴¹

The secular-purpose approach was given definitive approval in *School District v. Schempp*,³⁴² where the Court said that the relevant tests in determining whether a given governmental enactment runs afoul of the establishment clause are: (1) Does the enactment have a secular legislative purpose, and (2) does it have a primary effect that neither advances nor inhibits religion?³⁴³ Statutes that allow churches

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337. For a sampling of the general views of Jefferson and Madison on the subject, see CHURCH AND STATE IN AMERICAN HISTORY, *supra* note 142, at 68-87.

338. *Walz v. Tax Commn.*, 397 U.S. 664 (1970).

339. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

340. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 41 U.S.L.W. 5153 (U.S., June 25, 1973) (public aid to parochial schools); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (public aid to parochial schools); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayers in public schools); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (religious instruction in public schools).

341. *Tilton v. Richardson*, 403 U.S. 672 (1971) (capital grants to church-related colleges); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (free textbooks for parochial school students); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing laws); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (bus transportation of children to parochial schools).

342. 374 U.S. 203 (1963).

343. 374 U.S. at 222.

to incorporate meet this test easily. These statutes are clearly directed to secular ends—to facilitate the carrying on of business, entering into contracts, and acquiring and disposing of property. Their primary effect can also be measured by these secular considerations. The state is not prescribing a faith, sanctioning religious acts or programs, or giving its support to religious teaching when it authorizes a group to form a religious corporation any more than the state is supporting a private business when it grants a corporate charter to a commercial group. This was clearly recognized in *Bradfield v. Roberts*,³⁴⁴ one of the few early cases arising under the establishment clause. In upholding the constitutionality of congressional grants to a District of Columbia hospital that was owned and operated by a sisterhood of the Roman Catholic Church, the Court said that the corporation that controlled the hospital was itself nonsectarian and “simply . . . a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists.”³⁴⁵

The secular-purpose requirement brings to the fore a view frequently voiced by state courts³⁴⁶ in characterizing and dealing with religious corporations: An incorporated religious society is viewed as a dual entity.³⁴⁷ It is, first and primarily, a religious association dedicated to spiritual ends, with its own internal authority concerning religious matters. As a corporation, it is a secular entity, operating under state auspices and subject to the general laws of the state respecting corporate procedure and contractual and proprietary matters. In short, a religious society is seen as serving both religious and secular purposes, and the incorporation privilege is directed to the secular aspects of its operation.

The Supreme Court has also stressed neutrality as a primary consideration in interpreting the establishment clause.³⁴⁸ Carried to its logical conclusion, this means that regulating laws of general application must apply equally to churches and religious activities and, conversely, that churches may not be denied privileges granted to other groups under general laws. Obviously, state laws that grant the corporate privilege to all nonprofit corporations meet the neutral-

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344. 175 U.S. 291 (1899).

345. 175 U.S. at 298-99.

346. See, e.g., *Gray v. Good*, 44 Ind. App. 476, 89 N.E. 798 (1909); *Miller v. Trustees of Baptist Church & Congregation*, 16 N.J.L. 251 (1837).

347. See C. ZOLLMAN, *supra* note 6, at 117-18.

348. *School Dist. v. Schempp*, 374 U.S. 203, 222-27 (1963).

ity test so far as their use by religious societies is concerned. Under such general laws the religious factor is not a relevant consideration; the nonprofit element is the key classification factor.

The arguments with respect to neutrality lose some of their persuasive force when churches do not derive their corporate privilege from general incorporation laws embracing all nonprofit organizations. For instance, the incorporation of churches may take place under statutes that are designed peculiarly for ecclesiastical or religious societies, although they do not single out any one denomination for special treatment.³⁴⁹ The classification in such statutes is in terms of societies organized for religious purposes. This type of law on its face is not neutral. It is fair, however, to assume that any state that permits the incorporation of societies organized for religious purposes also permits the incorporation of other nonprofit societies. Thus, the religious corporation laws may be viewed in the context of other state laws having to do with nonprofit associations, just as a law granting tax exemptions for property held for religious purposes may be a part of a general statutory scheme for exempting property used by nonprofit organizations.³⁵⁰

More difficulty is encountered in a state like New York, which has, over the years, enacted a series of separate incorporation statutes that are tailored to the needs of particular churches.³⁵¹ These individual statutes are, in a sense, special statutes, since they deal with the incorporation of churches of a designated denomination. Furthermore, they offer the opportunity of granting preferential treatment to some churches at the expense of others and thereby of violating the concept of neutrality. This way of dealing with the problem is supported by historical considerations. It may be viewed as a survival of earlier days when the state dealt specially with an established church and also as a carryover from the earlier era when the corporate privilege

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349. *E.g.*, COLO. REV. STAT. ANN. §§ 31-20-1 to -14 (1963); IDAHO CODE §§ 30-1101 to -1110 (1967); ME. REV. STAT. ANN. tit. 13, §§ 2861-3161 (1964); MINN. STAT. ANN. §§ 315.01-.50 (1969), *as amended*, MINN. STAT. ANN. §§ 351.01-.50 (Supp. 1973).

350. In *Walz*, the Court noted that New York had "not singled out one particular church or religious group or even churches as such; rather, it [had] granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." 397 U.S. at 673.

351. *See* N.Y. RELIG. CORP. LAW (McKinney 1952), *as amended*, N.Y. RELIG. CORP. LAW (Supp. 1972). The following is an example of the kinds of problems that can arise: Where a state statute specifies a given voting age for a religious corporation and the religious corporation's bylaws allow those of a lesser age to vote, a question is raised as to the legal effectiveness of decisions made when the underaged voters participate. This problem could become critical when the matter being dealt with concerns purely secular matters such as the sale or mortgage of real property.

was granted only by special charter. Once a state gets into the practice of providing a separate corporation law for a particular church that is influential enough in the legislature to secure an enactment of this kind of law, the legislature probably finds it difficult to escape from it. It may be that the historical considerations are in themselves adequate to support this legislation. Leaving the historical consideration aside, however, the most important consideration is whether the practical effect of these laws is to prefer some churches at the expense of others. In New York it appears from an examination of the individual statutes that any church body seriously interested in securing the corporate privilege has no difficulty in obtaining it. Moreover, in New York, general statutes permit the incorporation of religious bodies, so that churches not specifically provided for by the hand-tailored statutes may nevertheless incorporate under a general statute.³⁵² Indeed, it may be argued that churches organized under the general incorporation law stand in a better position than those for which special statutes have been enacted because the general laws allow churches much more freedom and flexibility in defining their internal procedures and practices.³⁵³ Since the special denominational type of law is designed to provide a corporate scaffolding for the particular ecclesiastical structure, it thereby gives a legal support to the church's own internal laws. The important question this kind of statute raises is not whether it is unduly preferential or discriminatory, but whether, in its practical operation, it unduly restricts the freedom of the churches and therefore violates the free exercise clause of the first amendment. More attention will be given to this question later.³⁵⁴

Finally, it may be argued that the state may appropriately implement religious liberty by authorizing the use of legal means that enable churches better to achieve their purposes. Entering into contracts and acquiring and holding at least some property, activities that are essential to carrying out religious functions, are greatly

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352. N.Y. RELIG. CORP. LAW §§ 3-27 (McKinney 1952).

353. For example, the Maryland statutes governing the Protestant Episcopal Church and its dioceses in the state of Maryland extensively regulate various aspects of internal procedure. For a sample list of those items regulated, see note 373 *infra*. However, in a state such as Washington, which utilizes the MNPCL, WASH. REV. CODE ANN. §§ 24.03.005-.925 (Supp. 1972), very little internal regulation is set forth. Methods are provided for removing officers, WASH. REV. CODE ANN. § 24.03.130 (Supp. 1972), limiting the sale of all or substantially all of the corporate property, WASH. REV. CODE ANN. § 24.03.215 (Supp. 1972), allowing merger or consolidation, WASH. REV. CODE ANN. § 24.03.195 (Supp. 1972), and dissolution, WASH. REV. CODE ANN. §§ 24.03.235-.302 (Supp. 1972).

354. See text accompanying notes 364-74 *infra*.

facilitated by the use of the corporate privilege. The privilege thus becomes a means of promoting the exercise of religious liberty by collective entities and is a phase of what Chief Justice Burger has called "benevolent neutrality."³⁵⁵ Indeed, the resemblance and the parallels between the arguments in support of the validity of incorporation laws and in support of the validity of tax exemption laws are striking.

The discussion up to this point has centered on the question of whether the grant of the corporate privilege to a religious society violates the establishment clause. Other constitutional considerations are suggested under the free exercise clause of the first amendment. Since the use of the corporate device as a means of acquiring, holding, and disposing of property and doing business is now considered virtually indispensable to the functioning of any kind of organized group, it is arguable that the church may claim the privilege of incorporation as a matter of constitutional right in the name of religious liberty. This claim, if valid, jeopardizes the Virginia³⁵⁶ and West Virginia³⁵⁷ constitutional provisions, which prohibit the incorporation of churches.

It may seriously be doubted, however, whether the free exercise argument, stated in this abstract form, would have much persuasive force with the Supreme Court. Considerations of the importance of the corporate form may be sufficient to sustain legislative authorization of the incorporation of churches, but not compelling enough to create a right of incorporation. The idea is now so well established in American law that the corporate privilege is a special grant from the legislature, made only at its discretion,³⁵⁸ that any claim of a constitutional right of incorporation, whether made by religious or by secular entities, would hardly receive serious attention. But, again, this question is largely academic. Even if religious societies have no constitutional right to incorporate, the claim can be made that they have a right under the equal protection clause of the fourteenth amendment not to be discriminated against in the enjoyment of the corporate privilege. Perhaps the state is free to withhold the corporate privilege from all nonprofit societies, but if it grants the privilege generally, it should not be free to deny the privilege on religious grounds. Such discrimination offends either the equal protection

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355. *Walz v. Tax Commn.*, 397 U.S. 664, 669 (1970). See quotation from Justice Story in note 331 *supra*.

356. VA. CONST. art. IV, § 14.

357. W. VA. CONST. art. 6, § 47.

358. See H. HENN, *LAW OF CORPORATIONS* § 12, at 18 (1970).

clause or the free exercise clause or the two in combination and is clearly incompatible with the neutrality concept.³⁵⁹

While the Virginia and West Virginia prohibitions on religious corporations are subject to attack on the ground of discrimination, the question may be raised whether the practical effect of the operation of the laws in these two states is to hamper the churches in a substantial way in carrying on their secular enterprises. As previously noted,³⁶⁰ in both these two states, legislation permits the acquisition of property for religious purposes in the name of trustees, and the benefit of the charitable trust doctrine has been extended by statute to trusts for religious purposes. While, therefore, the handling of commercial and property transactions in Virginia by churches may not be as conveniently done as in other states where the full corporate privilege is enjoyed, it is not clear that churches in Virginia have suffered seriously from this restriction. It is of interest, however, that at the time revision of the Virginia constitution was proposed, the argument was made that this provision should be deleted from the Virginia constitution on the ground of its possible conflict with rights secured under the religion clauses of the first amendment.³⁶¹

More concrete free exercise questions may be raised by incorporation laws that restrict rather than enhance the freedom of churches. Mention may be made first of state legislation that restricts the total amount of real estate that may be owned by religious corporations.³⁶² There is no evidence to indicate that these restrictions have imposed a substantial burden on churches or have seriously restricted them in

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359. See the opinion of the Michigan Supreme Court in *In re Proposal C*, 384 Mich. 390, 432-33, 185 N.W.2d 9, 28-29 (1971), where the court relied on both equal protection and free exercise grounds in declaring invalid a Michigan constitutional provision that excluded private school children, including those attending parochial schools, from receiving shared time instruction or auxiliary services at public schools.

"Neutrality in its application requires an equal protection mode of analysis . . . . In any particular case the critical question is whether the circumference of legislation encircles a claim so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Walz v. Tax Commn.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

For development of the thesis that the twin religion clauses of the first amendment forbid the use of the religious factor as the basis for a classification for purposes of governmental action, see P. KURLAND, *RELIGION AND THE LAW* (1962).

360. See text accompanying notes 139-72 *supra*.

361. The 1969 report of the Virginia Commission on Constitutional Revision stated: "[The section banning incorporation of churches] singles out the religious bodies for exclusion from the benefits of a general law to which other bodies are entitled. By so discriminating against churches the present section is probably unconstitutional under the First Amendment of the Federal Constitution." *COMM. ON CONSTITUTIONAL REVISION, REPORT ON THE CONSTITUTION OF VIRGINIA* 125 (1969). The Commission recommended the deletion of the provision, but the new Virginia constitution, effective July 1, 1971, retains the provision. VA. CONST. art. IV, § 14.

362. See statutes listed in note 242 *supra*.

the exercise of their religious functions. But whether these restrictive provisions are valid is another question. The first inquiry should be whether such laws are aimed peculiarly at religious societies.

If, for instance, a limitation of this nature were part of the general laws applicable to all corporations or at least to all nonprofit corporations, it may seriously be doubted that the validity of the restrictions could be challenged. On the other hand, if the limitation is directed peculiarly against corporations organized for religious purposes in order to prevent a large accumulation of property by churches, it may violate either the free exercise or the equal protection clauses. However, courts may accept the argument, based on historical experience, that some limitations on the holding of real property by churches is justified by the tendency of churches to accumulate property and thereby to acquire power that may be deemed inimical to the public interests. In terms of a familiar test,³⁶³ the state may be found to have a compelling interest in imposing these restrictions. It is doubtful, however, that a state could persuasively document its position that accumulation of property by churches presents a greater threat to the public interest than accumulation by other corporations, both profit and nonprofit.

Perhaps even more important in considering the free exercise clause are the restrictions that specifically tailored incorporation laws may place on the internal freedom of churches. These statutes may set forth very detailed procedures to be followed in running the affairs of the church. For instance, the New York statute that provides for the incorporation of the Episcopal Church specifically defines the powers of the vestry and the board of wardens and the procedure to be followed at meetings of the board.³⁶⁴ A celebrated case revolved around whether the statute had been duly observed with respect to the dismissal of a rector.³⁶⁵ In some states provision is made that only persons of legal age shall take part in the corporate meetings.³⁶⁶ This is proving to be a particularly troublesome provision at present in view of the tendency to reduce the legal age, and in some cases

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363. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

364. N.Y. RELIG. CORP. LAW §§ 40-49 (McKinney 1952), as amended, N.Y. RELIG. CORP. LAW §§ 40-49 (McKinney Supp. 1972).

365. *Rector, Church Wardens & Vestrymen of the Church of the Holy Trinity v. Melish*, 301 N.Y. 679 (1950), *cert. denied*, 340 U.S. 936 (1951). This case was in and out of the New York courts from 1949 to 1958. The rector was dismissed due to alleged pro-Communist leanings. His successor was duly appointed by the bishop responsible and was required to secure a court order directing the sheriff to expel the dismissed rector from the vestry. The dismissed rector's son, however, was granted a stay of the order since he had not been a party to the original action. *Application of Melish*, 6 App. Div. 2d 819, 176 N.Y.S.2d 362 (1958). The record is silent beyond this point.

366. See note 269 *supra* and accompanying text.

churches have acted to reduce the voting age from twenty-one to eighteen before the civil law has been modified. If a church in its own constitution and bylaws regulating its affairs as a religious society provides that eighteen-year-olds have a vote in all matters coming before the group, whereas the statute under which the church is incorporated permits voting to be done on matters properly coming before the corporate group only by persons of at least twenty-one years of age, may the church go ahead and do its business by reference to its own internal law and disregard the limitations imposed by the law under which it is incorporated?

Any discussion of state involvement in a church's internal affairs brings up the dual capacities in which church corporations or church societies operate. With respect to the handling of business matters and the acquisition and disposition of property, church bodies are conducting secular affairs and are appropriately subject to the laws of the state. But with respect to their own spiritual affairs, such as the admission or expulsion of members, the election or dismissal of a minister, and questions of doctrine, ecclesiastical organizations continue to be viewed as unincorporated associations and are free to make their own decisions without interference by the state.³⁶⁷ Matters distinctively spiritual or ecclesiastical relate to such issues as the admission or expulsion of members, the election or dismissal of a minister, and matters of doctrine. Obviously, this secular-spiritual dichotomy is of importance in connection with the questions we are discussing here. If the granting and exercise of the corporate privilege and the doing of business with regard to property matters is considered an aspect of the secular enterprise of the church, then church corporations, like other corporations, are subject to the state's usual laws respecting contract, property, and association law and must be expected to conform to it. It is not supposed that the churches do not have to conform with the property laws respecting the registration of deeds, the signatures required for a valid deed, and restrictions on the use of property or that a church is immune to the rules respecting contractual liability. Nor is it seriously argued that churches are immune to the general laws respecting the principles of agency in determining who is authorized to make contracts for a church. If this is the case, the question may seriously be raised whether churches may claim immunity to provisions of association law that affect the churches in carrying on their secular activities.

Unfortunately, the spiritual-secular distinction, while an acceptable abstract proposition, does not always admit of easy application.

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367. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

A matter that may seem secular to the civil authorities may have important religious significance to ecclesiastical authorities.³⁶⁸ For instance, a church may well assert that the age at which members may participate in its meetings, when and how its meetings are conducted, and what procedures are used in calling and dismissing its ministers are internal affairs of central concern to its operation as a religious enterprise. The state may be intruding too significantly into the affairs of a church when it regulates these matters under its corporation laws.³⁶⁹

A further consideration relevant to the spiritual-secular dichotomy is found in the doctrine of excessive entanglements, recently developed by the Supreme Court as a test in the interpretation of the establishment clause.³⁷⁰ The Court found that one purpose of the establishment clause is to avoid intrusion by civil authorities into religious affairs. Government may not engage in programs or enact laws that require extensive surveillance by civil authorities of the activities of religious institutions, since such surveillance entails the risk of entangling the state in matters of religious significance. The excessive entanglements idea at least suggests that the state may run afoul of the first amendment if it attempts to regulate internal church matters that have a significant religious aspect and may properly be regarded as falling within the sphere of the church's autonomy.

While it may be argued that the religious society, having elected to avail itself of the corporate privilege, has consented to be governed by the conditions and restrictions imposed by the law, this argument does not answer questions raised by the excessive entanglements issue. The doctrine of unconstitutional conditions is now too well devel-

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368. This situation has been causing some perplexity among courts faced with the problem. For example, in *Draskovich v. Pasalich*, 280 N.E.2d 69 (Ind. App. 1972), the court was faced with a property dispute involving a congregation of the Serbian Eastern Orthodox Church. The court, in the course of its opinion stated:

This causes us to consider what is religious doctrine and practice. . . .

The religious rites, doctrines, polity and practices of a church certainly contain as an essential part beliefs and practices in regard to the ownership of property. These beliefs are primarily religious and not secular. Frequently these beliefs are as strongly held as *religious beliefs* in regard to baptism or the sacraments. In other words, *beliefs* as to the proper method for a church to own property are frequently bound up with and intermingled in the religious rites, doctrines, polity and practices of the church.

280 N.E.2d at 78-79 (emphasis original).

369. President James Madison, in vetoing the bill to incorporate the Episcopal Church for the District of Columbia on the ground that it violated the establishment clause, relied primarily on the argument that the statute, by regulating matters internal to the church, intruded on ecclesiastical matters and gave a legal sanction to ecclesiastical law. See note 333 *supra*.

370. *Walz v. Tax Commn.*, 397 U.S. 664, 675 (1970): "[T]he questions [in deciding whether to tax churches or grant exemptions] are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."

oped to suggest that a state may condition a privilege in any manner it sees fit.³⁷¹ Presumably a religious body may continue to exercise its general privileges to carry on business under a statute permitting its incorporation even though it challenges the validity of some statutory restrictions on the ground of undue interference in internal matters.³⁷²

The consent argument may have some validity, however, in the case of special incorporation statutes that, like those in New York, are tailored to meet the needs of a given denomination. It should be emphasized that statutes of this kind, enacted at the request of the body, are designed to secure a conformity of the civil law to the church's internal law. The state has accommodated its laws to the needs of a given denomination and, in a very real sense, has used its authority to implement the freedom of the churches to fashion their own ecclesiastical law. It would seem that the problems most likely to arise will result from the failure to amend the statute to conform to changes in the church's own internal law.³⁷³ If a church is restricted by the provisions in a specifically tailored statute, perhaps it should seek amendment of the statute rather than attempt to repudiate a part of it on constitutional grounds. If the state has a general religious corporation law, it may be possible for the church to reincorporate under the general law; this could prove beneficial due to the greater freedom on internal matters that such laws generally allow.³⁷⁴

Finally, attention may be directed to problems that may result from the intervention by civil organs in the internal affairs of a

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371. The doctrine is that a state may not condition a benefit on the waiver of a constitutional right. See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). For earlier discussion, see Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Merritt, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929).

372. See *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958), and *Speiser v. Randall*, 357 U.S. 513 (1958), where the Court held that churches could continue to enjoy statutory tax exemptions despite failure to observe restrictions that the Court found to be unconstitutional.

373. See generally Casad, *supra* note 49. An excellent example of the type of extensive regulation that this type of statute may impose can be found in Maryland. In Maryland, each diocese of the Episcopal Church has its own statute of incorporation—e.g., MD. ANN. CODE art. 23, §§ 274A-97 (Diocese of Maryland), 298-312 (Diocese of Eaton), 312A-Q (Diocese of Washington) (1973). These acts vary among the dioceses as to matters of internal regulation, but do regulate, among other things, such procedural matters as the age of those eligible to vote for the vestry, MD. ANN. CODE art. 23, §§ 275 (Maryland, 18), 299 (Eaton, 21), 312A (Washington, 18) (1973), the number of vestrymen and the date of the annual congregational meeting, MD. ANN. CODE art. 23, § 301 (1973), powers and duties of the vestry, MD. ANN. CODE art. 23, § 304 (1973), powers, duties and obligations of the rector, MD. ANN. CODE art. 23, § 305 (1973), and powers and duties of the registrar, MD. ANN. CODE art. 23, § 306 (1973).

374. See note 353 *supra* and accompanying text.

religious society. Before further discussion, attention should be called to the implications of the Supreme Court's decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.³⁷⁵ The Court held that the Georgia courts had violated the religion clauses of the first amendment by upholding the freedom of a local Presbyterian congregation to secede from the national church body and to take its property with it.³⁷⁶ The Georgia courts had used the traditional departure-from-fundamental-doctrine rule to settle the dispute. According to this rule, property contributed to a religious body by its members was impressed with a trust in favor of the fundamental doctrines of that body. If a dispute arose over the control of this property, civil courts were allowed to determine which faction had been faithful to the trust.³⁷⁷ The Supreme Court held that the rule was unconstitutional because it required a state court to intrude into distinctively ecclesiastical matters—first, by determining the fundamental doctrines of the church and, second, by inquiring whether there had been a substantial departure from such doctrines.³⁷⁸

The Court, speaking through Mr. Justice Brennan, said that questions concerning church ownership, use, and control of property were appropriate for determination by the civil courts and might necessarily involve the application of doctrine if a dispute were due to an internal schism over control of church property. The doctrinal matter should, however, be left to determination by the authoritative organs established by the denomination, subject to possible judicial review for collusion or fraud.³⁷⁹ This approach requires a determina-

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375. 393 U.S. 440 (1969).

376. 224 Ga. 61, 159 S.E.2d 690 (1968).

377. See Note, 75 HARV. L. REV. 1142, *supra* note 49; Note, 74 YALE L.J. 1113, *supra* note 49.

378. The Court stated:

The departure-from-doctrine element of the implied trust theory which they [the Georgia courts] applied requires the civil judiciary to determine whether actions of the general church constitute such a "substantial departure" from the tenets of faith and practice existing at the time of the local churches' affiliation that the trust in favor of the general church must be declared to have terminated. This determination has two parts. The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of these doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

393 U.S. at 449-50.

379. 393 U.S. at 446-47. The Court stated that "civil courts [have] no role in deter-

tion of the locus of ultimate authority, as fixed by church law. But the Court said that the matter could also be properly determined by the application of neutral principles.³⁸⁰ Presumably, the Court had in mind general principles derived from contract, property, or trust law or rules derived from the laws of a state relating to corporations and nonprofit associations.³⁸¹ In a separate opinion accompanying a later per curiam decision,³⁸² Mr. Justice Brennan indicated that even the resort to church polity to resolve such disputes might also be illegal, since the inquiry into polity could itself be deemed to be an inquiry into an ecclesiastical matter.

Admittedly, *Presbyterian Church* raises a number of difficult questions, as evidenced by the confusion in subsequent state court decisions.³⁸³ No attempt is made in this Article to explore such difficult

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mining ecclesiastical questions in the process of resolving property disputes," but that "there might be some circumstances in which marginal civil court review of ecclesiastical determinations would be appropriate." 393 U.S. at 447 (emphasis original). It then quoted from *Gonzalez v. Archbishop*, 280 U.S. 1, 16 (1929), as follows: "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." 393 U.S. at 447. This language, said the Court, 393 U.S. at 447, was converted to a constitutional rule by *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

380. "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without establishing churches to which property is awarded." 393 U.S. at 449.

381. See Justice Brennan's separate opinion in *Maryland & Va. Eldership of The Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368-70 (1970), concurring in the majority's per curiam dismissal of the appeal in this case.

Justice Harlan, in his short concurring opinion in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 451 (1969), indicated that nothing in the Court's opinion would preclude a state court's using familiar trust principles, including reversion of the property to the donor in case of failure to observe the conditions of the grant, in dealing with church property.

Interestingly, the Georgia court, on remand of the *Presbyterian Church* case, interpreted language in the Court's opinion to mean that Georgia could no longer enforce any aspect of its implied trust doctrine with respect to property owned by a Presbyterian congregation. Accordingly, it held that since title had been taken in the name of the congregation, the congregation would prevail. *Presbyterian Church in the United States v. Eastern Heights Presbyterian Church*, 225 Ga. 259, 167 S.E.2d 658 (1969), cert. denied, 396 U.S. 1041 (1970). Two other state courts, *Wyche v. Alexander*, 15 N.C. App. 130, 189 S.E.2d 608 (1972); *Presbytery v. Rohrbauer*, 79 Wash. 2d 367, 485 P.2d 615 (1971), have since interpreted the Court's language differently.

382. *Maryland & Va. Eldership of The Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368-70 (1970). Justice Brennan was joined in his opinion by Justices Marshall and Douglas.

383. The lower courts have used some widely disparate rules in handling church property disputes since the *Presbyterian Church* case. For example, in *Nolynn Assn. of Separate Baptists in Christ v. Oak Grove Separate Baptist Church*, 457 S.W.2d 633 (Ky. 1970), cert. denied, 401 U.S. 955 (1971), the Kentucky supreme court held that it was proper to seek to identify the polity of the church involved in litigation and to resolve property disputes accordingly. In *Maryland & Va. Eldership of The Churches of God v. Church of God at Sharpsburg, Inc.*, 254 Md. 162, 254 A.2d 162 (1969), appeal dismissed, 396 U.S. 367 (1970), the Maryland court ignored polity and simply viewed

questions as whether church polity continues to be controlling, or even relevant, or whether there is room for continued application of an implied trust doctrine guided by conceptions of polity.³⁸⁴ The emphasis here is on the significance of the statutory provisions that may be invoked as neutral principles in the determination of these controversies. The statute under which a congregation is incorporated may prove to be decisive in a dispute involving questions of doctrine. For instance, in a recent case the Maryland Court of Appeals held that the statute under which the local congregation had been incorporated³⁸⁵ did not provide for any subjection of the congregation to the discipline and authority of a higher church body.³⁸⁶ The statute did not explicitly recognize the polity doctrine and on its face gave control of the property to the congregational corporation. The Maryland court saw the statute as a neutral principle of corporation law.³⁸⁷ By a combination of what might be called the "formal title" doctrine³⁸⁸ and the positive statutory provision, the court decided the case without reference to the internal law of the denomination or to the implied trust doctrine.

Whether the Maryland court made the correct choice of the applicable neutral principle is not the important question for our purposes; what is important is that the statute played the decisive part. This suggests that an incorporation statute that explicitly subjects congregations that organize under it to the polity and discipline of a

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how title was actually held with respect to the local congregational property in question. *Accord*, *Smith v. Church of God*, 326 F. Supp. 6 (D. Mo. 1971); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied*, 396 U.S. 104 (1970); *Polen v. Cox*, 259 Md. 25, 267 A.2d 201 (1970). Other courts view the implied trust doctrine as a permissible approach to the resolution of church property disputes, since they find it to be a "neutral principal of law." *United Methodist Church v. St. Louis Crossing Independent Methodist Church*, 276 N.E.2d 916 (Ind. App. 1971); *Macedono-Bulgarian Orthodox Church "St. Clement Ohridski" v. Macedonian Patriotic Organization "Fatherland"*, 27 Mich. App. 713, 184 N.W.2d 233 (1970).

384. 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, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347; Note, *Hull Memorial: A Limited Solution to the Problem of Judicial Intervention in Church Property Disputes*, 18 KAN. L. REV. 71 (1969); Note, *Limitations on the Power of Courts in Resolving Church Property Disputes*, 36 TENN. L. REV. 549 (1969).

385. MD. ANN. CODE art. 23, §§ 256-70 (1973).

386. *Maryland & Va. Eldership of The Churches of God v. Church of God at Sharpsburg, Inc.*, 254 Md. 162, 254 A.2d 162 (1969), *appeal dismissed*, 396 U.S. 367 (1970).

387. "The Maryland Religious Corporation Law is a general law for *all* religious corporations and has no reference whatever to doctrine. It, therefore, meets the requirement of a 'neutral principle of law.'" *Maryland & Va. Eldership of The Churches of God v. Church of God at Sharpsburg, Inc.*, 254 Md. 162, 168, 254 A. 162, 166 (1969), *appeal dismissed*, 396 U.S. 367 (1970) (emphasis original).

388. Under this doctrine the titleholder of the property has the right to determine use of the property with neither theology nor administrative church law as relevant considerations. See generally Casenote, 54 IOWA L. REV. 899, 907 (1969).

denominational body would be recognized as a valid and controlling neutral principle that would not require a court to enter into consideration of doctrinal matters. On the other hand, if the statute under which a church is incorporated makes no explicit mention of subjection of the local church to the discipline or authority of the church hierarchy, the resolution of a dispute between a local congregation and a national church organization is not so clearly indicated. The statute can be construed to set forth a neutral principle, namely, that if the congregation is given authority to acquire, own and dispose of property, then, so far as the civil courts are concerned, the disposition of the property rests in the corporation according to procedures defined by its charter or bylaws.³⁸⁹ Thus, property acquired by a corporation serving a local congregation might not be subject to any implied trust in accordance with the polity of the church. If, however, the congregation's affiliation with a hierarchical structure is recognized in the congregation's constitution or bylaws, neutral principles of either contract, trust, or associational law may be invoked to justify a civil court's deference to the determination of the issue by the appropriate ecclesiastical agency specified in the law of the church.³⁹⁰ These considerations suggest that *Presbyterian Church*, by placing a premium on neutral principles—including principles derived from corporation statutes—may spark a new interest among national church organizations in incorporation statutes that deal specifically with given denominations and may thereby counter the general trend in favor of general religious corporate statutes such as the MNPCA. Quite clearly, a national body runs a risk if its local congregations are incorporated under general statutes that take no account of denominational affiliations.

The foregoing discussion suggests some corresponding questions concerning the merger of church bodies,³⁹¹ particularly in the case where a congregation may want to disaffiliate itself from one denomination and attach itself to another. Obviously, the preceding discussion will apply if the congregation is committed by statute to a given

389. For an example of the mechanics of such an approach, see *Mack v. Huston*, 23 Ohio Misc. 121, 256 N.E.2d 271 (C.P. 1970).

390. Thus, in the hypothetical case under consideration, it could be concluded that the members, by their voluntary adherence to the written documents, had agreed to recognize the hierarchical authority and the organs provided for determination of disputes within the church. Or it could be concluded that the language in the basic documents of the local congregation subjected property acquired by the congregation to an implied trust governed by the polity and internal law of the church.

391. On the issue of merger, see *Cadman Memorial Congregational Soc. v. Kenyon*, 306 N.Y. 151 (1953), wherein a local congregation of the Congregational Christian Church sued to enjoin the merger of that church with the Evangelical and Reformed Church. The court of appeals of New York found that there was no harm to plaintiff in that its congregational polity was preserved by the merger and that none of its property rights was affected.

polity and subject to the discipline of a given church. On the other hand, if the statute under which a congregation is incorporated is silent on the matter of polity and affiliation and vests the property in the hands of the congregation, a neutral principle of corporation law would allow the congregation to elect to affiliate with another body and carry its property with it. A state court may still be free to invoke an implied trust doctrine to prevent the congregation from diverting the property from its original use.³⁹²

Finally, questions may be raised respecting congregational dissolution, as distinguished from merger or transfer of assets to a related body. Here again, trust concepts may be involved. The property of an unincorporated church body is usually dealt with according to the doctrines of trust law.³⁹³ If there is a complete failure of the trust, the dissolution of the society may result in a reversion to the grantor.³⁹⁴ On the other hand, there may be an application of the cy pres doctrine, whereby the property is turned over to a use for a similar purpose.³⁹⁵ Of course, where the congregation was attached to a denominational body, it would be quite natural to suppose that the cy pres doctrine would be applied so as to require that the property be held for the benefit of that body or at least subject to its control. Some state statutes expressly provide for such disposition in the case of certain types of churches with a congregational polity.³⁹⁶ In any event, it would not appear that the property would simply be divided among the remaining members of the congregation. If, however, the congregation has been incorporated under a statute that simply provides for a dissolution procedure and for distribution of the property among the members, more difficult questions may arise. While the statutory procedure may be said to be a neutral principle, authorizing a distribution to members of property that, in its most essential aspects, can be viewed as held in trust for religious purposes would seem to be an extraordinary result. It can, therefore, be expected that the statute would be interpreted to mean that upon dissolution the property would be held in trust subject to the cy pres doctrine or held for the benefit of the denominational body to which the church is attached.

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392. See *United Methodist Church v. St. Louis Crossing Independent Methodist Church*, 276 N.E.2d 916 (Ind. App. 1971); *Macedono-Bulgarian Orthodox Church "St. Clement Ohridski" v. Macedonian Patriotic Organization "Fatherland"*, 27 Mich. App. 713, 184 N.W.2d 233 (1970).

393. See note 49 *supra*.

394. See text accompanying note 292 *supra*.

395. See note 290 *supra* and accompanying text.

396. See note 293 *supra*.