THE AUTONOMY OF RELIGIOUS BODIES

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." The "religion" that is not to be "established" is, in the first analysis at least, necessarily a *collective* entity—a religious organization or a particular shared mode of worship, affirmation or observance. The religion whose "free exercise" is not to be "prohibited," on the other hand, has often been thought of, at least in the first analysis, as an activity of *individuals*, and the right to engage in such activity without state interference has been characterized as an attribute of *individuals* rather than of collectivities.

Further exploration, however, has determined that state sponsorship of religious activity by individuals in nonreligious groupings is contrary to the no-establishment clause (as in the case of prayer in public schools[1] or "transcendental meditation"[2]) and that individuals freely exercising their religion collectively in a religious organization confer upon that organization certain protections against state regulation. Laurence Tribe, in his magisterial *American Constitutional Law*, has explained the legal recognition of the *collective* right of free exercise as follows:

> Any attempt to constitutionalize the relationship of the state to religion must address the fact that much of religious life is inherently associational, interposing the religious community or organization between the state and the individual believer. Especially in the area of religion, courts in this country have been reluctant to interfere with the internal affairs of private groups.[3]
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> It is not only the sanctity of religious conscience in the abstract which has been of concern in these [church property] cases; it has also been the integrity of religious associations viewed as organic units. Recognition of the principle that associations have rights different from those of the persons constituting them has been somewhat grudging in American constitutional law. But one sphere in which such recognition has been clear is that of religious organizations and their autonomy.... [T]he Supreme Court has recognized for nearly a quarter-century that, whatever may be true of other private associations, religious organizations as

1. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington v. Schempp*, 374 U.S. 203 (1963), discussed at IIIC2b.

2. *Malnak v. Yogi*, 592 F.2d 197 (CA3 1979), discussed at IIIC2d(9) and VF1.

3. Tribe, L., *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Fndn. Press, 1988), § 14-1, p. 1155, citations omitted.

> spiritual bodies have rights which require distinct constitutional protection....
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> The New Testament provided early precedent for civil deference to religious authority on ecclesiastical questions.[4]

The New Testament reference is to Acts 18:12-16, in which Gallio, proconsul of Achaia, was importuned to judge a claim that Paul was "persuading men to worship God contrary to the law." Gallio replied to Paul's accusers, "If it were a matter of wrongdoing or vicious crime, I should have reason to bear with you, O Jews; but since it is a matter of questions about words and names and your own law, see to it yourselves; I refuse to be a judge of these things."[5]

As long as disputes within or between religious organizations pertain only to "words and names and your own (ecclesiastical) law," American courts are loath to intervene; they often follow Gallio's example: "And he drove them from the tribunal."[6] But when "temporal" interests are involved that affect ownership of property, rights of church employees under (civil) labor law, or torts by the religious body against members or outsiders, the civil courts are (increasingly) willing to adjudicate the dispute. The terms on which they do so, and the application of the religion clauses of the First Amendment to such disputes, can have a vital bearing on the autonomy of religious bodies.

It can scarcely be denied that an important dimension of the collective free exercise of religion is the right of religious organizations to manage their own affairs free from government intervention or regulation that would reshape, distort or impair the religious group's understanding of its faith, its mission or its standards of membership, leadership and spiritual authority.

One commentator has analyzed the implications of the Free Exercise clause for a "right to church autonomy" as follows:

> The free exercise clause protection for religious activity includes at least three rather different kinds of rights....
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> One category is the bare freedom to carry on religious activities: to build churches and schools, conduct worship services, pray, proselytize, and teach moral values....
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> Second, and closely related, is the right of churches to conduct these activities autonomously: to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the clause.
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> Third is the right of conscientious objection to government policy....

4. Ibid., pp. 1236-1237, citations omitted.
5. Acts 18:13, 14b-15 (RSV), cited in Tribe, *supra*, 2d ed., § 14-11, p. 1237, n. 73.
6. Acts 18:16 (RSV).

> When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future.[7]

"Autonomy" is the quality of self-determination of a collectivity, whether a nation, corporation or community. It is the equivalent for a group of what freedom is to an individual. It includes the group's ability to define for itself its (1) nature, (2) purposes, (3) standards of conduct, (4) internal structure, (5) mode of operations, (6) selection of leadership, (7) terms of admission, discipline and expulsion of members, and (8) constituting of authority over: (a) its organization, (b) property, (c) resources, (d) quality control, (e) administration, (f) relationships with outsiders, (g) supervision of agents and employees, (h) boundary determinations, and (i) resolution of disputes concerning the foregoing.

The desire for autonomy is certainly not unique to religious organizations. It is felt by every group seeking to achieve the objectives for which it exists, and often takes the form of demands to be left alone, whether voiced by labor unions, trade associations, professional guilds, fraternal lodges or literary clubs. Why should the claims to autonomy by religious organizations be more sacrosanct from outside interference than those of other associations?

That question has been voiced by a few critics who insist that "churches" are not mentioned in the First Amendment; they have no unique claims to rights not available to others. Why should they be exempted from laws of general application, such as "landmarking" statutes or prohibitions against sex-discrimination (as in exclusion of women from ordination)? One answer would be that *all* voluntary nonprofit organizations should enjoy greater autonomy than is now the case. Another is that, although few would contend that autonomy should be absolute for religious organizations, there are appropriate conditions and limitations upon free exercise of religion fittingly tailored to its unique character, which are detailed in the final volume of this work. But the determinative answer is that outlined above: that religion is an associational activity; it cannot exist apart from religious organizations.[8] Religion is *sui generis* under the First Amendment: it is to be free, but not established by the state. It is "special" under American law, and therefore special considerations are

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7. Laycock, Douglas, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," *Columbia Law Review*, 81:7 (Nov. 1981), pp. 1388-89-91, citations omitted.

8. Judge Arlin Adams, in his thoughtful concurring opinion in *Malnak v. Yogi*, quoted Emile Durkheim, the leading early sociologist of religion, as follows:

> The really religious beliefs are always common to a determined group which makes a profession of adhering to them and to practicing rites connected with them.... In all history we do not find a single religion without a church. *Elementary Forms of the Religious Life*, 1915, 43-44; 592 F.2d 197 (CA3 1979) n. 44.

justified to protect its autonomy—not absolutely, but in balance with other important interests.

It is ironic that some of the critics who seem willing to trade off the claims to autonomy of religious groups for supposedly greater goods are often also able to become greatly exercised in support of the claims to self-determination of every ethnic enclave or inhabited island. Freedom is no less precious to religious bodies than to minority populations of other kinds.

1. Whitefield's Principle

The cogency of the claim to autonomy of religious groups is nowhere more clearly demonstrated than in the experience of the founder of Methodism, John Wesley. In his *Journal*, under date of May 9, 1739, he related his efforts to build a meeting place for two of the religious societies he had founded in Bristol:

> I had not at first the least apprehension or design of being personally engaged, either in the expense of this work, or in the direction of it; having appointed eleven feoffees, on whom I supposed these burdens would fall of course. But I quickly found my mistake; first with regard to the expense: for the whole undertaking must have stood still, had not I immediately taken upon myself the payment of all the workmen; so that before I knew where I was, I had contracted a debt of more than a hundred and fifty pounds. And this I was to discharge how I could; the subscriptions of both societies not amounting to one quarter of the sum. And as to the direction of the work, I presently received letters from my friends in London, Mr. Whitefield in particular, backed with a message by one just come from thence, that neither he nor they would have anything to do with the building, neither contribute anything towards it, unless I would instantly discharge all feoffees, and do everything in my own name. Many reasons they gave for this; but one was enough—viz., "that such feoffees *always would have it in their power to control me; and if I preached not as they liked, to turn me out of the room I had built*." I accordingly yielded to their advice, and calling all the feoffees together, cancelled (no man opposing) the instrument made before, and took the whole management into my own hands. Money, it is true, I had not, nor any human prospect or probability of procuring it: but I knew "the earth is the Lord's, and the fullness thereof": and in His name set out, nothing doubting.[9]

George Whitefield, the evangelical preacher who electrified crowds in England and America, had an important insight into the reason for autonomy in religious bodies. It was John Wesley and his brother Charles who "invented" Methodism. They were the determiners of who and what was consistent with its genius. No person less inspired than they—and certainly not government—was to be able to countervail

9. Nehemiah Curnock, ed., *The Journal of the Rev. John Wesley, A.M.*, 3:237 (New York: Eaton & Maims). Entry for May 9, 1739, emphasis added.

their leadership in the movement they had organized, and control of the "temporalities" was an indispensable element in preserving the force and purity of the spiritual essence of the movement. Whitefield's Principle is no less true today.

2. The Nottingham Purge

On March 21, 1746, John Wesley visited one of his fledgling societies in Nottingham, which had not been flourishing as it should. He met with the eighteen members thereof and discovered among them what he described as a number of "triflers or disorderly walkers." He was in no doubt what to do. "I made short work, cutting off all such at a stroke, and leaving only that little handful... who were really in earnest to save their souls," he wrote. And when he left the next day, the society was much smaller, but much stronger.[10] The other eleven were expelled on the spot without ceremony or "due process." In that instance, "quality control" was direct and immediate.

3. Church Polities

As religious movements mature, and the charismatic leaders who organized them pass on and are succeeded by others perhaps less gifted, the religious body tends to regularize and formalize its structure and standards so as to be less dependent upon the charisma of individuals. The locus for decision-making authority is determined by the group's experience or its theology or other factors congenial to it. That locus may be in the local face-to-face group, in which case its polity is *congregational*. The locus of authority may be in a *cluster* of congregations, in which case its polity is *presbyterial*. The locus of authority may be regional, national or global, in which case it is *hierarchical*, whether the decision-makers be bishops, archbishops, prelates, pontiffs, patriarchs, apostles (as in the Council of the Twelve Apostles of the Mormon Church) or lay dignitaries (such as the same Apostles).

The mode of decision-making and of selection of decision-makers may be democratic or autocratic, rational or aleatory (as in the choice of a replacement for Judas, which was done by lot—Acts 1:26), whatever seems suitable to the organization and pleasing to God (in the eyes of its members).

In actuality, most modern ecclesiastical polities are *mixed*. That is, some matters are decided at a local level and others at various higher levels. In the Lutheran Church—Missouri Synod, for instance, doctrinal purity and the training of clergy are closely governed at the national level, while property is held and controlled by local congregations. Thus it is hierarchical with respect to doctrine but congregational with respect to property.[11]

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10. Ibid., Entry for March 21, 1746.

11. Author's study of polity of Lutheran Church—Missouri Synod, conducted under contract with a congregation thereof, 1982. This "split polity" phenomenon played a remarkable role in a recent church property dispute in Massachusetts. The highest court in that commonwealth had ruled in

The United Methodist Church, on the other hand, has another sort of mixed polity; it is governed by a General Conference that meets once every four years and has little continuing existence in between. It owns almost no property, and has no interim surrogate. The bishops of the church have few powers collectively. They preside over the General Conference in rotation, but have no vote in it. Each bishop has virtually absolute power in his own episcopal area over appointment of clergy to local churches in that area, but he has little formal or direct power over church property. Property is owned by local trustees, who cannot buy, build or sell churches without permission from the pastor and the district superintendent (an appointee of the bishop). If the property is abandoned or diverted to other purposes (including other religious purposes), it reverts to the Annual Conference, which is the basic organizational unit of the church, encompassing from several dozen to several hundred congregations. (Most local Methodist churches have reverter clauses in their deeds that specify that ownership reverts to the Annual Conference if the local congregation does not operate under the governance of the denomination.)

4. "Spiritual" v. "Temporal"?

It is sometimes contended that when a church obtains property, it enters the temporal realm and must abide by the rules that the secular world has erected for regulating ownership of property. This type of spiritual/temporal dichotomy implies that churches cannot claim autonomy in temporal matters, and that those can somehow be subjected to secular regulation without affecting the spiritual freedom of the church. When the Worldwide Church of God was placed in receivership, the court issuing the receivership order remarked:

> I just don't think ecclesiastical matters have anything to do with the financial aspects of the operation out there. I can see a clear delineation between what is ecclesiastical and what is not, but it has no reference whatsoever to financial matters.[12]

The idea that the faith of a religious group can somehow be severed from the material resources by which it is sustained and implemented is the legal equivalent of a kind of dualism that supposes disembodied spirit can operate independently of involvement with the baser realm of flesh. For Christians, the Incarnation means that

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Antioch Temple v. Perekh, 383 Mass. 854, 422 N.E.2d 1337 (1981) that a Pentecostal body had such a polity, and a lower court interpreted that to mean all church property disputes should be viewed as being subject to a split-polity "rule," applying it to a Russian Orthodox church that had no such polity, and indeed expressly stipulated a uniformly hierarchical polity in its constitution. *Primate and Bishops' Synod of the Russian Orthodox Church Outside Russia v. Russian Orthodox Church of the Holy Resurrection*, 617 N.E.2d 1031 (Mass. App. 1993), aff'd 636 N.E.2d 211 (Mass. 1994), cert. denied 115 S.Ct. 924 (1995).

12. Excerpt from Reporter's Transcript of Proceedings in Superior Court of California, Los Angeles County, *People of the State of California v. Worldwide Church of God*, Feb. 21, 1979. See § D2 below.

spirit can and does work in and through the flesh, not divorced from it. Spirit can probably work independently of the flesh, but it is not the proper responsibility of human authority to restrain the flesh with the hollow assurance that the spirit still is free. A similar principle applies to the church. The physical resources of money, property, structure (people) are the *means* whereby the faith is embodied and the spiritual vision realized. They can no more be treated as though separate from the spiritual or ecclesiastical or sacred than can the body be considered wholly independent of the soul.

5. "Belief" v. "Action"

In one of its earlier decisions on the regulation of religious behavior, the U.S. Supreme Court held that Congress could prohibit the practice of polygamy by the Mormons, even though carried on in furtherance of religious doctrine.

> Laws are made for the governance of actions and while they cannot interfere with mere religious belief and opinion, they may with practices.... Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[13]

This dichotomy between belief and action that marked the primitive stages of church-state law in this country is closely akin to the equally primitive dichotomy between spiritual and temporal. Granting freedom for belief and spirit is no great boon, as it is very difficult for secular powers to reach either of them except as they become manifest in action in the "real"—temporal—world. That is where religious liberty makes a difference: with respect to *actions* that are motivated and impelled by religious belief; with respect to the use and disposition of the material resources with which the faith is clothed and enabled to body itself forth in the world. What does the "free *exercise*" of religion mean if it does not refer to action and temporal embodiment? "Exercise" implies *action*, and *action* implies an entity that *acts*, not only through flesh-and-blood *persons* but through the *temporalities* that give substance and force and presence and permanence to their action.

The very distinction between *belief* and *action* is an artificial and misleading one—an artifact of European and Enlightenment views of the more intellectual Founders, who thought of religion as a credal, word-focused enterprise of "beliefs," "opinions," "principles," "doctrines" and "tenets." In actuality, religion is first and foremost a matter of shared experiences, relationships, attitudes, visions, rites and expectations. The *words* come later, as beliefs, scriptures, creeds and theologies are formulated to regularize, rationalize, systematize and communicate the inchoate experiences that

13. *U.S. v. Reynolds*, 98 U.S. 145 at 166 and 164 (1878), discussed at IVA2a.

preceded them.[14] Thus *actions* are as central to religion as *beliefs*, and both should be protected from state interference unless and until they "break out in overt acts against peace and good order."[15]

That does not mean that when a church buys property, builds a sanctuary, raises funds, spends and invests them, hires employees, enters into contracts with non-members, and so on, it is wholly immune from the secular stricture of laws that apply to others similarly engaged. But the extent and effect of the application of such laws is subject to the canons of the First Amendment, as more recent courts have interpreted them with greater sophistication than was evident in the "first approximation" spelled out in the Mormon cases. That sophistication has been only gradually arrived at, through a certain amount of case-by-case or trial-and-error adjudication, as the Supreme Court has explored what the religion clauses imply for the autonomy of religious bodies. The quest for better understanding of that autonomy has not been advanced by efforts to deny religious significance to "temporalities." Some of the main church-state tensions do arise at the boundaries between the "spiritual" and "temporal," the "sacred" and the "secular." But that does not justify the state's preempting jurisdiction in the latter as though it had no effect on the former.

6. Incorporation

One of the issues that looms large in the legal mind is *incorporation*. Long stretches of Zollman,[16] Torpey[17] and Hammar[18] are devoted to the absorbing questions of how to incorporate a church, advantages and disadvantages thereof, types of corporations, history of church incorporation, etc., etc., so those need not be treated here. They are essentially peripheral to the needs and interests of churches, at least to the degree that they are mechanisms tailored to meet the formal requirements of civil statutes and regulations. To the extent that they are necessary to enable a religious group to hold, encumber and dispose of property, to enter into contracts, to sue and be sued, and to protect officers and members from individual liability, they are more important, but the details of procedure remain somewhat technical and of little theological or constitutional significance for this work.

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14. Cf. Justice Robert Jackson: "William James... reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people. `If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support....'" *U.S. v. Ballard*, 322 U.S. 78,93 (1944) (dissenting).

15. *Reynolds v. U.S.*, 98 U.S. 145, 163 (1878), discussed at IVA2a.

16. Zollman, Carl, *American Church Law* (St. Paul: West Pub. Co., 1933), pp. 102-194.

17. Torpey, William G., *Judicial Doctrines of Religious Rights* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1948), pp. 82-117.

18. Hammar, Richard, *Pastor, Church and Law* (Springfield, Mo.: Gospel Pub. House, 1983), pp. 127-136. See also Kauper, cited in next footnote.

"Incorporation" is the process of embodying a religious society in a way that is "visible" to the law, and it is thus the essence of a "boundary" function. Religious societies would be at a serious disadvantage if they were obliged to remain legally "invisible," as they are in some countries where religion is not recognized as a distinctive human undertaking.

> [T]he 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.[19]
>
> 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 Virginia and West Virginia constitutional provisions, which prohibit the incorporation of churches.[20]

But the state's willingness to recognize the civil existence of a religious body does not properly entail an unlimited range of state requirements or regulations of the incorporated body.

> [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.[21]
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> 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 developed to suggest that a state may condition a privilege in any manner it sees fit. 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 grounds of undue interference in internal matters.[22]

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19. Paul G. Kauper and Stephen C. Ellis, "Religious Corporations and the Law," 71 *Michigan Law Review* (Aug. 1973), 1499, 1558.

20. Ibid., at 1564.

21. Ibid., at 1568.

22. Ibid., at 1568-9. See further discussion under § F below.

What regulations may be legitimate in the state's recognition of religious bodies is the subject-matter of Volume I, "The Autonomy of Religious Bodies," which focuses primarily on concerns *internal* to churches. Subsequent volumes deal with relations between churches and the "external" world.

A. EARLY AUTONOMY DECISIONS

The Supreme Court of the United States worked its way gradually into the area we now refer to as the law of church and state (as it did into other areas of law in the new nation). In the colonial period the law in the New World tracked that in the Old. But with the American Revolution a new age began, and transitions had to be made from old ways to new, not all of which are yet accomplished. But on the whole, the shift from an establishment to a disestablishment frame of law regarding matters affecting religion was carried out with surprising ease, with only a few glitches marring its progress. One of those was the status of "glebe lands."

1. *Terrett v. Taylor* (1815)

One of the earliest decisions by the Supreme Court of the United States on a church-state issue had to do with the ownership of "glebe lands" in Virginia. Prior to the American Revolution, the Anglican church had been the established church of that colony, but after the Revolution it was disestablished, and ceased to be an arm of the state. It became the Episcopal Church, a private religious association like other churches. Its clergy were no longer supported by taxes, and it was obliged to rely on voluntary contributions. By the Incorporation Act of 1784 it was allowed to incorporate in order to hold property, and its prerevolutionary holdings were confirmed to it. Following the subsequent adoption by the legislature of the new state of Virginia of the Bill for Establishing Religious Freedom in 1785-86, there was an effort to repeal the Incorporation Act, which succeeded in 1787.

There remained a controversy over the "glebe lands," agricultural land that the Anglican church had acquired prior to disestablishment, the income from which was applied toward the maintenance of the church and the support of the clergy. In 1802 the legislature decreed that the vacant glebes of the Episcopal parishes, and those that in time became vacant by the death of the incumbent, should be sold by the Overseers of the Poor and the proceeds used (after paying parish debts) for the support of the poor or for any other nonreligious purpose that a majority of the voters might determine. (Property given to the parishes since 1777 was to be left undisturbed.)[23]

The Episcopal Church contested this action in court, and in 1815 the case came before the Supreme Court of the United States, which ruled in an opinion delivered by Justice Joseph Story.

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23. Stokes, A.P., *Church and State in the United States* (New York: Harper & Bros., 1950), vol. I, pp. 348-396 *passim*.

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 legislative to deprive it of its superiority over other religious sects, and to withhold from it any support by public taxation. But...it is difficult to perceive 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 justly be 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 compulsory 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.

Be, however, the general authority of the legislature as to the subject of religion as it may, it will require other arguments to establish the position that, at the revolution, all the public property acquired by the Episcopal churches, under the sanction of the laws, became the property of the state. Had the property thus acquired been originally granted by the state or the king, there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners, or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it; nor of the parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive and unjust, and endured only because it could not be resisted. It was not forfeited; for the churches had committed no offense.

The dissolution of the regal government no more destroyed the right to possess or enjoy this property than it did the right of any other corporation or individual to his or its own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the state were held. The state itself succeeded only to the rights of the crown; and, we may add, with many a flower of prerogative struck from its hands. It has been asserted as a principle of the common law, that the

> division of an empire creates no forfeiture of previously-vested rights of property. And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice. Nor are we able to perceive any sound reason why the church lands escheated or devolved upon the state by the revolution any more than the property of any other corporation created by the royal bounty or established by the legislature.[24]

"This case was not decided under any specific section of the Federal Constitution or the Bill of Rights.... The decision was based on the general principles of fundamental law which protect all corporations alike, including religious corporations."[25]

Thus was confirmed the right of churches, like any other corporations, to own property in the United States. But the thornier question was yet to be addressed: how to determine who within a divided church was rightfully entitled to control the property thus owned? That question will be pursued below after an examination of other early church-state cases.

2. Attacks on Property Rights of Collectivist Religious Communities

Completely overlooked in many compendiums of church-state cases of the Supreme Court is a series of eleven decisions (six in state supreme courts and five in the U.S. Supreme Court) dealing with the autonomy of collectivist faith-communities that sought to follow the New Testament model of holding "all things in common."[26] Theirs was not the conventional pattern of organizational religious life at that time (or since). These collective entities were subject to various legal attacks by expelled or disjoined members (or their heirs), who sought a partition of the communal properties and possession of their supposed share therein. Given the commitments made by members at their induction to share their goods in common, these suits were essentially attacks on the autonomy of the religious bodies to organize themselves as their spiritual vision required and to obtain legal recognition and respect for their chosen mode of operation.

These cases offer a unique window of vantage upon a historic phenomenon of the frontier—the formation of utopian settlements designed to embody one or another vision of the ideal community. There were dozens of such communities scattered across the American landscape, some religious and some secular, some predating the formation of the Union.

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24. *Terrett v. Taylor*, 9 Cranch 43 (1815).

25. Stokes, A.P., and Pfeffer, L., *Church and State in the United States* (New York: Harper & Row, 1964), p. 105. (This case reached the Supreme Court on diversity of citizenship. Tribe, L., *American Constitutional Law*, 2d ed., § 8-1, p. 564.)

26. "And all who believed were together and had all things in common; and they sold their possessions and goods and distributed them to all, as any had need." Acts of the Apostles 2:44-45 (RSV).

These religious settlements constitute a fascinating story in themselves, beginning with Bohemia Manor (1683) and Woman in the Wilderness (1694), and running through the more enduring experiments of Ephrata (1735), Harmony (1804)/ New Harmony (1814)/ Economy (1825), Zoar (1817), to Amana (1842), Oneida (1848) and the Hutterite Bruderhof (1874). The most extensive and long-lasting of the religious communities was the Shakers (1774), who maintained their distinctive way of life for over two centuries.[27] The religious communities outlasted their secular counterparts—Owenite colonies, Fourierist phalanxes and socialist communes—because of their stricter regimens, spiritual focus and higher level of commitment. But they were not without their detractors and dissidents, some of whom went to law against them, which is where they enter the purview of this study. Some cases even reached the U.S. Supreme Court, though they do not appear in the literature purporting to catalogue that court's wrestlings with religious issues, perhaps because they did not explicitly invoke the Religion Clauses of the First Amendment.

These cases are of continuing interest, however, because they recite the allegations against tightly organized religious movements that still are heard today—that they are the creatures of autocratic despots unscrupulously exploiting gullible and credulous followers, whose capacity to decide for themselves is diminished by overbearing regimens. The Supreme Court's disposition of these cases—in striking contrast to the way it dealt with the Mormon Church in the same epoch—should be instructive if brought to bear on some of the anti-cult litigation of the present era, reported in Volume II.[28]

a. *Waite v. Merrill* (1826). The first example of this genre was rendered by an appellate court in Maine in 1826 in a case brought against the Shakers by a former member who had been brought into the society as a youth by his father and there remained until he was thirty-two, when he left. When he reached majority, he had signed the covenant agreeing to the rules of the society, which included a disclaimer of individual interest in the communal property.

> All the members that should be received into the Church should profess one joint interest as a religious right; that is, all were to have a just and equal right and privilege according to their needs in the use of all things in the Church, without any difference being made on account of what any of us brought in, so long as we remained in obedience to the order and government of the Church, and are holden in relation as members, are likewise equally holden according to their ability to maintain and support

27. See Hinds, W.A., *American Communities and Cooperative Colonies* (1878, reprinted 1975); Noyes, J.H., *History of American Socialism* (1870, reprinted as *Strange Cults and Utopias of Nineteenth-Century America*, 1966); Nordhoff, C., *The Communistic Societies of the United States* (1965); Bestor, A., *Backwoods Utopias* (Philadelphia: Univ. of Penn. Press, 1950, 1970); Oved, Y., *Two Hundred Years of American Communes* (New Brunswick, N.J.: Transaction Books, 1988).

28. See IIB.

> one joint interest in union and conformity to the order and government of the Church....
>
> As it was not the duty or purpose of the Church in uniting into Church order to gather and lay up an interest of this world's goods—but what we become possessed of by honest industry, more than for our own support, was to be devoted to charitable uses, for the relief of the poor, and such other uses as the gospel might require, therefore it was and still is our faith never to bring debt or demand against the Church or each other, for any interest or services which we have bestowed to the joint interest of the Church; but freely to give our time and talents, as brethren and sisters for the mutual good one of another, and other charitable uses according to the order of the Church.

The judge instructed the jury that they must decide what weight to assign to the plaintiff's having signed the covenant.

> He... told the jury that by the plaintiff's own shewing it appeared that he was a man of common abilities, and of competent understanding to bind himself at the time he signed the covenant, and that he must be presumed to have understood it;—that from the evidence before them there was nothing which the law recognized as compulsion or undue influence, so as to avoid the act, if the signatures were really the plaintiff's;—that there was nothing in the covenant itself inconsistent with law, or morally wrong, which could render it void;— and that therefore, however inconsistent with their own particular views of christianity or religion the faith of the shakers as developed in this cause might be, yet if they were satisfied that the plaintiff knowingly signed the covenant, their verdict ought to be for the defendants. And the jury found for the defendants. To these opinions and directions of the Judge the plaintiff [objected].

The plaintiff's attorneys argued on appeal that the covenant was illegal and against public policy and therefore void.

> The contract itself is unconstitutional and illegal, and therefore void.... [I]t is contrary to the Constitution... as it is in derogation of the right to acquire and possess property. It infringes the duties of children and parents reciprocally to support each other; and destroys the natural relation subsisting between them. All the property and services of the contracting parties are pledged to the association for their own support alone, no provision being made for the discharge of other obligations.
>
> The contract is also void as being against good morals. The parties to this covenant bind themselves to observe the order and rules, and to submit to the discipline of the Church.... Now the contract in this case, taken with its practical exposition by the Shakers themselves, goes to the destruction of marriage, which is a moral as well as a political institution.... The very names of husband and wife are not known among them; and even those already united in that relation, however advanced in life, as

> soon as they enter the pale of this self styled Church are separated forever by unrelenting despotism.... The love they have hitherto had for each other they are now enjoined to extinguish forever; and to regard their children as no longer their own.... [A]ll surrender their affections into the common stock, where they are lost as so many drops in the ocean.... They have no ritual for the celebration of the ordinance of matrimony; and should any among them enter into that relation, they are immediately expelled from the society, with the anathemas of eternal perdition, for disobedience to the gifts of the elders.... Can such a contract receive the sanction of law?
>
> Its tendency to fetter and enslave the mind and person is contrary to the genius and principles of a free government. In effect it is a contract that the party will always remain in the profession of his present faith; under the penalty of forfeiting all his estate should he become wiser and change his religious opinions. Thus,... all freedom of thought, inquiry, and action, in a subject of all others the most important, are perpetually restrained. It is also a contract for unlimited servitude, without any other compensation than bare support; and is therefore unconscionable, and void, being in derogation of personal liberty.

The court's decision was delivered by Mellen, C.J., to the effect that the judge's instructions to the jury were correct, that the covenant in question was properly admitted into evidence, and that the jury considered the plaintiff bound by it and thus not entitled to recover compensation. The only remaining question was whether the covenant was valid.

> It is said that [the covenant] is void, because it deprived the plaintiff of the constitutional power of acquiring, possessing and protecting property. The answer to this objection is, that the covenant only changed the mode in which he chose to exercise and enjoy this right or power; he preferred that the avails of his industry should be placed in the common fund or bank of the society, and to derive his maintenance from the daily dividends which he was sure to receive. If this is a valid objection, it certainly furnishes a new argument against banks, and is applicable to partnerships of one description as well as another.
>
> It is said that the covenant... is contrary to the genius and principles of a free government, and therefore void. To this it may be replied that one of the blessings of a free government is, that under its mild influence, the citizens are at liberty to pursue that mode of life and species of employment best suited to their inclination and habits, "unembarassed by too much regulation;" and while thus peaceably occupied, and without interfering with the rights and enjoyments of others, they freely are entitled to the protection of so good a government as ours; though perhaps all these privileges and enjoyments might be contrary to the genius and principles of an arbitrary government. But, in support of this objection, it is contended that the covenant is a contract for perpetual service and surrender of liberty. Without pausing to enquire whether a man may not legally contract with another to serve him for ten years as well as one,

> receiving an acceptable compensation for his services, we would observe that by the very terms of the fourth and fifth articles, a secession of members from the society is contemplated and its consequence guarded against in the fifth by covenants never to make any claim for their service, against the society.... Besides the general understanding and usage for persons to leave the society whenever they are inclined so to do, the plaintiff himself has in this case given us proof of this right, by withdrawing from their fellowship, and, now, in the character of a stranger to their rules and regulations, demanding damages in consequence of the dissolution of his contract. We, therefore, cannot consider the contract of a subscribing member as perpetual; he may dissolve his connection when he pleases, though perhaps he may thereby surrender some of his property, as the consideration of his dissolution of the contract. In all this we see nothing like servitude and the sacrifice of liberty at the shrine of superstition or monastic despotism.
>
> It is said the covenant is void because it is in derogation of the inalienable right of liberty of conscience. To this objection the reply is obvious; the very formation and subscription of this covenant is an exercise of the inalienable right of liberty of conscience. And it is not easy to discern why the society in question may not frame their creed and covenant as well as other societies of Christians; and worship God according to the dictates of their consciences. We must remember that in this land of liberty, civil and religious, conscience is subject to no human law; its rights are not to be invaded or even questioned, so long as its dictates are obeyed, consistently with the harmony, good order and peace of the community. With us modes of faith and worship must always be numerous and variant; and it is not the province of either branch of government to control or restrain them, when they appear sincere and harmless.[29]

As a final fillip, the court observed that even if the covenant were illegal, the plaintiff could not recover because the law will not advance an illegal transaction, so in arguing to that end, the plaintiff only defeated his own purpose. Little that has been written by judicial pen since 1826 exhibits a more genial recognition of the right of unconventional religions to enjoy full freedom of religion.

b. *Goesele v. Bimeler* (1852). The Supreme Court of the United States rendered its first decision in such a case in 1852, dealing with a suit brought by the heirs of a member of the Separatists of Zoar, Ohio, a group of German immigrants. The opinion of the court was delivered by Justice John McLean.

> In the year 1817, the members of the [Zoar] association emigrated from Germany to the United States. They came from the Kingdom of Wertemberg [*sic*], where they had been known for years as a religious society called Separatists. They were much persecuted on account of their

29. *Waite v. Merrill*, 4 Greenleaf (Maine) 102 (1826).

religion. Goesele, the ancestor of the complainants, with another member, had been imprisoned for nine years; and the safety of Bimeler depended on his frequent changes of residence and living in the utmost privacy. In that country they sought to establish themselves by purchasing land, but they found that the laws would not allow them this privilege. Disheartened by persecution and injustice, they came to this country in pursuit of civil and religious liberty. When they arrived at Philadelphia, they were in a destitute condition. They were supported while in that city, and enabled to travel to the place where they now live, by the charities of the Friend Quakers of Philadelphia and of the city of London. These contributions amounted to eighteen dollars to each person. A large majority of the society consisted of women and children.

While at Philadelphia, Bimeler, the head and principal man of the association, purchased, in his own name, from Godfrey Haga, the five thousand five hundred acres of land [on which they settled]. A credit of thirteen years was given, three years without interest. A deed to Bimeler and his heirs was executed for the land, the seventh of May, 1818; a mortgage to secure the consideration of $15,000 was executed. On their arrival at the place of their destination, they found it an unbroken forest; their means were exhausted, and they had no other dependence than the labor of their hands. They were no strangers to a rigid economy, and they were industrious from principle.

At the time of their settlement at Zoar, they did not contemplate a community of property. On the 15th of April, 1819, articles of association were drawn up and signed by the members of the society, consisting of fifty-three males and one hundred and four females. In the preamble they say, "that the members of the society have, in a spirit of Christian love, agreed to unite in a communion of property, according to the rules and regulations specified." The members renounce all individual ownership of property, present or future, real or personal, and transfer the same to three directors, elected by themselves annually; that they shall conduct the business of the society, take possession of all its property, and account to the society for their transactions. Members who leave the society are to receive no compensation for their labors or property contributed, unless an allowance be made them by a majority of the society.

* * *

The ancestor of the complainant... died in 1827, a member of the society. His name [—Johannes Goesele—] was signed to the articles.... On the first payment made for the land, it appeared that Goesele paid a small sum that remained unexpended of the eighteen dollars he received at Philadelphia....

It appears, by great industry, economy, good management, and energy, the settlement of Zoar has prospered more than any part of the surrounding country. It surpasses, probably, all other neighborhoods in the State in the neatness and productiveness of its agriculture, in the mechanic arts, and in manufacturing by machinery. The value of the property is now estimated by complainant's counsel to be more than a

million dollars. This is a most extraordinary advance by the labor of that community, about two thirds of which consists of females.

In view of the facts stated, it is not perceived how the case in the bill can be sustained. A partition is prayed for, but there is no evidence on which such a right can be founded. The plan, as stated, first agreed upon at Zoar for individual proprietorship and labor, was abandoned in less than two years.... No right was acquired by the ancestor of the complainant on this ground. He then signed the... articles, which... renounced individual ownership of property, and an agreement was made to labor for the community, in common with others, for their comfortable maintenance. All individual right of property became merged in the general right of the association. He had no individual right, and could transmit none to his heirs. It is strange that the complainant should ask a partition through their ancestor, when, by the terms of his contract, he could have no divisible interest. They who now enjoy the property, enjoy it under his express contract.

* * *

The fraud charged on Bimeler, in the purchase of the land, if true, could not help the [complaint]. But the charge has no foundation. Bimeler purchased the land in his own name, and became responsible for the payment of the consideration. And he retained the title until the purchase-money was paid, and an act of incorporation was obtained, when he signed the articles, and placed the property under the control of the society, he having no greater interest in it than any other individual. But, before this, he openly declared that he held the land in trust for the society. As an honest man, he could not change, if in his power, the relation he bore to the vendor, until the consideration was paid. In this matter, the conduct of Bimeler is not only not fraudulent, but it was above reproach. It was wise and most judicious to secure the best interests of the association.

* * *

There are many depositions in the case, taken in behalf of the complainants, by persons who have been expelled from the society, or, having left it, show a strong hostility to Bimeler. They represent his conduct as tyrannical and oppressive to the members of the association, and as controlling its actions absolutely. And several instances are given to impeach his moral character and his integrity. Two of the witnesses say that he drives a splendid carriage and horses.

In regard to the carriage, it is proved to be a very ordinary one, worth about three hundred dollars, one of his horses worth about twenty dollars and the other thirty or forty. By respectable persons out of the society, Bimeler's character is sustained for integrity and morality, and several instances are given where, even in small matters, he deferred to the decision of the trustees against his own inclination. And many facts are proved wholly inconsistent with the charge of oppression.

That Bimeler is a man of great energy and of high capacity for business, cannot be doubted. The present prosperity of Zoar is evidence of this. There are few men to be found any where, who, under similar

> circumstances, would have been equally successful. The people of his charge are proved to be moral and religious. It is said that, although the society has lived at Zoar for more than thirty years, no criminal prosecution has been instituted against any one of its members. The most respectable men who live near the village say, that the industry and enterprise of the people of Zoar have advanced property in the vicinity ten per cent.
>
> Bimeler has a difficult part to act. As the head and leader of the society, his conduct is narrowly watched, and often misconstrued. Narrow minds, in such an association, will be influenced by petty jealousies and unjust surmises. To insure success, these must be overcome or disregarded. The most exemplary conduct and conscientious discharge of duty may not protect an individual from censure. On a full view of the evidence, we are convinced that, by a part of the witnesses, great injustice is done to the character of Bimeler. On a deliberated consideration of all the facts of the case, we think there is no ground to authorize the relief prayed for by the complainants.[30]

In this perceptive opinion we see reflected the unsuccessful cabal of a group of enemies of the prospering community of Zoar, setting out to "break" the corporation and divide up the remains among expellees and disaffected former members and heirs of nondisaffected ones—the epitome of the "anticult" coterie that will be seen again in a later century.[31] One wishes that court opinions rendered then would be as perspicacious and humane as Justice McLean's in his understanding of the hazards and attainments of a communal organization.

c. *Baker v. Nachtrieb* (1856). Four years later, the court's scrutiny shifted from Zoar to another communal society, this one in Pennsylvania, called variously Harmony or Economy, but in either case, Rappites. The opinion of the court was delivered by Justice John Campbell, the most junior justice at the time.

> In 1819 [the plaintiff] became associated with George Rapp and others, in the Harmony Society in Indiana, and remained with them there, or at Economy, in Beaver County, Pennsylvania, till 1846. He devoted his time, skill, attention, and care, during that period, to the increase of the wealth and the promotion of the interest of the society.... [I]n 1846, the plaintiff being then forty-eight years old, and worn out with years and labor for said association, was [by his account] wrongfully and unjustly excluded from it, and deprived of any share of its property, benefits, or advantages, by the combination and covin[32] of George Rapp and his associates; that at the time of his exclusion he was entitled to a large sum of money, which those persons unjustly and illegally appropriated to their own use; that

30. *Goesele v. Bimeler*, 14 Howard 589 (1852).

31. See IIB.

32. Covin = in law a collusive or deceitful agreement between two or more persons to defraud or swindle another or others (Webster).

George Rapp was the leader and trustee of the association, invested with the title to its property; and that, since his death, the defendants [Romelius L. Baker and Jacob Henrici] have acquired the control and management of its business and affairs, and the possession of its effects. The plaintiff calls for the production of the articles of association, which from time to time have regulated this society, and prays for an account and distribution of its property, or a compensation for his labor.

The defendants produce a series of articles, by which the association has been governed since its organization in 1805.

They admit, that from small beginnings the society have become independent in their circumstances, being the owners of lands ample for the supply of their subsistence, warm and comfortable houses for the members, and engines and machinery to diminish and cheapen their labors. They affirm that the plaintiff participated in all the individual, social, and religious benefits which were enjoyed by his fellows, under their contract, until he became possessed by a spirit of discontent and disaffection, a short time before his membership terminated. They deny that the plaintiff was wrongfully excluded from the association or deprived of a share or participation in the property and effects, by the combination or covin of George Rapp and his associates; but assert that voluntarily, and of his own accord, he separated himself from the society. They deny that he had a title to any compensation for labor and service while he was a member, other than that which was expended for his support, maintenance, and instruction, and that which he derived during the time from the spiritual and social advantages he enjoyed....

The society was composed at first of Germans, who emigrated to the United States in 1805, under the leadership of George Rapp. The members were associated and combined by the common belief that the government of the patriarchal age, united to the community of property, adopted in the days of the Apostles, would conduce to promote their temporal and eternal happiness. The founders of the society surrendered all their property to the association, for the common benefit. The society was settled originally in Pennsylvania, was removed in 1814 and 1815 to Indiana, and again in 1825 to Economy, in Pennsylvania.

The organic law of the society, in regard to their property, is contained in two sections of the articles of association, adopted in 1827 by the associates, of whom the plaintiff was one. They are as follows: "All the property of the society, real, personal, and mixed, in law or equity, and howsoever contributed and acquired, shall be deemed, now and forever, joint and indivisible stock; each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money, or labor, and the same rule shall apply to all future contributions, whatever they may be.

"Should any individual withdraw from the society, or depart this life, neither he, in the one case, nor his representatives, in the latter, shall be entitled to demand an account of said contributions..., or to claim anything from the society as a matter of right. But it shall be left altogether to the

discretion of the superintendent to decide whether any, and, if any, what allowance shall be made to such member, or his representatives, as a donation."

The defendants, admitting, as we have seen, that the plaintiff, until 1846, was a contented member of the association, answer and say, that during that year he became disaffected; used violent threats against the associates; made repeated declarations of his intention to leave the society, and in that year fulfilled his design by a voluntary withdrawal and separation from the society, receiving at the same time from George Rapp two hundred dollars as a donation. They exhibit... a writing, signed by the plaintiff, to the following effect:

"To-day I have withdrawn myself from the Harmony Society, and ceased to be a member thereof; I have also received of George Rapp two hundred dollars as a donation, agreeably to contract.

Joshua Nachtrieb

"Economy, *June* 18, 1846."

* * *

This writing would have much probative force, if we were simply to treat it as an admission of the statement it contains, when considered in connection with other evidence in the record. But, we think, this writing is something more than an admission, and stands in a different light from an ordinary receipt. The writing must be treated as a contract of dissolution, between the plaintiff and the society, of their mutual obligations and engagements to each other.... Treating this writing as an instrument of evidence of this class, it is clear that the [appeal] has not made a case in which its validity can be impeached. To enable the plaintiff to show that the rule of the leader, (Rapp,) instead of being patriarchal, was austere, oppressive, or tyrannical; his discipline vexatious and cruel; his instructions fanatical, and, upon occasion, impious; his system repugnant to public order, and the domestic happiness of its members; his management of their revenues and estate rapacious, selfish, or dishonest; and that the condition of his subjects was servile, ignorant, and degraded, so that none of them were responsible for their contracts or engagements to him, from a defect of capacity and freedom, as has been attempted by him in the testimony collected in this cause, it was a necessary prerequisite that his [appeal] should have been so framed as to exhibit such aspects of the internal arrangements and social and religious economy of the association. This was not done; and for this cause the evidence cannot be considered.... Decree reversed. Bill dismissed.[33]

Apparently the plaintiff proved by testimony more and other than his original complaint claimed. The court below had awarded him $3,890, but that award was vacated by the Supreme Court on the ground that, whatever the plaintiff contended or purported to show, the writing he executed at parting had served as a quitclaim to wipe clean the slate of whatever had gone before. We see reflected in the final

33. *Romelius Baker and Jacob Henrici v. Joshua Nachtrieb*, 19 Howard 126 (1856).

paragraph of the opinion a germ of the argument of diminished capacity that was to become popular a century later, attributing to "cult" regimes the impairment of faculties such that supposed victims were rendered no longer responsible for their acts and released from their legal obligations.[34] That line of argument did not impress the Supreme Court in 1856, and has not had much success since, but it continues to appear as a putative escape hatch from the consequences of one's commitments.

d. *Speidel v. Henrici* (1887). Jacob Henrici made another appearance on the docket of the Supreme Court, along with Jonathan Lenz, as trustees of the Harmony Society of Beaver County, Pennsylvania (Romelius Baker having died in 1868), as defendants in a suit brought by one Elias Speidel. The court below dismissed the suit, and the plaintiff having died, his estate appealed to the Supreme Court. The defendants were represented by a Pittsburgh lawyer, George Shiras, Jr., who was later appointed to the Supreme Court by President Benjamin Harrison. The opinion of the court was delivered by Justice Horace Gray. The complaint averred that the Harmony Society was the creation and fiefdom of one George Rapp, "a person of great intellectual power, clear-sight, sharp-witted, eager for superiority, and a born leader of men," who exploited it for his own benefit.

> [A]bout 1800 Rapp, without license or ordination, and in violation of law, began to preach clandestinely to his countrymen [in Germany], including the plaintiff's parents, and "preached to them the doctrine that the Lord had chosen him as their spiritual leader, that the second advent of Christ and the beginning of the millenium, as taught by the Revelation of St. John, was near at hand, and that, in order to be saved from eternal damnation, it would be necessary for them to separate from the established church of their country, to form a settlement by themselves under his guidance and control, and thus fit themselves for the second coming of Christ and accomplish their salvation."
>
> That Rapp, "by means of such clandestine teachings, and by the exercise of strong will power over the weaker minds of his said disciples, obtained such overpowering influence over about three hundred families of them," including the plaintiff's parents, that he caused them to separate from their established church, to believe in and accept Rapp as their only spiritual leader and as a necessary medium of their salvation..., that during the year 1804 and 1805, "in pretended furtherance of the said pretended plan of their salvation," Rapp made about one hundred and twenty-five families of them, the plaintiff's parents included, sell all their land and possessions, emigrate to the United States, and settle near Zelienople, in Butler County, in the State of Pennsylvania, upon a wild, uncultivated tract of land, selected by said Rapp and by him called Harmony..., and there "they formed a colony or voluntary association... and became wholly subject to [Rapp's] absolute power and control in both spiritual and temporal affairs."

34. See esp. *U.S. v. Fishman*, 743 F.Supp. 713 (N.D.Cal. 1990), discussed at IIB6o(3).

That, up to their arrival at Harmony, the heads of said families had severally paid their own expenses, and had kept, and had intended to keep, their several means as their own, and to live each family by itself; "but when said Rapp had succeeded in bringing them to said Butler County, and in separating them from their home and friends, he fraudulently and corruptly conceived the scheme to take advantage of their ignorance and helplessness, and of their blind reliance upon him as the prophet of the Lord, and the Lord's chosen mouthpiece in guiding them to salvation, for the purpose of gratifying his fierce ambition and lust for power, by acquiring unrestricted dominion over the money and means and mode of living of his followers, and by reducing them to abject dependence upon his irresponsible will;" and "in furtherance of this scheme, falsely and fraudulently pretended to his said followers, the plaintiff's parents included, that they could not and would not be saved from eternal damnation, except that they would renounce their plan of establishing a separate and exclusive home for each family in said settlement, and that they would yield up all their possessions, the same as it had been done by the early Christians..., and that they would lay their said possessions at the feet of the said Rapp as their apostle, to be placed into a common fund of said Harmony Society, in keeping of said Rapp as their trustee, and that they would live henceforth as a community or common household with all the rest of the followers of said Rapp, and submit themselves and their families to the control of said Rapp to do for said community such work as he should direct, the avails thereof to form part of said common fund, relinquishing to him and to his successors in the leadership of said community the management of all of said trust funds and the disposition of their own persons and those of their wives and children, and they receiving only the necessaries of life in return; but that said Rapp knew better, and did not honestly believe any of the foregoing things to be necessary for their salvation."

* * *

That Rapp ruled over the community continuously from 1805 until his death in 1847 with absolute dominion, making the only laws or rules that were allowed to govern it, teaching and making them all believe that "whoever broke any of said laws or rules committed the unpardonable sin, the sin against the Holy Ghost, which would neither be forgiven here nor in the other world;" forbidding the use of tobacco; determining "the character and amount of victuals to be supplied from the common store to the inmates of the community, and the material and cut of the dress of all males and females therein, and the hours of labor, rest, and eating;" sitting as sole judge and jury to try all charges against them, fixing the punishment at will, by putting on a diet of bread and water, excluding from church for a time, or reprimanding or expelling, without action of the community, or hearing or appeal; making them confess their sins to him, "invariably, and as a necessary condition of receiving the forgiveness of the Lord;" not permitting them to acquire any knowledge of the English language, or to have access to English books or papers; forbidding them,

on pain of damnation, to associate with or to visit any but inmates of the community; not allowing them to have any money or to buy or sell on their own account, threatening them for any disobedience with the punishment of Ananias and Sapphira;[35] permitting them to become citizens of the United States, but compelling them to vote at elections for the candidate whom he selected; repeatedly and corruptly making some of them forge the names of dead persons to legal instruments, and sign and swear to false statements, he knowing them to be false; that during all this time his management of said trust funds was selfish and rapacious; that in 1818 he destroyed the records of the original contributions made by the heads of families in 1805, for the avowed purpose of preventing the young people from finding out about them; that he studiously and fraudulently concealed from the contributors to said trust funds all his money transactions, and habitually destroyed the records thereof, and in 1845 gathered up out of the said trust fund and secreted the sum of five hundred and ten thousand dollars in coin.

That "the whole of the said system of said Rapp was repugnant to public policy and the laws of the land...; and until after the plaintiff so left said community he was kept under such duress and restraint by the iron will of said Rapp that he did not know, and had no means of ascertaining, the iniquity and degradation thereof and the impious and blasphemous character of the teachings of said Rapp."

That the said trust fund so received and accepted by Rapp, by profits, interest and accretions, had become of the value exceeding eight million dollars, and the net profits thereof for many years and now exceeded the sum of two hundred thousand dollars annually....

The prayer of the [appeal] was "that said trust be rescinded and held for naught, as resting upon fraud and iniquity and being contrary to public policy and the laws of the land;... that [the plaintiff] have compensation for his contributions to said trust and to its assets; that a distribution of said assets be had, and that the plaintiff receive his share therein."

* * *

Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches[36] in asserting them.

* * *

The plaintiff, upon his own showing, withdrew from the community in 1831, and never returned to it, and, for more than fifty years, took no step to demand an account of the trustees, or to follow up the rights which he claimed in this [appeal].

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35. Ananias and his wife Sapphira sold some land and lied about the amount they had received, secretly holding back some of the proceeds rather than giving it to the apostles for the church; they were admonished for this deception by the Apostle Peter, and fell down dead at his feet. Acts of the Apostles 5:1-10.

36. Laches = neglect or delay in asserting rights.

> If he ever had any rights, he could not assert them after such a delay.... In any aspect of the case... the plaintiff showed so little vigilance and so great laches, that the Circuit Court rightly held that he was not entitled to relief in equity.... Decree affirmed.[37]

The Supreme Court, after having indulged the plaintiff to the extent of spreading his accusations across ten pages of the *United States Reports*, concluded that his contentions were too "stale"[38] to contemplate and sent him on his way empty-handed. They are quoted here at some length to suggest the continual drumfire of allegations that besets unconventional, high-energy religious movements then and now, and to provide some continuity between the 1856 Harmony case preceding it and the 1902 Harmony case that follows.

e. *Schwartz v. Duss* (1902). By the turn of the century the Harmony Society had lost most of its vitality, and a different kind of allegation was brought against its caretakers: not that they were pursuing wrongful purposes under the guise of religious association, but that they were not taking care to perpetuate its original religious purposes.

> This suit was brought for the distribution of the property and assets of the Harmony Society, which the bill alleged had ceased to exist. The bill also prayed for an injunction against John S. Duss to restrain him from in any wise dealing with the property of the society, and also for a receiver.... It stated the origin and principles and plan of government of the society; that many industries were started and conducted by it, including a savings bank; the town of Economy, Pennsylvania, founded by it; and that its acquisitions, including 3000 acres of land in the city of Pittsburgh, amounted, in 1890, to upwards of $4,000,000....
>
> The bill also averred... that in 1890 there "began a... conspiracy, the results of which overturned and destroyed the entire government of the society, wasted nearly its entire wealth, depleted its membership to a few aged and infirm women, and placed the management of the society and the control of its remaining assets in the hands of one man and certain associates and confederates, within and without the ranks of the society."
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> * * *
>
> That the acting and directing mind of the conspiracy was John S. Duss....
>
> The [appeal] detailed the acts and purposes of Duss at great length. It is, however, enough to say that the [appeal] alleged that he became senior trustee... and conceived the purpose of wrecking and dismembering the society, and attempted to execute such purpose.... [H]e caused the expulsion of at least one member, and induced or paid others to withdraw.... [T]he increase in the society could only be through the admission of new members, and he directed that no new members be

37. *Speidel v. Henrici*, 120 U.S. 377 (1887).

38. A term used in one of the English precedents quoted by the court.

> elected under any circumstances whatever, and as a result thereof the said Duss and Susie, his wife, were the last members admitted in the four years preceding the filing of the [appeal].
>
> * * *
>
> [T]he membership of the society was reduced to eight persons, none of whom were aware of the actions of Duss, or were consulted by him.
>
> * * *

If half of what the plaintiffs alleged was true, Duss and his associates should have been guilty of several forms of breach of fiduciary duty in the looting of the society, and resort should have been had to the criminal law, or at the least to the restitution of the property of the society and reconstruction of its form with new officers. But instead the plaintiffs sought a remedy encountered in the preceding cases—breaking up the society and dividing its assets (which were alleged to have been already largely dissipated) among the plaintiffs.

The case had been referreed by a master, who investigated the complaints and then recommended dismissing them, which was done by the Circuit Court and affirmed by the Circuit Court of Appeals. The Supreme Court granted *certiorari*. The plaintiffs were represented by George Shiras, 3d, as noted earlier, and the opinion of the court was delivered by Justice Joseph McKenna.

> Two questions were submitted to the master: (1) Have the plaintiffs such a proprietary right or interest as would entitle them upon the dissolution of the society to share all its property or assets, or which entitles them to an accounting? (2) Has the society been dissolved by consent or by an abandonment of the purposes for which it was formed? A negative answer to either of the propositions determines the controversy against [the defendants], and both were so answered [in the negative] by the master and by the Circuit Court and the Circuit Court of Appeals. The case, therefore, seems not to be as broad or as complex as presented in the argument of counsel. The case is certainly clear from any disputes of fact, and we may dismiss from consideration the accusations against Duss, not only as to his motives in joining the society, but also as to his motives and acts as a member and officer of it. We are concerned alone with the legal aspect and consequences of his acts and those of his associates.
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> * * *
>
> [A]s to the relations of the plaintiffs to the society the master found as follows:
>
> "1st. That none of the plaintiffs were ever members of the society.
>
> "2d. That all of those members of the society through whom Christian Schwartz claims as their heir, signed the agreements [constituting the society], and continued members until their death [and likewise with the other plaintiffs]....
>
> "6th. That none of the parties through whom the plaintiffs claim contributed any money or property to the society."

* * *

> Manifestly the plaintiffs cannot have other rights than their ancestors, and the rights of the latter depend upon the agreements they signed.... [These included the provision:]
>
> "All the property of the society, real, personal and mixed, in law or equity and howsoever constituted or acquired, shall be deemed, now and forever, joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in lands, goods, money or labor, and the same rule shall apply to all future contributions, whatever they may be."
>
> * * *
>
> The purpose [of the society] was definite and clearly expressed. It was certainly thought to be clear enough by the men who framed it to declare and accomplish the "sacrifice of all narrow and selfish feelings to the true purpose of the association," as the articles fervidly declared. And it was provided that the member who withdrew from the society could make no demand against it "as a matter of right." The member who died left no right to his representatives. It needs no argument to show that[,] as such members had no rights[,] they could transmit none to the [plaintiffs] in this case.
>
> * * *
>
> The master, and both [courts below], found that the society had not been dissolved, either by the consent of the members or by the abandonment of the purposes for which it was founded. On account of this concurrence the disputed facts involved in that finding, under the rules of this court, and the circumstances of the record, we do not feel disposed to review.[39]

Justice George Shiras, Jr., and Justice Gray (who wrote the opinion in *Speidel v. Henrici*, *supra*) took no part in the decision. Unlike earlier cases in this series, this one evoked a strong dissent from Chief Justice Melville W. Fuller and Associate Justice David J. Brewer.

> [I]f the system of patriarchal government has been abandoned; if for the communistic scheme, a capitalistic scheme has been substituted; if the society has become a trading community and lost all of its distinctive attributes; if it is undergoing the process of liquidation; if all its property and assets have passed to a trading corporation and the power of carrying out its original principles has departed; if its membership has become practically incapable of perpetuation; it follows that the trusts [created at its formation] have been defeated and the society ended to all intents and purposes.
>
> * * *
>
> No new member has been admitted since 1893. It is suggested that this was because none desired admission. This may be so, and this would explain the diminishing of over five hundred members in 1827 to two

39. *Schwartz v. Duss*, 187 U.S. 8 (1902).

> hundred and eighty-eight in 1847, and forty-five in 1890. But the result is the same. The eight remaining cannot reasonably be held to represent the great communistic scheme which the Wurtembergers [*sic*] of 1803 sought to found on "the basis of Christian Fellowship, the principles of which being faithfully derived from the sacred Scriptures include the government of the patriarchal age, united to the community of property adopted in the days of the Apostles, and wherein the single object sought is to approximate, so far as human imperfection may allow, to the fulfillment of the will of God, by the exercise of those affections, and the practice of those virtues which are essential to the happiness of man in time and throughout eternity."
>
> As the membership diminished, the wealth increased, but not from contributions by new members, and operations were carried on by hired labor.
>
> Not one of the eight contributed to the three or four millions of property accumulated. It is conceded that Duss alone is the active member. But he is not the society, nor does the society in respect to its avowed principles any longer exist.
>
> * * *
>
> The master found, as matter of law, that the society continued to exist because the surviving members had not formally declared it to be dissolved, and that the purposes and principles of the society could not be held to have been abandoned unless by the formal action of all its members....By the articles neither the members, nor the Board of Elders, nor the Board of Trustees, nor all together, possessed the power voluntarily to formally dissolve the association, and it is for a court of equity to adjudge whether a condition of dissolution or a condition requiring winding up is or is not created by acts done or permitted.
>
> * * *
>
> The titles held by the trustees in this case were held for the benefit and use of the society in the maintenance of its principles. When the purposes of the trusts failed, the property reverted, not because of special provisions to that effect, but because that was the result of the termination of the trusts.
>
> Complainants, or some of them, are the heirs and next of kin of members who signed the articles... and who died in fellowship. The service of one of these families is said to aggregate three hundred years of unrequited toil. They are entitled to invoke the aid of the court in winding up of this concern, and these decrees ought to be reversed.[40]

The Chief Justice persuaded only Justice Brewer to this point of view, and "the said Duss" must have heaved a huge sigh of relief when he was permitted by the majority to proceed on his way without impediment.[41]

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40. *Schwartz v. Duss, supra*, Fuller dissent.

41. Later sources indicated what that way was. See Oved, *supra*, pp. 80-81.

This long-running saga of the Harmony Society reveals the life span of a more-or-less successful religious movement, beginning with its origin in the following of a dynamic and charismatic leader, George Rapp, its first years of penurious but inspired struggle, its flourishing as a result of its own cohesive community and productive labors, its gradual decline in numbers and in purposiveness, and its eventual demise. (Of course, the really "successful" religions count their life span in centuries rather than decades, but the pattern is usually similar.) Because of their intense commitment to their vision, which differs from that of their neighbors, they often encounter strong resistance and even peril (as in the experience of the Mormon movement).[42] Yet in every instance recorded above, the Supreme Court of the United States upheld their right to choose their own mode of organization and to maintain it against those who would have broken it up for their own benefit—even in the final instance when the complainants may have had more justification on their side. The court declined each of the heated invitations to intervene in the affairs of such religious communities—unconventional, even "communistic," though they were—and left them to pursue their own course unimpeded: a genuine, early and consistent recognition of autonomy. One further state case fits in this sequence.

f. *Iowa v. Amana Society* (1906). A new form of attack on a religious community emerged in Iowa involving the Amana villages, one of the more remarkable communal religious settlements of America. Many modern Americans familiar with the name "Amana" on their freezers may not realize that—like "Oneida" silverplate—it originated in a religious commune. On the complaint of a citizen—one Martha Wilson—the county attorney of Iowa County brought an action against the Amana Society for activities not authorized by its corporate charter and demanded, not that it cease such activities, but that the corporation itself be dissolved and its corporate privileges forfeited. The case was decided by the Supreme Court of Iowa in an opinion written by Judge Ladd.

> [T]he contention of the state is that the [Society], though organized under the statutes relating to corporations not for pecuniary profit, is exercising the functions of a corporation for pecuniary profit, in that it is possessed of extensive property interests with which, in connection with divers business enterprises, the society is engaged in money making, and that, for this reason, the corporation should be dissolved and its franchise forfeited. The [Society] does not deny having property as alleged, nor that such property is so employed as to yield a fair return, but insists that the purpose is not pecuniary profit in the sense contemplated by statute [but instead is for religious purposes].
>
> * * *
>
> [Under the nonprofit corporations statute] the manipulation of property which may be acquired by corporations of this class so that it shall yield a profit and the use of such profit to promote its objects is not prohibited.

42. Discussed at IVA2.

Indeed, the right to the income from the beneficial employment of property is one of the incidents of ownership.... The mere fact that money may be necessary to meet expenses will not authorize the corporation to engage in some independent business enterprise to earn it.... Obviously the power to acquire and make use of property was intended to be incidental to and in aid of the power conferred to accomplish certain purposes through the organization of a corporation, and... must be directly and immediately appropriate to the execution of the purposes designated. This does not mean that the property or enterprise shall be indispensable.... Nor does it mean, as the Attorney General seems to contend, that in no event may such a corporation engage in secular work.

The defendant is an organization of religious character. The charitable and benevolent objects included are such only as are enjoined as duties in the exercise of that Christian faith for the promotion of which the corporation was created. The preamble to [its] Constitution... recites the emigration of the "community of True Inspiration" from Germany to this country in 1843 "for the sake of civil and religious liberty," its settlement at Ebenezer, near Buffalo, New York, and removal therefrom to Iowa county "according to the known will of God."

* * *

> Article 2. In this bond of union tied to God among ourselves, it is our unanimous will and resolution that the land purchased here, and that hereafter may be purchased, shall be and remain a common estate and property, with all improvements thereupon and all appurtenances thereto, as also with all the labors, cares, troubles, and burdens, of which each member shall bear his allotted share with a willing heart.

The third [article] declares that "agriculture and raising of cattle and other domestic animals, in connection with some manufacturing and trades, shall, under the blessing of God, form the means of sustenance of this society. Out of the income of the land and other branches of industry, the common expenses of the society shall be defrayed. The surplus, if any, shall from time to time be applied to the improvement of the common estate of the society, to the building and maintaining of meeting and school houses, printing establishments, to the support and care of the old, sick, and infirm members of the society, to the founding of a business and safety fund, and to benevolent purposes in general...." [A]rticle 5 requires every one, upon becoming a member, to surrender all his property to the trustees, for which a receipt is given.

> Article 6. Every member of this Society is, besides the free board and dwelling, and the support and care secured to him in his old age, sickness and infirmity, further entitled out of the common fund to an annual sum of maintenance for himself or herself.... And we the undersigned members of this corporation in consideration of the enjoyment of these blessings in the bond of our Communion, do hereby release, grant, and quit claim to the said corporation, for ourselves, our children, heirs and administrators, all claims for wages and interest of the capital paid in to the common fund, also all claims of any part of the

> income and profits, and of any share in the estate and property of the Society separate from the whole and common stock"....
>
> [A]rticle 8 [provides] for the repayment of the amount received, to any member receding from the society.

* * *

It is manifest from these extracts from the articles and constitution that the corporation was organized to aid in effectuating certain ideals in religious life, especially those relating to communistic ownership of property; and the state insists that such ownership and the management of the property for the maintenance of the community cannot be other than purely secular and is inappropriate to religious purposes. Possibly a majority of Christians have concluded that community ownership of property apparently ordained by the Apostles was merely temporary[,] but this opinion has not been shared by all. The Moravians, Shakers, the Oneida Community, and more recently the Zionists, have thought otherwise. No one will claim that the doctrine is entirely without support in the Scriptures. Those who became believers on the day of Pentecost, we are told, not only continued "steadfastly in the Apostles' doctrine," but "were together, and had all things in common, * * * sold their possessions and goods, and parted them to all men, as every man had need.* * * Neither said any of them that aught of the things which he possessed was his own; but they had all things in common.* * * Neither was there any among them that lacked; for as many of them as were possessors of lands or houses sold them, and brought the prices of the things that were sold, and laid them down at the Apostle's feet; and the distribution was made unto every man according as he had need." Why was this done? Merely as a temporary expedient, or shall the awful fate of Ananias and Sapphira for concealing part of the price of their property be accepted as proof that communal life was enjoined as one of the doctrines of the Christian faith? It is not within the province of any department of the government to settle differences in creeds, and the courts ought not to arrogate to themselves the power to restrain or control their free exercise of any, so long as this shall be harmless. It is not for them to determine what ought or ought not to be an essential element of religious faith.... In this country the conscience is not subject to any human law and the right of free exercise, so long as this is not inimicable to the peace and good order of society, is guaranteed by the Constitution.

The members of the defendant society regard the mode of life described in the Acts of the Apostles as an essential part of their religion.... Their motion [notion?] is that people are placed in this world for the one purpose of saving their souls, and that this requires the crucifixion of such desires and appetites as divert attention from God. Their aim is to live such a life as Christ lived. To attain this they believe it necessary that everything be held in common; that each individual be relieved from the cares and burdens of separate property ownership, to the end that selfishness be eradicated; and that all may enjoy the better opportunity of knowing and serving God. This is an essential element of their religious

faith, and this, when innocent of injurious consequences, is, as we think, the test to be applied in determining whether such enterprises as those carried on by the Amana Society may be prosecuted by a corporation not organized for pecuniary profit.

The Attorney General, in support of his argument that the ownership and management of the property is not for a religious purpose, quotes numerous definitions of religion by eminent scholars and divines, and then eloquently summarizes them by saying: "Religion pertains to the spiritual belief and welfare of man, as distinguished from his physical wants and necessities...." Theoretically the distinctions pointed out may be correct. Practically religion may not be so completely separated from the affairs of this life. Theology, the science of religion... has steadily insisted upon connecting religion with the life men lead and the things they do in this world.... The anticipated advantages of nearly every religion or creed are made dependent on the life its followers live, and the criticisms oftenest heard are that the exalted doctrines of righteousness professed are too frequently forgotten in the ordinary pursuits of life, and that the contests for wealth in some circles are wedged [waged?] with the rapacity of beasts of prey. Surely a scheme of life designed to obviate such results, and by removing temptations, and all the inducements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion when its devotee regards it as an essential tenet of their [*sic*] religious faith....

Lastly, it is argued that the organization and maintenance of such a society is obnoxious to sound public policy. Certain it is that the status of the individual members is not in accordance with prevailing American ideals. Community [collectivist] life is thought by many to be inconsistent with the development of individuality, and to be destructive of the incentives to individual growth and higher living. But in this country all opinions are tolerated and entire freedom of action allowed, unless this interferes in some way with the rights of others. Each individual must determine for himself what limit he shall place upon his aspirations, and, if he chooses to smother his ambitions, the public has no right to interfere. Nor can the acquiring of considerable property be objectionable, if managed so as not to be injurious to state. No claim is made that a monopoly has been created, nor would the evidence support such a claim if made....

* * *

On these considerations we reach the conclusion that the defendant society has not exceeded its powers as a religious corporation. Secular pursuits, such as those conducted by it, are not ordinarily to be regarded as incidentals to the powers of a religious corporation for the very good reason that ordinarily they bear no necessary relation to the creed it is organized to promote. But where the ownership of property and the management of business enterprises in connection therewith are in pursuance of and in conformity with an essential article of religious faith, these cannot be held, in the absence of any evidence of injurious results, to

> be in excess of the powers conferred by the law upon corporations. We have discovered no decision touching the question decided; but in view of the spirit of tolerance and liberality which has pervaded our institutions from the earliest times, we have not hesitated in giving the statute an interpretation such as is warranted by its language and which shall avoid the persecution of any and protect all in the free exercise of religious faith, regardless of what that faith may be. Under the blessings of free government, every citizen should be permitted to pursue that mode of life which is dictated by his own conscience, and if this, also be exacted by an essential dogma or doctrine of his religion, a corporation organized to enable him to meet the requirement of his faith is a religious corporation and as such may own property and carry on enterprises appropriate to the object of its creation.[43]

This opinion, uttered decades before *Cantwell v. Connecticut*,[44] *West Virginia v. Barnette*,[45] *U.S. v. Ballard*,[46] *Sherbert v. Verner*,[47] or *Wisconsin v. Yoder*,[48] breathes a "spirit of tolerance and liberality" toward the (collective—even "collectivist") free exercise of religion that one wishes could be instilled into disputes over the alleged misdoings of more recent religious collectivities.

What this case essentially involved was an effort by an outside critic to utilize the machinery of the state to attack the internal organization and operation of a religious body carried on by its own adherents on its own property and doing no one outside any harm so far as appears in the record reported in the Iowa Supreme Court's opinion. The state corporations law was the mechanism employed, since no other seemed available, and it did not suffice, thanks to the composure of the court. Nowadays the tax laws are a more accessible device for "regularizing" religious conduct, but in 1906 things were simpler; there was no state or federal corporate income tax, therefore no income-tax exemption, and property-tax exemptions were relatively primitive and uncontroverted.

Today a challenge could be made to the nonprofit status of the Amana Society rather than to its corporate existence, and it could be disqualified for exemption under §501(c)(3) of the federal Internal Revenue Code. Today the Internal Revenue Service follows the example, not of the Iowa Supreme Court, but of the Iowa Attorney General in defining the provision of food, clothing and shelter to the members of a religious community as a nonreligious (or at least a non-tax-exempt) activity. This type of problem will be discussed at greater length in connection with the tax exemption of churches.[49]

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43. *Iowa v. Amana Society*, 109 N.W. 894 (1906).
44. 310 U.S. 296 (1940), discussed at IIA2c.
45. 319 U.S. 624 (1943), discussed at IVA6b.
46. 322 U.S. 78 (1944), discussed at IIB6a.
47. 374 U.S. 624 (1963), discussed at IVA7c.
48. 406 U.S. 205 (1972), discussed at IIIB2.
49. See VC6.

The Amana Society, perhaps because of the increasing complications of tax and commercial laws, became a producing and marketing cooperative in 1932, and its refrigerators and freezers are a well-known brand on the commercial market. Separated from the cooperative is the Amana Church Society, which carries on the religious teachings of Christian Metz, who led the pilgrimage from Germany to the U.S. in 1842. Its ideals of following the collectivist example of the Apostles—despite the encouragement of the Iowa Supreme Court in 1906—have succumbed to the "hydraulic"[50] pressures of the environing American culture, and the world is poorer because of it, even if some of the inhabitants of the Amana villages may individually have become richer.

g. *Order of St. Benedict v. Steinhauser* (1914). The Supreme Court of the United States in 1914 again visited the question of property held in common by a religious community, this time a religious order of the Roman Catholic Church. In this instance, however, the party seeking the help of the courts was not a dissident or heir trying to break the collectivity but the collectivity itself trying to enforce its claim to the estate of one of its members. That claim was resisted by the executor of the estate, arguing—among other things—that the principle upon which the order was founded was void as contrary to public policy.

The Order of St. Benedict was founded by Benedict of Nursia in the early sixth century in Italy, from whence it spread throughout Western Europe, coming to the United States in 1846. The members followed a strict rule set by the founder, taking vows of obedience, stability, chastity and poverty. The New Jersey chapter of the order was incorporated in 1868 by special act of the state legislature. One of its members, Father Augustin Wirth, was born in Bavaria in 1828 and came to the United States in 1851. The next year he joined the Order of St. Benedict, took its solemn vows, and was ordained to the priesthood. He worked as a pastor in various states as directed by his superiors until his death in 1901. During his lifetime, Father Wirth published many books on religious subjects, holding the copyrights and contracts with publishers in his own name. He received the royalties during his lifetime, and they were then paid to the order until 1906, when the administrator of the estate brought suit against the publishers. The instant suit was brought by the order to recover these royalties and any other assets from the estate.

The opinion of a unanimous court was delivered by Justice Charles Evans Hughes:

> It is clear that, according to the principles of the complainant's organization, Father Wirth was not entitled to retain for his own benefit either the moneys which he received for his services in the various churches with which he was connected or those which he derived from the sale of his books. By the explicit provision of the constitution of the

50. A term used by Chief Justice Warren Burger in *Wisconsin v. Yoder*, 406 U.S. 205 (1972): "The Amish [Amana?] mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards."

[Order], it was a necessary consequence of his continued membership, that his gains—from whatever source—belonged to it, and that as against the [order] he could not assert title to the property which he received. The claim of the Order... is resisted upon the grounds (1) that the decedent had the permission of the Abbot to retain, as his own property, the proceeds of the sale of his books, and (2) that the obligation sought to be enforced by the [order] is void as being against public policy.

1. While there was evidence that Father Wirth was required to account to the Abbot for the salary and perquisites received in his church work, it appeared that the income from his books was treated in a different manner. This income he was allowed to retain and use.... It may have been the concession of a special privilege to permit the decedent to act directly in the distribution of the moneys which he had earned by his additional labors, instead of turning them over to the head of the Order, but we cannot say that it was a permission without restriction or one which essentially altered his relation to the Order and his fundamental duty while he remained a member of it.... [I]n view of the basic law of the organization, there is no warrant for the conclusion that the Abbot had any authority to allow Father Wirth to assert an independent title or to hold the property as absolutely his own.... [I]t cannot be said that while his membership continued he had, or could have, the privilege of accumulating an individual estate for his own benefit and free from the obligations of the Order.

2. We are thus brought to the question whether the requirement, which lies at the foundation of this suit, is void as against public policy; that is, whether, by reason of repugnance to the essential principles of our institutions, the obligation though voluntarily assumed, and the trust arising from it, cannot be enforced. In support of this view, it seems to be premised that a member of the Order can be absolved from his vows only by the action of the Head of the Church and that unless the requisite dispensation is thus obtained the member is bound for life in temporal, as well as in spiritual, affairs.... It is thus assumed that the vows in connection with the `Rule' bind the member in complete servitude to the Order for life or until the Head of the Church absolves him from his obligations; and it is concluded that an agreement for such a surrender, being opposed to individual liberty and to the inherent right of every person to acquire and hold property, is unenforceable in the civil courts and cannot form the basis for an equitable title in the complainant.

This argument, we think, disregards the explicit provision of the complainant's constitution as to voluntary withdrawal. [The constitution of the Order] leaves no doubt that the member may voluntarily leave the Order at any time.... If he severs his connection with the corporation, it cannot be heard to claim any property he may subsequently acquire. His obligation runs with his membership and the latter may be terminated at will.

> With this privilege of withdrawal expressly recognized, we are unable to say that the agreement—expressed in... the complainant's constitution—that the gains and acquisitions of members shall belong to the corporation, must be condemned.... The validity of agreements providing for community ownership with renunciation of individual rights of property during the continuance of membership in the community, where there is freedom to withdraw, has repeatedly been affirmed.[51] In *Burt v. Oneida Community*, in describing the character of that society, the Court of Appeals of New York said that its main purpose was the `propagandism of certain communistic views as to the acquisition and enjoyment of property' and `the endeavor to put into practical operation an economic and industrial scheme which should embody and illustrate the doctrines which they held and inculcated.' Necessarily, said the court, "the basic proposition of such a community was the absolute and complete surrender of the separate and individual rights of property of the persons entering it; the abandonment of all purely selfish pursuits, and the investiture of the title to their property and the fruits of their industry in the common body, from which they could not afterwards be severed or withdrawn except by unanimous consent. It was fashioned according to the pentecostal ideal, that all who believed should be together and have all things common.[52] It was intended to be in fact, as they frequently styled themselves, but a single family upon a large scale with only one purse, where self was to be abjured and the general good alone considered."[53]
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> * * *
>
> In the present case, there was no infringement of Father Wirth's liberty or right to property. He did not withdraw from the Order. He had agreed, by accepting membership under the complainant's constitution, that his individual earnings and acquisitions, like those of other members, should go into the common fund and, except as required for the maintenance of members, should be used in carrying out the charitable objects of the Order. It is not unlikely that the copyrights upon his books derived their commercial value largely, if not altogether, from his membership. Certainly, the equitable ownership of these copyrights, by virtue of his obligation, vested in the complainant and the moneys in question when received became in equity its property and were subject to its disposition.[54]

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51. Citing *Goesele v. Bimeler*, 14 How. 589 (1852), discussed at § b above; also *Schriber v. Rapp*, 5 Watts 351 (Pa. 1836).

52. Paraphrasing Acts 2:44.

53. 137 N.Y. 346, 33 NE 307 (1893); citing also *Speidel v. Henrici*, 120 U.S. 377, discussed at § d above; *Gasely v. Separatists*, 13 Oh. St. 144 (1862); *Waite v. Merrill*, 4 Maine 102 (1826), discussed at § a above; *Gass v Wilhite*, 2 Dana (Ky.) 170 (1834); *State v. Amana Society*, 132 Iowa 304 (1906), discussed immediately above.

54. *Order of St. Benedict of New Jersey v. Steinhauser, Individually and as Administrator of Wirth*, 234 U.S. 640 (1914).

Once again the Supreme Court declined the invitation to dissolve the form of organization that a religious entity had chosen for itself or to sever the legal bonds binding its collective property at the behest of interested outsiders. None of the cases cited by the court is to the contrary.