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THE CONSTITUTIONAL DIMENSIONS OF CHURCH PROPERTY DISPUTES

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When a church breaks into factions or a local church withdraws from a denomination, the disputants also frequently divide over who should retain the church property.[1] If the parties seek judicial redress,

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1. Internal disputes over church property continue to generate noteworthy litigation and frequently involve sizeable stakes. For example, after the most recent United States Supreme Court decision, Jones v. Wolf, 443 U.S. 595 (1979), the Alabama Supreme Court awarded the two million dollar assets of the Trinity Presbyterian Church to the majority of the congregation who left the Presbyterian Church in the United States to join the Presbyterian Church in America, a more conservative denomination. Trinity Presbyterian Church v. Tankersley, 374 So. 2d 861 (Ala. 1979), *cert. denied*, 445 U.S. 904 (1980). *See* Maust, *Connectional Denominations Try Retying Their Property Slipknots*, 23 CHRISTIANITY TODAY 1271 (1979). The New Jersey Supreme Court has recently decided two cases, together concerning over one-half million dollars in property and cash. Diocese of Newark v. Burns, 83 N.J. 594, 417 A.2d 31 (1980); Protestant Episcopal Church v. Graves, 83 N.J. 572, 417 A.2d 19 (1980). In June 1980, the General Assembly of the United Presbyterian Church amended its constitution to assert that local church property was in a denominational trust for the two and one-half million member church. The amendment attempts to insure that a schismatic local church cannot take local property with it. *See United Presbyterians Act to Tighten Church Control*, N.Y. Times, June 2, 1980, at A14, col. 6. *See also* Maust, *Rumbles of Realignment in U.S. Presbyterianism*, 24 CHRISTIANITY TODAY 520 (1980).

A related topic beyond this Article's scope is the constitutionality of state intervention to prevent violation of laws relating to charitable trusts. The most recent newsworthy illustration was the attempt by the California Attorney General to place into receivership the assets of the Worldwide Church of God in order to prevent an alleged diversion of assets to the personal benefit of those controlling the church. Worldwide Church of God, Inc. v. California, 623 F.2d 613 (9th Cir. 1980). On four occasions, the church's leaders unsuccessfully sought certiorari to halt trial court orders stemming from the litigation. Worldwide Church of God, Inc. v. California, 101 S. Ct. 270 (1980); Worldwide Church of God, Inc. v. Superior Court of Cal., 100 S. Ct. 2974 (1980); Rader v.

the reviewing civil court may discover that the issue does not lend itself to easy resolution, because the dispute may result from disagreement over ecclesiastical governance or doctrine. The first amendment's religion clauses, however, compel the court to devise a method of resolution that does not address the merits of the religious controversy or related church issues.[2] By declaring the central matter to fall beyond judicial purview, the Constitution requires a court to resolve a dispute often without access to critical information.[3]

Church property disputes furnish a case study on the intersection of public law and private law. The private association makes internal allocations of property interests, and principles of private law normally decide any disputes that may arise.[4] Public concerns, here the concern for religious autonomy, may require modifying the private law. Modi-

Superior Court of Cal., 444 U.S. 916 (1979); Worldwide Church of God, Inc. v. Superior Court of Cal., 444 U.S. 883 (1979) (certiorari petitions in response to unreported decisions by California court of appeals). The Attorney General finally dropped the action when the legislature enacted a law that would prospectively forbid his office from initiating such litigation. *See California Planning to Halt Cases on Church of God and Synanon*, N.Y. Times, Oct. 15, 1980, at A28, col. 4. The Attorney General had also initiated litigation of a similar nature against Synanon, which claimed it was a church. *See* Synanon Foundation, Inc. v. California, 444 U.S. 1307 (1979) (Rehnquist, Circuit Justice).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. Cantwell v. Connecticut, 310 U.S. 296 (1940), first applied the free exercise clause to the states, and Everson v. Board of Educ., 330 U.S. 1 (1947), first applied the establishment clause to the states. For a history of the process of incorporation of the clauses into the fourteenth amendment, see Abington School Dist. v. Schempp, 374 U.S. 203, 253-65 (1963) (Brennan, J., concurring). The constitutional guarantees were first applied to cases concerning internal church disputes in Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

3. Extensive academic studies of the topic are not current. The best pieces include Casad, *Church Property Litigation: A Comment on the Hull Church Case*, 27 WASH. & LEE L. REV. 44 (1970); Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347; Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142 (1962); Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113 (1965). A recent discussion is Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980). Also of value are L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12 (1978); Annot., 52 A.L.R.3d 324 (1973). The church history that deals most thoroughly with the issues covers only the early cases. C. ZOLLMAN, AMERICAN CIVIL CHURCH LAW 142-235 (1917). A later edition appeared in 1933, but the earlier version is the classic edition.

4. *See* Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930); Sampen, *Civil Courts, Church Property, and Neutral Principles: A Dissenting View*, 1975 U. ILL. L.F. 543, 558-70; *Developments in the Law—Judicial Control of Private Associations*, 76 HARV. L. REV. 983 (1963).

fied rules of private law, however, may produce decisions that frequently fail to do justice. In this instance, the first amendment directs courts to steer clear of the underlying religious controversy; therefore, they may not consider evidence of the sort they might examine in a nonecclesiastical dispute. Consequently, rules of private law are modified to exclude the forbidden evidence. The result is a new methodology for dispute resolution for which the excluded evidence is nonessential. If, as this Article concludes, the modifications fail, the judiciary should make other modifications to develop a more satisfactory methodology. The alternative is to continue with current methods but to acknowledge that the decisions they produce are pragmatic ways to settle controversies rather than ways to approximate perfect justice.

The underlying constitutional concerns are appropriate. The relevant Supreme Court cases explicitly invoke the first amendment's free exercise clause,[5] but they consistently emphasize the dangers of church-state entanglement,[6] an argument associated with the establishment clause.[7] The focus of concern is not the individual believer, but the religious organization.[8] The cases assume that this institutional protection safeguards the free exercise rights of church members who exercise their rights as voluntary adherents of the organization.[9] The constitu-

5. *E.g.*, Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 448-50 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107-08, 120-21 (1952).

6. *E.g.*, Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 709-10 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 448-49 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116, 119 (1952).

7. *See* L. TRIBE, *supra* note 3, § 14-12, at 865-66.

8. *See, e.g.*, Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 710-11, 721-22 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). *See also* L. TRIBE, *supra* note 3, § 14-12, at 876.

9. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 606-07, 618-19 (1979) (Powell, J., dissenting); L. TRIBE, *supra* note 3, § 14-12, at 876. Religious voluntarism and its corollary, political noninvolvement, also underlie the establishment clause. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968). The first amendment also aligns itself with pluralist political theory—that private associations should enjoy maximum freedom from the state if they are to contribute most to society's well-being. *See Developments in the Law*, *supra* note 4, at 986-90, (citing J. FIGGIS, CHURCHES IN THE MODERN STATE 18-22, 32-39 (2d ed. 1914); Laski, *Notes on the Strict Interpretation of Ecclesiastical Trusts*, 36 CAN. L.T. 190 (1916); Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 418-29 (1916)). For a critical viewpoint, see Stringfellow, *Law, Polity, and the Reunion of the Church: The Emerging Conflict Between Law and Theology in America*, 20 OHIO ST. L.J. 412, 412-19 (1959) (arguing that church-state separation reflects the theology of Protestant dissent, favors religious pluralism, and thus is not a neutral policy).

tional analysis thus recognizes the intimate relationship between the first amendment's religion clauses; the avoidance of entanglement protects the church's free exercise rights and implicitly the members' rights.

Since 1872,[10] the Supreme Court has furnished guidance with a series of decisions, but it still has failed to fully solve the problem of methodology. This Article first argues that the Court has accepted some methods and rejected others without establishing a defensible theoretical basis for the distinctions. The Article therefore reevaluates the case law and the methods it has produced for resolving church property disputes.

The Supreme Court has approved two methods for resolving church property disputes. One method is that of complete deference to church authority. Complete deference, first approved in *Watson v. Jones*,[11] calls for a court to defer to the judgment of the highest authority in a hierarchical church and to the majority, or other designated decisionmaker, in a congregational church. The other method, approved in *Jones v. Wolf*,[12] is based on the concept of neutral principles. The method has two versions. Under the "formal title" version, a court may look to statutes, deeds, and other secular documents—that is, articles of incorporation and the like, as opposed to internal church documents, such as constitutions and books of discipline—to determine property ownership.[13] Under the broader version of neutral principles, courts may also consider provisions in church documents.[14] Under neither version does neutral principles permit inquiry into religious doctrine.[15] Thus, a court may not rely on a provision that requires an interpretation of religious doctrine or governance; it must rely entirely on "secular" language—that is, language that a civil court can interpret without the need to interpret church doctrine or governance.[16] The

10. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

11. *Id.*

12. 443 U.S. 595 (1979).

13. *E.g.*, Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969); Merryman v. Price, 147 Ind. App. 295, 259 N.E.2d 883 (1970), *cert. denied*, 404 U.S. 852 (1971).

14. *E.g.*, Paradise Hills Church, Inc. v. International Church of Foursquare Gospel, 467 F. Supp. 357 (D. Ariz. 1979); Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 868 (1976).

15. Jones v. Wolf, 443 U.S. 595, 603-04 (1979).

16. In the context of these cases, "secular" has a broad meaning. Just as "secular language" does not require courts to interpret church doctrine or governance, "secular provisions" in docu-

rule of complete deference, then, seeks to avoid constitutional difficulties by relying entirely on internal church decisions. Neutral principles seeks the same goal by looking exclusively to secular language and traditional concepts of property law.

In developing these methods, the Court has emphasized that safeguarding church rights requires keeping churches independent of secular control or manipulation.[17] A church's right to choose its doctrines and polity (form of government)[18] requires that the state not intrude for the benefit of one faction over another.[19] The dangers to religious freedom, however, have more subtle dimensions. If, for example, a judicial decision resolves a dispute on a doctrinal basis, it rewards the faction adhering to the court's interpretation and deters churches from deviating from that interpretation lest they forfeit the chance for judicial support.[20] State entanglement in religious controversy thus can inhibit the free development of doctrine.[21] Such judicial intrusion also risks implicating secular interests in matters of purely ecclesiastical concern. The state's limited competence in adjudicating doctrinal disputes creates the danger of misinterpretation and may result in the state creating its own

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ments are provisions that do not require the interpretation of religious concepts. This Article also refers to "secular documents" as documents, such as deeds and articles of incorporation, that a church or other organization would limit not to internal use, but would normally file on public record to meet civil responsibilities.

17. *E.g.*, Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 721-22 (1976) (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

18. In church affairs, "polity" is frequently used to describe "the general governmental structure of a church and the organs of authority defined by its own organic law." Kauper, *supra* note 3, at 353-54.

19. *E.g.*, Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 709 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952).

20. The classic illustration of state interference with doctrinal change is Free Church of Scotland v. Overtoun, [1904] A.C. 515 (Scot.), in which a small group of congregations successfully argued that they were entitled to the extensive property holdings of the United Free Church of Scotland, because the denomination had departed from past doctrine—the principle of an established church—when it merged with the United Presbyterian Church. At stake were three universities, 800 churches, and over one million pounds in investments. Parliament, however, reversed the decision and established a commission to fairly reallocate the property. Churches (Scotland) Act, 1905, 5 Edw. 7, c. 12. For an account, see Peck, *American Versus British Ecclesiastical Law*, 15 YALE L.J. 255, 255-59 (1906). The Supreme Court has recognized the danger of judicial favoritism toward a church faction because of its doctrinal beliefs. *E.g.*, Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 709 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115 (1952).

21. *See, e.g.*, Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 710 (1976) (quoting Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 446 (1969)).

standard as a replacement for the authentic religious one.[22] Judicial intrusion thus can subvert the religious association.

The church property cases also exhibit considerable awareness that even minor intrusion must be prohibited, because even an intrusion that is not obviously detrimental threatens damage to religious freedom. The hazards of entanglement[23] justify a healthy margin for error in judicial decisions to avoid unconstitutional inquiry. For example, a court may not inquire into the precise jurisdiction of a hierarchical tribunal[24] or its fidelity to church procedural rules,[25] because the inquiry may lead to doctrinal misinterpretation. If the Court were to view the constitutional analysis as balancing the risk of abridging religious freedom against the risk of permitting a church to act unfairly against the members' expectations, the scale weighted with the former concern would virtually always outweigh the latter scale.[26] Under current case law, the only possible exception might arise in the rare instance of secularly defined fraud or collusion by church decisionmakers.[27] Even in this case, however, the result of the balance is uncertain.

Heightened sensitivity to the hazards of entanglement has led the Court to insist that its determinations are entirely divorced from any

22. *See* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 450-51 (1969).

23. First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.

Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969). *See* Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 709-10, 713-14 (1976).

24. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 710 (1976) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872)).

25. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 713 (1976).

26. In another first amendment context, the Court stated that state infringement on free religious exercise could be compelled by only "the gravest abuses, endangering paramount interests . . . ." Sherbert v. Verner, 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

27. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 713 n.7 (1976), outlawed judicial inquiry into arbitrariness by church decisionmakers in a hierarchical church, but did not decide whether a court could review allegations of fraud or collusion. The Court has yet to reach the issue. *See* Jones v. Wolf, 443 U.S. 595, 609 n.8 (1979). *See also* notes 187-205 *infra* and accompanying text.

related controversy over religious doctrine and that the tools for decisionmaking are entirely secular and religiously neutral.[28] This Article, however, argues that assertions of judicial neutrality for methods currently in use rest on questionable assumptions that permit courts to avoid the religious implications of their methodologies and to claim accuracy in the resulting decisions.

The Article begins with a sympathetic analysis of the Supreme Court cases. It explains how the Court has dealt with the underlying problems of church-state relationships. According to the argument, the Court has viewed intrachurch affairs in ways that permit it to designate certain judicial solutions as constitutional. The assumption that church members fully submit to designated church authority justifies the complete deference method, and the assumption that provisions in various documents reflect an agreement about property ownership justifies neutral principles. The Article then critically assesses the complete deference and neutral principles tests, which have resulted from case law development. It questions not only the assumptions underlying their use, but also the ability of the tests to avoid intrusion into matters protected by the first amendment. Finally, the Article proposes the secular documents method as an alternative means for deciding these disputes.

I. THE SUPREME COURT CASES: THE DEVELOPMENT OF METHODOLOGY

A. Watson v. Jones

Watson v. Jones[29] begins the line of Supreme Court cases dealing with church property disputes. The Court declared that the civil judiciary should not evaluate underlying doctrinal controversy, but instead should completely defer to the determinations of internal church authority.[30]

28. *See, e.g.,* Jones v. Wolf, 443 U.S. 595, 602 (1979); Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

29. 80 U.S. (13 Wall.) 679 (1872). For detailed recountings of the case, see, e.g., M. HOWE, THE GARDEN AND THE WILDERNESS 74-88 (1965); Weeks & Hickey, *"Implied Trust" for Connectional Churches:* Watson v. Jones *Revisited,* 54 J. PRESBYTERIAN HIST. 459 (1976); Note, *Judicial Intervention in Disputes Over the Use of Church Property, supra* note 3, at 1154-58.

30. 80 U.S. (13 Wall.) at 727. Prior to *Watson,* New England judges tended to side with local dissenting congregations, and elsewhere the denomination and its loyalists frequently proved victorious. For a brief history, see Note, *Judicial Intervention in Disputes Over the Use of Church Property, supra* note 3, at 1149-54.

The Civil War divided the Walnut Street Presbyterian Church in Louisville, Kentucky, although the denomination's General Assembly[31] sided with the Union. A majority of the congregation agreed with the General Assembly, but a pro-Southern faction dominated the local session.[32] The dispute continued into the post-war years, and the appointment of the pastor and the installation of new session members were the resulting controversies that involved both church and civil authorities.[33] The General Assembly and the state synod declared the loyal faction to be the true church, but the Kentucky courts held for the dissidents.[34] The loyalist faction then invoked diversity jurisdiction to bring the case to federal court and won consistent victories before the circuit court and Supreme Court.[35]

The Supreme Court employed the case to establish an enduring doctrine for resolving church disputes. It divided the types of cases a court might encounter into three categories. First, the Court recognized that property might be subject to an express trust "devoted to the teaching, support or spread of some specific form of religious doctrine or belief."[36] In these cases, according to the Court, the general law of secular charities should apply, and the Court should enforce the trust. If necessary, the judiciary must engage in doctrinal inquiry to determine the beneficiary's fidelity to the trust's objective.[37]

The second class of cases deals with the congregational or independent church that, "so far as church government is concerned, owes no fealty or obligation to any higher authority."[38] For these churches, the

31. The Presbyterian polity is hierarchical and of the synodical or associational variety. The local congregation chooses members to comprise a session to see to daily administrative affairs. All the ministers and an elder from each church comprise the presbytery for the district and supervise the spiritual welfare of member churches. The synod consists of all the ministers and an elder from each church in a district composed of several presbyteries. At the highest level is the General Assembly, consisting of selected ministers and elders from the presbyteries. 80 U.S. (13 Wall.) at 681-82.

32. A session is the governing body of the local church. *Id.*

33. The full history of the controversy is complicated. For elaborate capitulations, see *id.* at 681-700 (1872) (statement of the case); Weeks & Hickey, *supra* note 29, at 459-66.

34. Watson v. Avery, 65 Ky. (2 Bush) 332 (1867). The court recognized a general principle of judicial deference to church authorities, but asserted the power to review the jurisdiction asserted by those authorities. *Id.* at 347-48. It held that under the denomination's constitution, the synod lacked authority over local church elections. *Id.* at 353-54.

35. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

36. *Id.* at 722.

37. *Id.* at 723-24.

38. *Id.* at 722.

standard rules for secular voluntary associations also apply, and decisional authority rests with the majority of members or any organ for governance that they have instituted.[39] The organ might consist of trustees or other church officers.

The final class of cases, which includes the dispute in *Watson v. Jones*, involves hierarchical churches. In these cases, the congregation or church body holding the property "is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization."[40] In these cases, courts must defer to the general church's highest authority.[41]

In adopting a deferential rule, the Court specifically rejected the English departure-from-doctrine rule. Under that rule, a court would view church property as an implied trust held for the benefit of those who keep the true doctrine of the church, that is, the doctrine to which the church's founders subscribed. In case of dispute, a court would ascertain the church's true doctrine and find for the faction that adhered to it.[42] The *Watson* Court noted that the English standard developed to resolve disputes concerning dissenting churches in a country with an established church. The Court therefore attributed the English judiciary's intrusiveness to a constrained conception of free religious exercise.[43] According to the Court, religious freedom in the United States

39. *Id.* at 724-26.

40. *Id.* at 722-23.

41. [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Id. at 727. The Court gave a broad definition of ecclesiastical matters: "[T]heological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Id.* at 733.

42. Lord Eldon first articulated the English rule in Attorney General *ex rel.* Mander v. Pearson, 3 Mer. 353, 36 Eng. Rep. 135 (Ch. 1817). He formulated much of his thinking on the rule in Craigdallie v. Aikman, 1 Dow 1, 3 Eng. Rep. 601 (H.L. 1813). For a discussion of the cases, see Note, *Judicial Intervention in Disputes Over the Use of Church Property, supra* note 3, at 1145-49.

43. And we can very well understand how the Lord Chancellor of England, who is, in his office, in a large sense, the head and representative of the Established Church, who controls very largely the church patronage, and whose judicial decision may be, and not unfrequently is, invoked in cases of heresy and ecclesiastical contumacy, should feel, even in dealing with a dissenting church, but little delicacy in grappling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages. . . . Laws then existed upon the statute-book hampering the free exercise of

permits religious organizations to create organs to resolve church disputes; the civil judiciary will not reverse their decisions.[44]

In *Watson v. Jones* the Supreme Court championed the autonomy of the religious organization, but emphasized the institution rather than the individual member. It grounded its argument on the right of individuals to form associations and create tribunals to resolve disputes; thus church members impliedly consent to church government.[45] According to the Court, then, a church is a voluntary association, and the laws governing such associations apply to both the organization and its members.[46] The extreme deference that the Court gave to churches, however, has deeper roots. The tenor of the opinion discloses a special concern for the viability of the institutional church. According to the Court, the availability of recourse to civil courts "would lead to the total subversion of such religious bodies."[47]

> religious belief and worship in many most oppressive forms, and . . . there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles.

80 U.S. (13 Wall.) at 727-28.

44. *Id.* at 728-29.

45. *Id.* at 729.

46. *Id.* at 714. *Watson* analogized religious organizations to voluntary charitable organizations and even stated that the "rights of property, or of contract [of religious organizations], are equally under the protection of the law, and the actions of their members subject to its restraints." *Id.* The Court, however, did not resolve the dispute precisely according to this analysis. Instead, it gave the decisions of religious organizations a deference that the decisions of other voluntary charitable organizations have never enjoyed. *See* Sampen, *supra* note 4, at 558, 563-70; *Developments in the Law, supra* note 4, at 1036-37.

47. 80 U.S. (13 Wall.) at 729. The Court's recognition of the church as an entity, as opposed to a collection of individual members, permitted it to avoid considering the possibility of partition among the vying factions. A few older cases permitted partition. *E.g.,* Niccolls v. Rugg, 47 Ill. 47, 51-52 (1868) (ratio of factions' memberships was two to one); Ferraria v. Vasconcellos, 31 Ill. 25, 34, 53 (1863) (two factions nearly equal in number, and the court believed all members had an equal interest in the property). Many older cases, however, refused to permit partitioning. *E.g.,* Dressen v. Brahmeier, 56 Iowa 756, 9 N.W. 193, 197 (1881) (church title was vested in a corporation; therefore majority should keep property); LeBlanc v. Lemaire, 105 La. 539, 542, 30 So. 135, 137 (1901) (individuals do not have a protectible interest in church property).

Sharing church property as an alternative to partition is even more rare. *E.g.,* Huffhines v. Sheriff, 65 Okla. 90, 92, 162 P. 491, 493 (1916) (partition was an unnecessary extreme). A Kentucky statute specifically dictates alternate use when a church divides, except when the issue is excommunication on the grounds of immorality. KY. REV. STAT. § 273.120 (1973). Earlier Kentucky cases often used the statutory device. *E.g.,* Rose v. Briggs, 205 Ky. 619, 266 S.W. 236 (1924) (statute applies when power of church authority is not backed by a constitution and therefore is only advisory in nature); Poynter v. Phelps, 129 Ky. 381, 111 S.W. 699 (1908) (both factions retained their beliefs and neither was excommunicated for immorality).

More recent Kentucky cases have avoided alternate use. Two cases have held that in a congregational church, the majority faction should gain complete control, provided it has not departed

Watson, a pre-*Erie* decision,[48] elucidated only federal common law.[49] Nonetheless, the Court's concern for church autonomy stemmed in part from the policies reflected in the first amendment. As a later Supreme Court opinion noted, the decision "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation . . . ."[50] The way to secure free exercise was to minimize state interference and to recognize the autonomy of the institutional church. The extensive deference that resulted implied that institutional stability was a prerequisite for religious freedom.

The Court enhanced church autonomy by limiting the necessity and propriety of incursions into both doctrine and polity. Rejecting the English departure-from-doctrine rule avoided the need not only to construe religious doctrine, but also to determine which deviations are radical departures from fundamental doctrine as well as which doctrines are sufficiently fundamental to invoke the rule.[51] By rejecting fictional

from church doctrine; otherwise the minority faction should prevail. Fleming v. Rife, 328 S.W.2d 151 (Ky. 1959); Bunnell v. Creacy, 266 S.W.2d 98 (Ky. 1954). Dicta in other cases would permit alternate use temporarily to permit the church to decide which faction should obtain the property. Bray v. Moses, 305 Ky. 24, 28, 202 S.W.2d 749, 751 (1947); Jones v. Johnson, 295 Ky. 707, 710, 175 S.W.2d 370, 371 (1943).

48. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

49. After *Watson*, state courts generally followed the decision in cases concerning hierarchical churches. As for congregational churches, most courts adhered to the English rule's notions of implied trust and departure-from-doctrine. *See* C. ZOLLMAN, *supra* note 3, at 215-21; Casad, *supra* note 3, at 51-56; Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 442-47 (1964); Note, *Judicial Intervention in Disputes Over the Use of Church Property*, *supra* note 3, at 1157-58, 1167-75.

According to one analysis, in most cases in which courts found against a congregational majority, the majority had engaged in an attempt to seriously alter the church's connection with other churches in a larger organization. Thus, under the guise of protecting doctrinal stability, courts would protect denominational stability and prevent institutional change. *See* Casad, *The Establishment Clause and the Ecumenical Movement*, *supra*, at 444 & nn.82 & 83.

Courts have distinguished, misread, or rejected the *Watson* precedent. *E.g.*, Smith v. Pedigo, 145 Ind. 361, 393, 44 N.E. 363, 364 (1896) (distinguishing *Watson* because it dealt with differences in political belief, not doctrine); Mt. Zion Baptist Church v. Whitmore, 83 Iowa 138, 147, 49 N.W. 81, 86 (1891) (*Watson* is authority for rule that church property is held in trust for church's purposes and any members less than the whole cannot divert it from the church by substantial departure-from-doctrine); Watson v. Garvin, 54 Mo. 353, 384 (1873) (rejecting *Watson* as nonbinding authority; courts must decide questions of ecclesiastical law connected with property rights by virtue of their jurisdiction over property rights).

50. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

51. Evaluating the seriousness of a doctrinal deviation is not always an easy task for the nonmember of a church. *See, e.g.*, Wilson v. Hinkle, 67 Cal. App. 3d 506, 136 Cal. Rptr. 731, *cert. denied*, 434 U.S. 858 (1977) (minister of a Unity church who practices charismatically); St. Nicholas Ruthenian Greek Catholic Church v. Bilanski, 19 Del. Ch. 49, 162 A. 60 (1932) (priest

implicit trusts and permitting doctrinal inquiry only in cases of explicit trusts, the Court drastically reduced the instances in which a court might need to scrutinize the doctrinal beliefs of the church founders. The narrowed applicability of the trust notion also lessened the impediment to doctrinal development. A church could modify its religious tenets without fear that departure from the founders' beliefs would work a forfeiture. Doctrinal development thus became a permissible characteristic of a church, subject to the church's internal judgment, and the civil judiciary therefore could avoid questions of doctrinal fidelity and change.

By defining the church's internal decisional mechanism as the final authority, the *Watson* Court also limited inquiries into ecclesiastical polity. Under the *Watson* method, a court need only ascertain whether the church is hierarchical or congregational and then identify the highest church authority, be it the majority of a congregation or a church tribunal. The Court apparently did not believe that the task called for answers to essentially religious questions and therefore regarded the inquiry as a proper activity for the civil judiciary. The Court assumed that church members submit to a structure of church governance in which the highest church authority enjoys plenary power and that each church is either hierarchical or congregational.[52] These assumptions

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who changed one word in the mass); Kelley v. Riverside Boulevard Independent Church of God, 44 Ill. App. 3d 673, 358 N.E.2d 696 (1976) (pastor's practice of wearing earrings); Parker v. Harper, 295 Ky. 686, 175 S.W.2d 361 (1943) (use of piano music or Sunday school literature); Mertz v. Schaeffer, 271 S.W.2d 238 (Mo. App. 1954) (whether the Missouri Synod of the Lutheran Church deviated from Lutheran orthodoxy in its definition of "inspiration" and "church fellowship"); Canterbury v. Canterbury, 143 W. Va. 165, 100 S.E.2d 565 (1957) (whether it violates the authorized doctrine of the Indian Creek Primitive Baptist Church to state "that the birth of the spirit is not necessary except to see the church here in time; that there is no hell beyond this life, and that goats are sheep in disobedience").

Even Lord Eldon, the formulator of the English rule, faced the problem of discerning doctrine. In Craigdallie v. Aikman, 2 Bligh 529, 4 Eng. Rep. 435 (H.L. 1820) (Scot.), the Court of Sessions, faced with an inability to distinguish the doctrinal principles of the two factions, decided against the minority faction on the grounds that it had withdrawn from the congregation by refusing allegiance to the general church. Lord Eldon affirmed the holding:

> I have had the mortification, I know not how many times over, to endeavor myself to understand what these [doctrinal] principles were, and whether they have, or have not, deviated from them; and I have made the attempt to understand it, till I find it, at least, on my part to be quite hopeless. . . . [A]fter racking my mind again and again upon the subject, I really do not know what more to make of it.

Id. at 543-44, 4 Eng. Rep. at 440-41. The *Watson* Court noted Lord Eldon's plight in its rejection of the English rule. 80 U.S. (13 Wall.) at 727-28.

52. 80 U.S. (13 Wall.) at 722, 724-25, 726-27. The Court's analysis did not require it to distinguish between the two types of hierarchial structure. In the episcopal type, the system is

made the inquiry seem less intrusive. By making these assumptions, however, the Court ignored the possibility that a church might contain elements of both structures and assign some powers exclusively to the local church and some to the denomination.

The Court further insulated the church from judicial intrusion by recognizing that a church's decisionmaking system is part of a separate, independent legal system. Because laws, disciplinary rules, precedents, and reliance on usage and custom create a self-enclosed system, questions of church polity do not stand in isolation; they inevitably entangle a court in matters beyond its competence. Thus the Court forbade judicial inquiry into the scope of a church tribunal's jurisdiction over ecclesiastical subject matter.[53] According to the Court, in almost every case the criteria for ascertaining jurisdiction—and hence the validity of the ecclesiastical decree—would be church doctrine. Thus a jurisdictional inquiry would risk the same evils that the Court sought to banish when it rejected the departure-from-doctrine test.[54] The Court also seemed to increase a church's judicial immunity by ignoring another issue. Although complete deference appears to permit church tribunals to make bad faith decisions with impunity, the Court failed to address the problem. Apparently the Court's belief in judicial restraint and church autonomy outweighed concerns about unpalatable church decisions and their adverse impact on religious freedom.

As an additional reason for deferring to church authority, the Court

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authoritarian, and ecclesiastical authorities at the top of the structure exercise authority. In the synodical or associational polity, members at the local level elect representatives to a higher governing body, and these representatives elect members of a still higher governing body. The Presbyterian Church is an example of the latter type. *See* Kauper, *supra* note 3, at 354; Note, *Judicial Intervention in Disputes Over the Use of Church Property, supra* note 3, at 1143-44.

Although I have not made a precise analysis, I suspect that synodical churches have caused more difficult litigation than episcopal ones, because their democratic bases of governance suggest a limit on the degree to which local churches are willing to completely relinquish authority to the hierarchy, whose power comes from below and not from above. With congregational churches, the legal controversy frequently focuses on whether or not the church is actually hierarchical. *E.g.*, Crumbley v. Solomon, 243 Ga. 343, 347, 254 S.E.2d 330, 332 (1979) (Jordan, J., dissenting); Kelley v. Riverside Boulevard Independent Church of God, 44 Ill. App. 3d 673, 681-88, 358 N.E.2d 696, 702-07 (1976); State *ex rel.* Morrow v. Hill, 51 Ohio St. 2d 74, 76-80, 364 N.E.2d 1156, 1158-60 (1977). *See* Note, *Judicial Intervention in Disputes Over the Use of Church Property, supra* note 3, at 1158-64.

53. 80 U.S. (13 Wall.) at 732-34.

54. "This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions." *Id.* at 733-34.

questioned the competency of the civil judge to rule upon points of ecclesiastical law. According to the Court, civil judicial review of an internal church decision would be "an appeal from the more learned tribunal in the law which should decide the case, to one which is less so."[55]

The *Watson* Court thus propounded a method for dispute resolution and a view of church polity that would severely limit advertent judicial interference with religious freedom. The resulting test, however, is not a mechanical device to allocate property; it seeks to satisfy the expectations of churches and their members. By assuming that a church is either hierarchical or congregational and that members totally submit to church authority, the Court could easily maintain that complete deference satisfies the parties' expectations.[56]

In rejecting the departure-from-the doctrine test, the *Watson* Court rejected a highly intellectual definition of a church and the rights of its members. Because the English test turned on doctrinal fidelity, it relied on articulated church doctrine to define ecclesiastical authenticity and the expectations of church members. In contrast, *Watson* set no doctrinal criteria, but instead relied on the internal church mechanism to select the criteria of its own choosing. The Court, then, did not assert that dissidents should expect to lose because of doctrinal deviation. It held instead that a church faction should accede to victory or defeat because the faction knew that the ultimate decision rested with a specified church entity that applied its own criteria. Unlike the departure-from-doctrine test, the criteria are not necessarily those of the church founders (or what a court asserts to be the founders' criteria).[57] There-

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55. *Id.* at 729.

56. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Id. at 728-29.

Departure-from-doctrine, however, arguably is also a means of protecting religious liberty, because it assures that the courts will protect the religious use for which the property was given. By blocking majority rule, it harmonizes the religious freedom of the church's contributors with institutional stability. *See* Kauper, *supra* note 3, at 351.

57. Departure-from-doctrine assumes that the donor intended the church's doctrine to remain static. The donor, however, may have had only a general charitable intent or perhaps an

fore the expectations of contemporary church members need not conform to those of their predecessors; conformity occurs only if a contemporary church organ has determined that conformity is critical. The present day church, then, determines the criteria.

The assumption of implicit consent to church governance does not require detailed doctrinal knowledge by church members, but merely an acknowledgment of institutional authority, arguably a more likely assumption. The requirement of doctrinal continuity thus gives way to a required institutional continuity. Because *Watson* found implied consent to internal governance, the Court assumed a continuing affiliation with a particular form of governance and its decisionmaking criteria. A disputing faction, then, should not expect either to set the criteria for resolution or to determine the mechanism for resolution at the time of the controversy. It must abide by its prior commitment to the institution.

Watson's assumptions about expectations thus enabled it to recognize a method of dispute resolution that avoids intrusion on religious freedom. Its genius lies in its ability to uphold institutional autonomy and yet satisfy an arguably valid set of expectations by churches and their members.

B. Bouldin v. Alexander

In *Bouldin v. Alexander*[58] the Supreme Court demonstrated that judicial deference has limits. Faced with internal church proceedings of a highly irregular nature, the Court was willing to deviate from *Watson* to achieve a desired result. *Bouldin* can also be viewed as a precursor to neutral principles analysis.

Legal title to the property of the Third Baptist Church in Washington, D.C., was held by four trustees. The congregation later elected seven general trustees for the church and included in their number three of the four property trustees. The congregation split into factions shortly after the church's construction. At an irregularly called meeting, Bouldin, who was the founding pastor, and a small minority of the

intent that the church change with the times. *See* Smith v. Nelson, 18 Vt. 511, 547-48 (1846) (dicta); C. ZOLLMAN, *supra* note 3, at 158-59. The English rule also focuses on the intent of those who originally made possible the church's physical facilities. It neglects the intent of those contributors who contributed to the church's upkeep and expansion throughout the church's history and whose respective intents likely depended on their times.

58. 82 U.S. (15 Wall.) 131 (1872).

congregation voted to turn out four property trustees and elect partisans to the positions. The Bouldin faction apparently refused to recognize the earlier election of the seven general trustees and believed that its action determined the identity of both the property trustees and the general trustees. The general trustees and the ousted property trustees sought an injunction and other relief to undo Bouldin's actions asserting control over church property.

The Supreme Court upheld a ruling against the Bouldin faction, but denied that it was determining the identity of church officers. The Court instead insisted that it was deciding only the legal ownership of the property: "[T]he question respects temporalities, and temporalities alone."[59] According to the Court, the Bouldin faction tried to replace the property trustees, as opposed to the church's general trustees. The Court, which accepted the validity of the initial election of the seven trustees, reasoned that any attempt to replace general trustees would have contravened church election rules.[60]

As for the property trustees, they were not removable under trust law, because the *cestui que trust* had shown no cause for removal.[61] The Court further argued that even if the church had the right to substitute property trustees, no ecclesiastical authority had determined that the Bouldin trustees were the legitimate title holders.[62] Rejecting the authority of the Bouldin faction, the Court stated:

> [I]t may not be admitted that a small minority of the church, convened without notice of their intention, in the absence of the trustees, and without any complaint against them, or notice of complaint, could divest them of their legal interest and substitute other persons to the enjoyment of their rights.[63]

The Court thus rejected the Bouldin faction because of its minority status and its flouting of regular procedures; whether either element could independently negate an assertion of ecclesiastical authority is unclear.

The Bouldin faction had also purported to excommunicate forty-one members of the church. The Court conceded that the civil judiciary lacked the power to question acts of church discipline even if the proce-

59. *Id.* at 137.
60. *Id.* at 138.
61. *Id.* at 137.
62. *Id.*
63. *Id.* at 138.

dure was irregular.[64] The Court, however, asserted its authority to ascertain whether the Bouldin faction could act on the church's behalf.[65] According to the Court, in a congregational church the majority represents the church if it adheres to church organization and doctrine.[66] Therefore the Bouldin faction's actions were not the actions of the church. The Court further noted that even if the excommunications had been valid, excommunication of the trustees would deprive them of church membership but not of their positions as trustees.[67]

Although the Court decided *Bouldin* shortly after *Watson*, it made no reference to the latter case.[68] The analysis, nonetheless, reflected *Watson*'s concern with judicial intrusion into religious affairs. In determining the identity of the property trustees, the Court began by applying a secular principle of trust law—the need for cause to justify removal of trustees.[69] An awareness of church autonomy, however, compelled the Court to show that its decision would hold even if the secular rule did not bind the church. The Court bolstered its reliance on property law by noting the lack of an authoritative church ruling on the subject.[70] This conclusion permitted the Court to avoid determining what criteria the church should apply; however, it required the Court to decide whether a particular church faction was the authoritative church decisionmaker.

The Court rested its determination on general statements about the lack of authority of a minority body following highly irregular procedures,[71] but it made no reference to specific church rules on decisional authority. To identify the proper body for church governance—the church trustees—the Court had to determine the validity of the initial election by looking to church records and determining that the initial trustees did not secede and forfeit their rights.[72] The Court resolved the secession issue by evaluating the trustees' conduct and noting the recognition of the trustees by other religious bodies, including the affili-

64. *Id.* at 139.
65. *Id.* at 140.
66. *Id.*
67. *Id.*
68. The briefs of the parties also failed to address *Watson*. Only one brief even mentioned *Watson*. *See* Brief for Appellee at 11, Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872).
69. 82 U.S. (15 Wall.) at 137.
70. *Id.*
71. *Id.* at 138.
72. *Id.* at 138-39.

ate denomination.[73]

As for determining the validity of the excommunications, the Court again avoided the substantive dispute by rejecting the authority of the Bouldin faction. In doing so, the Court assumed majority rule.[74] The Court also indulged in another assumption about religious polity by assuming that membership is not an essential prerequisite to trusteeship.[75]

Because the Court gave multiple justifications for the holding, the extent to which the decision deviated from *Watson* is difficult to discern. Like *Watson*, the *Bouldin* Court recognized the authority of the church to make its own determinations on doctrine and polity.[76] Much of the analysis rejects the authority of the Bouldin faction. Nonetheless the Court employed a different method than it did in *Watson*. Given the rejection of the Bouldin faction's authority, a *Watson*-oriented decision would next identify the legitimate church authority and defer to its determination. If there were no determination, the Court might either withhold decision until the authentic church authority had spoken or assume that the status quo prior to Bouldin's attempted coup reflected the authentic determination. In contrast, the *Bouldin* Court first argued that a secular principle of trust law, the need for cause to remove trustees, was dispositive. The Court thus applied a neutral principle of property law to determine continuing title by those universally conceded to have been initially the legitimate titleholders. Arguments about the validity of the Bouldin faction's authority were only secondary. Determinations about the validity of the *status quo ante*—the identity of the general trustees and their nonsecession—were based not on deference to church authority, but on substantive deliberations by the Court.

As for the excommunication issue, the Court denied making a substantive determination on the merits, but instead claimed to determine who authentically spoke for the church. Denial of the Bouldin faction's authority would have been sufficient. To reach its conclusion, however, the Court found it necessary to assume that in a congregational church, the majority members rule, "if they adhere to the organization and the

73. *Id.* at 139.
74. *Id.* at 140.
75. *Id.*
76. *Id.* at 139.

[church's] doctrines . . . ."[77] So broad a presumption might have been unnecessary if the Court had simply referred to existing church rules that stipulated majority rule. The reference to doctrinal fidelity is curious because it hints at the viability of the departure-from-doctrine test.[78] The Court's presumption, then, was unnecessary and questionable.

Bouldin's deviations from *Watson* and its failure to discuss the case

77. *Id.* at 140.

78. In 1874-75, Justice William Strong, the author of the *Bouldin* opinion, delivered two lectures on church law at Union Theological Seminary. W. STRONG, TWO LECTURES UPON THE RELATIONS OF CIVIL LAW TO CHURCH POLITY, DISCIPLINE, AND PROPERTY (1875). Whether or not he believed that *Watson* (in which he joined the majority) had fully rejected the English departure-from-doctrine rule is unclear. As with *Bouldin*, the lectures make no reference to *Watson*. Justice Strong, however, stated:

> I think it may safely be asserted as a general proposition, that whenever questions of discipline, of faith, of church rule, of membership, or of office, have been decided by the church in its own modes of decision, civil law tribunals accept the decisions as final, and apply them as made.

Id. at 41-42. Yet, Justice Strong distinguished between church officers and trustees in whom legal title is vested. He stated that courts would not undertake to determine the identity of church officers, but would identify trustees: "They have charge of the temporalities only, not at all of the spiritual interests." *Id.* at 64. He thus left grounds for judicial review by permitting a distinction between spiritual matters and property matters, the latter a potentially expansive category.

Justice Strong's notion of express trust permits considerable room in which to employ the departure-from-doctrine test. In harmony with *Watson*, 80 U.S. (13 Wall.) at 723-24, he would permit doctrinal inquiry when a deed, will, or other instrument expressly grants the property "for the express purpose of maintaining a specified form of organization, or while it remains in a particular ecclesiastical connection, or it may be conveyed to a church, the name of which implies a certain form of church government." W. STRONG, *supra*, at 45-46. His definition of an express trust is broader than *Watson*'s seems to be. For example, he would have considered an express trust a grant to a specified church, "for the erection and support of a German Reformed church . . . ." *Id.* at 55. According to Justice Strong, the trust would have two dimensions: "First, it is for the use of a church that is German Reformed in its form of government, its order, and its discipline. Secondly, it is for a church that holds the creed or articles of faith accepted by the German Reformed Church generally when the grant was made." *Id.* Yet Justice Strong recognized the limits of the English rule, at least in the case of congregational churches:

> Of course what I have said has no application to a case where the property is held by a church, or religious society, with no specific trust attached to it, or with no other than that it is for a religious use generally. Such cases sometimes arise in independent churches, governed solely by themselves . . . .

Id. at 59-60. Whether or not Justice Strong would have extended the above statement to hierarchical churches is unknown. Also unknown is the precise point at which he would distinguish property held in express trust from property not so held.

Justice Strong, a deeply religious man, took a special interest in church affairs. *See* Teaford, *Toward a Christian Nation: Religion, Law, and Justice Strong*, 54 J. PRESBYTERIAN HIST. 422 (1976). His views, therefore, may represent a thoughtful statement on the contemporary understanding of *Watson*, an understanding narrower than might otherwise be thought. His views also support the position of state courts that seemingly declined to follow *Watson*. *See* note 49 *supra*.

make it difficult to insist that the decisions are harmonious. Both decisions agree on a policy of judicial nonintervention, but *Bouldin* appears to permit more judicial latitude in methodology and degree of intrusion.[79] Later Supreme Court opinions[80] and some commentators[81] have generally ignored *Bouldin*'s deviance from *Watson* and emphasized its requirement of orderly process and rudimentary fairness. Given the opinion's failure to explain the deviance from *Watson*, its multiple rationales, and its nonconstitutional basis, this general conclusion is more significant than the opinion's niceties.

The case, however, offers another general contribution. It illustrates a court relying in part on neutral principles of law to resolve a property dispute and thus foreshadows the modern neutral principles analysis. The use of neutral principles is particularly interesting, because it appears in a case that apparently views *Watson* as unhelpful or perhaps irrelevant. This fact suggests the possibility of neutral principles as an alternative[82] to the *Watson* approach.[83]

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79. Why the *Bouldin* Court ignored *Watson* is a purely speculative question. One possible explanation might be that *Watson* faced no question about the church's structure and seat of authority. In *Bouldin* ascertainment of authentic authority was a central issue. The *Bouldin* Court, however, could easily have incorporated its inquiry into the *Watson* methodology: Ascertain the true church authority and then defer to it. Another explanation might be that *Watson* dealt with a hierarchical church and not with a congregational church, as did *Bouldin*. *Watson*'s dicta and holding, however, are plainly part of a comprehensive scheme designed to cover both types of churches.

Still another explanation might distinguish the nature of the inquiries in the respective cases. Although *Watson* limited judicial inquiry into a church tribunal's jurisdiction, it focused on avoiding doctrinal questions. Perhaps the Court viewed the *Bouldin* inquiries as so unrelated to theological doctrine that rigid rules limiting inquiry were unrequired. *Watson* may have ruled the jurisdictional questions off limits only because they affected the outcome of a doctrinal decision. The Court may have distinguished *Bouldin*'s polity questions as organizational, as opposed to doctrinal, at least for purposes of the case. If the Court made such a distinction, then the Court expected a far narrower reading of *Watson* than it has received. This explanation, however, fails to explain *Bouldin*'s brief allusion to doctrinal fidelity.

Another explanation would focus on the blatantly unconvincing nature of Bouldin's claims. The degree of irregularity did not lead the Court explicitly to find bad faith, but the Court's language hinted strongly at highly questionable conduct. This conduct may have led the Court to hold that *Watson* had no application to cases strongly hinting at unseemly conduct.

80. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 729 (1976) (Rehnquist, J., dissenting); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447 n.6 (1969).

81. *E.g.*, C. ZOLLMAN, *supra* note 3, at 212; Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, *supra* note 3, at 212.

82. *See also* Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 n.4 (1970) (Brennan, J., concurring).

83. In 1880, Bouldin again appeared before the court for a review of the settlement of ac-

C. Gonzalez v. Roman Catholic Archbishop

If *Bouldin* implied a narrowing of judicial deference, *Gonzalez v. Roman Catholic Archbishop*[84] articulated it. *Gonzalez* declared that ecclesiastical discretion did not include the right to act arbitrarily or in bad faith with impunity.[85] Moreover, the decision incorporated this declaration into the complete deference doctrine as a qualification of *Watson*'s holding.

In *Gonzalez* the Court affirmed dismissal of a complaint by a boy who unsuccessfully sought appointment to a family-endowed chaplaincy. Manila's Roman Catholic archbishop refused to make the appointment because the petitioner failed to satisfy canon law qualifications for the position. The petitioner may have qualified under canon law effective in 1820 when the chaplaincy was founded, but did not qualify under canon law in effect at the time of the controversy. Justice Brandeis deferred to church authority and stated his reasoning in a frequently quoted passage:

> In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise. Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations.[86]

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counts between himself and the church trustees. Bouldin v. Alexander, 103 U.S. (13 Otto) 330 (1880). The decision was to Bouldin's disfavor due to his refusal to cooperate fully in the settlement proceedings. The case contains no discussion relevant to the analysis in this Article.

84. 280 U.S. 1 (1929).

85. *Id.* at 16.

86. *Id.* at 16-17. The Court cited Brundage v. Deardorf, 55 F. 839 (C.C.N.D. Ohio 1893) (Taft, J.), *aff'd*, 92 F. 214 (6th Cir. 1899), in which the court found fatal a procedural irregularity under church law in the adoption of a new church constitution. According to the court, nothing in *Watson* required acquiescence to "an open and avowed defiance of the original compact, and an express violation of it." 55 F. at 847-48. *Brundage* was cited approvingly in Barkley v. Hayes, 208 F. 319, 328 (W.D. Mo. 1913), *aff'd sub nom.* Duvall v. Synod of Kansas, 222 F. 669 (8th Cir. 1915), *aff'd sub nom.* Shepard v. Barkley, 247 U.S. 1 (1918). There, however, the court found that the church's procedures were sufficiently regular to pass judicial muster. 208 F. at 329-33. Judge Isaac Redfield also previewed *Gonzalez* by asserting that courts will not interfere in internal church matters "so long as they keep within the reasonable application of their own rules, which were known to the members, or might have been learned by them, upon reasonable inquiry, at the time of connecting themselves with the . . . church." 15 AM. L. REG. (24 U. PA. L. REV.) 264, 278 (1876).

Other courts also previewed *Gonzalez*. *E.g.*, Barton v. Fitzpatrick, 187 Ala. 273, 65 So. 390 (1914) (procedural irregularity in replacing pastor); Bomar v. Mount Olive Missionary Baptist

Justice Brandeis also ruled that the archbishop was correct in applying canon law presently in effect, because the parties at the founding of the chaplaincy implicitly intended as much.[87]

The statement of the three exceptions to *Watson's* rule of complete deference was unelaborated; charges of fraud and collusion were not raised in the case. When the Court discussed the applicability of modern canon law to determine the applicant's qualifications, it arguably was determining whether or not the archbishop had acted arbitrarily. More likely, however, the Court was attempting to discern the founder's intent concerning which canon law to apply and was not second guessing an ecclesiastical determination on canon law. Once the Court ascertained the founder's intent, it did not assess the archbishop's determination under modern canon law.[88] The canon law discussion thus dealt with the terms of the trust—an inquiry permissible under *Watson*[89]—and not the possible arbitrariness of a church adjudication on doctrine.

The Court characterized the parties' relationship as contractual and based the exceptions to the *Watson* rule on the standards of civil contract and associations law.[90] It assumed that bad faith and arbitrariness, as defined by civil law standards, are not part of the agreement by which individuals submit to church authority. The *Gonzalez* dicta thus has a basis in civil law. Although the Court occasionally cited *Watson*,[91] it never discussed the case's analysis or its concern about religious autonomy. Nonetheless, the case's holding is consonant with *Watson* in that the *Gonzalez* Court avoided discussing theological issues. Its discussion about which canon law to apply was designed only

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Church, 92 Cal. App. 618, 268 P. 665 (1928) (questionable procedures amounting to fraud); Moustakis v. Hellenic Orthodox Soc'y, 261 Mass. 462, 159 N.E. 453 (1928) (statement that expulsion of member without notice, opportunity to be heard, or valid reason would be void absent express authority for arbitrary expulsion, although apparently no church regulations governed expulsion); Jones v. State, 28 Neb. 495, 44 N.W. 658 (1890) (before expulsion, member must receive notice and opportunity for defense even in absence of church rules governing expulsion); Hendryx v. People's United Church, 42 Wash. 336, 84 P. 1123 (1906) (pastor could not validly expel member in order to continue scheme to defraud church of its property).

87. 280 U.S. at 17.

88. The Court simply stated: "In concluding that Raul lacked the qualifications essential for a chaplain the Archbishop appears to have followed the controlling Canon Law. There is not even a suggestion that he exercised his authority arbitrarily." *Id.* at 18.

89. Watson v. Jones, 80 U.S. (13 Wall.) at 723-24.

90. 280 U.S. at 16. *See* text accompanying note 86 *supra*.

91. 280 U.S. at 16 & n.3.

to discern the terms of the express trust. Given *Watson*'s position that courts must determine theological issues if necessary to enforce an express trust,[92] the *Gonzalez* Court showed restraint in not delving further into church law than it did.

Although *Watson, Bouldin,* and *Gonzalez* did not rest on constitutional grounds, they disclosed a strong judicial preference for avoiding doctrinal disputes. *Bouldin* and *Gonzalez* showed a willingness to intrude to stop bad faith or arbitrariness, but both cases exhibited restraint. *Bouldin* offered civil law reasons for its decision to the extent possible,[93] and *Gonzalez* offered a civil law analysis for nonintervention and occasional intrusion.[94] The cases obviously demanded no hard and fast rule against all intrusions. Instead, they demonstrated a concern for protecting the rights of church members, although the standards for judging unacceptable church conduct were secularly based.

Watson permitted courts to decide doctrinal issues if necessary to safeguard the expectations of the founders of express trusts. *Bouldin* acted to stop the rule of an apparently rump church faction. *Gonzalez* articulated three exceptions to safeguard church members' reasonable expectations about the extent of their submission to church authority. Nonetheless, the concern for church members did not overshadow concern for the institutional church. Because of the assumptions that church members submit to virtually plenary church authority and that courts should not challenge church interpretations of doctrine or polity, the challengers could prevail only if they could prove fraud, collusion, or arbitrariness. The *Gonzalez* exceptions served as an outer limit to the substance of the "contract"[95] to which the parties agreed.[96]

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92. Watson v. Jones, 80 U.S. (13 Wall.) at 723-24.

93. *See* text accompanying notes 59-75 *supra*.

94. *See* 280 U.S. at 16.

95. *Id.*

96. According to our research, aside from Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 60 Ill. 2d 477, 328 N.E.2d 268 (1975), *rev'd*, 426 U.S. 696 (1976), only once did a court overrule a church decision by expressly relying on *Gonzalez*. Hatcher v. South Carolina Dist. Council of the Assemblies of God, 267 S.C. 107, 226 S.E.2d 253 (1976) (church hierarchy acted arbitrarily in its substantive decision to dissolve a local church). Since *Gonzalez*, some courts have decided cases on the basis of fatal procedural irregularities without relying on the Supreme Court case. Trustees of Del. Annual Conference of Union Am. Methodist Episcopal Church v. Ennis, 27 Del. Ch. 1, 29 A.2d 374 (1942) (bishop unilaterally removed pastor instead of employing trial before church tribunal as authorized by the church discipline); Coates v. Parchman, 334 S.W.2d 417 (Mo. Ct. App. 1960) (church elected officers without giving members the required notice of meeting and in absence of full church membership); Briscoe v. Williams, 192 S.W.2d 643 (Mo. Ct. App. 1946) (single member, without required authorization, called spe-

The analysis furnished by these cases remained unaltered until 1952 when the Supreme Court discerned the constitutional issue limiting judicial review of internal church disputes.[97]

D. Kedroff v. St. Nicholas Cathedral

In *Kedroff v. St. Nicholas Cathedral*[98] the Supreme Court recognized a constitutional prohibition on state interference in internal church affairs. Although the decision introduced a new dimension of analysis, it confirmed the vitality of the analysis that the prior cases employed.

After the Russian Revolution, a dispute broke out between the Moscow-based Russian Orthodox Church and the Russian Orthodox churches in the United States. The latter group eventually declared administrative autonomy,[99] and the New York legislature recognized its authority over churches and church property in the state.[100] The New York courts relied on the statute and refused to recognize the right of the archbishop appointed by Moscow to occupy the church's central cathedral in the United States.[101] The Supreme Court, however, invalidated the statute because it interfered with the first amendment's free exercise guarantee.[102]

According to the Court, a legislative attempt to transfer property

cial business meeting to remove pastor); Mitchell v. Albanian Orthodox Diocese in Am., Inc., 355 Mass. 278, 244 N.E.2d 276 (1969) (procedural irregularities invalidated bishop's election; court held the matter involved not church law but contract law); Randolph v. First Baptist Church, 53 Ohio Op. 2d 288, 120 N.E.2d 485 (1954) (member expelled without the full and impartial investigation required by church constitution); *cf.* Evangelical Lutheran Synod v. First English Lutheran Church, 47 F. Supp. 954, 964 (W.D. Okla. 1942), *rev'd on other grounds*, 135 F.2d 701 (10th Cir.), *cert. denied*, 320 U.S. 757 (1943) (dicta that in calling special meeting to consider withdrawal from denomination, church should have given notice of meeting's purpose, even though church regulations did not require notice of purpose); Markowitz v. St. Mary's Ukrainian Orthodox Church, 88 Pa. D. & C. 472, 474 (Lehigh County C.P. 1954) (members are entitled to notice and an opportunity for defense, even though church by-laws make no provision for suspension or expulsion).

97. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

98. *Id.*

99. The American group comprised at least four-fifths of the Russian Orthodox churches in the United States. St. Nicholas Cathedral v. Kedroff, 276 A.D. 309, 322, 94 N.Y.S.2d 453, 464, *rev'd*, 302 N.Y. 1, 96 N.E.2d 56 (1950), *rev'd and remanded*, 344 U.S. 94 (1952) (Van Voorhis, J., dissenting). The facts of the case are quite complex. For detailed summaries, see Duesenberg, *Jurisdiction of Civil Courts Over Religious Issues*, 20 OHIO ST. L.J. 508, 516-22 (1959); Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, *supra* note 3, at 1123-24 & n.44.

100. N.Y. RELIGIOUS CORP. LAW §§ 105-08 (McKinney 1952) (amended 1971).

101. St. Nicholas Cathedral v. Kedroff, 302 N.Y. 1, 32-33, 96 N.E.2d 56, 74 (1950).

102. 344 U.S. at 115-16.

from one church authority to another infringes on the religious freedom of the disfavored faction.[103] The Court rejected the argument that the legislature gave control to the American church in order to carry out faithfully the purposes of the religious trust and to thwart politically subversive activity by the Moscow church.[104] The Court noted the lack of charges of such activity against any cleric and stated that the remedy was action against individual subversives and not against the organization to which they belonged.[105]

To bolster its reasoning, the Court engaged in a lengthy recounting of *Watson* and noted that although the case rested on nonconstitutional grounds, it reflected the concerns of the first amendment.[106] Despite the lengthy discussion, the Court entered a very specific holding: The free exercise guarantee gives churches "[f]reedom to select the clergy, where no improper methods of choice are proven . . . ."[107] The Court accordingly held that the state cannot intrude "for the benefit of one segment of a church . . . into the forbidden area of religious freedom . . . ."[108]

On remand, the New York Court of Appeals reaffirmed its prior judgment, but based its holding on New York common law instead of on the statute.[109] The court ruled that Soviet domination of the Moscow patriarch prevented his American appointee from validly exercising the right to occupy the cathedral. The Supreme Court, however, found that the premises underlying the court's decision were the same as those underlying the statute. In a brief per curiam opinion, the Court held that the judiciary could not engage in a form of state action that is constitutionally forbidden to the legislature.[110]

The peculiar facts of the case limit its applicability to typical church property controversies. As the Court noted, the dispute entailed no in-

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103. *Id.* at 119.

104. *Id.* at 116-19.

105. *Id.* at 109-10.

106. "[*Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116.

107. *Id.*

108. *Id.* at 119.

109. St. Nicholas Cathedral v. Kreshik, 7 N.Y.2d 191, 164 N.E.2d 687, 196 N.Y.S.2d 655 (1959), *rev'd*, 363 U.S. 190 (1960). The court held that Communist domination had made the Moscow hierarchy an unfit trustee for the Cathedral. *Id.* at 215-16, 164 N.E.2d at 701, 196 N.Y.S.2d at 674-75.

110. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

trachurch controversy over faith or doctrine.[111] Despite the invocation of *Watson*, then, the Court had no occasion to explicitly reject doctrinal tests like departure-from-doctrine or to endorse the entire *Watson* framework.

In rejecting the political rationale for legislative action,[112] however, the Court engaged in an analysis somewhat analogous to an assessment of whether a state is deciding a church dispute on theological grounds. The state legislature had determined that the Moscow patriarchate had become a tool of the Soviet government and that the American church could more faithfully carry out the purposes of the religious trust. Thus the legislative analysis accepted by the New York court suggested an implied trust endangered not by doctrinal deviance but by political domination. The legislation continued to recognize the Moscow church's spiritual authority. The Court avoided determining whether courts could recognize political dominance without theological overtones as a deviation from a religious trust (as opposed to an artificial implied trust). It instead emphasized the state's authority to punish subversive activity by affiliated individuals.[113]

Although the Court's language is not precisely clear, it seems to deny that a legislature possesses the power to prevent political endangerment to a church. The Court stated that the New York legislative action went far beyond protecting the church's trustees in discharging their responsibilities and intruded upon the church's right to choose its hierarchy.[114] It failed to state, however, whether the legislature could have acted if it had devised a means for acting on its political concerns that avoided constitutionally forbidden conduct or whether any such attempt would have violated the first amendment. If the former, then political concerns would provide a constitutional avenue for a state to safeguard a church. An aggressive but deliberate court could use this avenue to control a religious organization. The latter alternative, however, seems more likely. The tone of the opinion suggests that regulation of individuals furnishes the state with a satisfactory means for curbing undesirable conduct and that pursuit of the same goal by direct church regulation would impermissibly impair free exercise. Thus just as *Watson* forbade doctrinal justification for judicial intrusion, *Kedroff*

111. 344 U.S. at 120.
112. *Id.* at 117-19.
113. *Id.* at 109-10.
114. *Id.* at 118-19.

apparently banned political rationales for impairing ecclesiastical autonomy.

Kedroff's most important contribution, of course, is its holding that the free exercise clause protects churches from state interference with doctrine, faith, and church government.[115] The Court, however, had no occasion to constitutionalize *Watson*'s rejection of the departure-from-doctrine rule, and some state courts declined to find an implicit constitutionalization in the opinion.[116] As for the tension between the interests of church organizations and church members, the Court emphasized organizational rights, because the case dealt with competing hierarchies and did not formally pit a dissident faction against a loyalist faction. Nonetheless, the Court cited *Gonzalez* and stated that churches have "[f]reedom to select the clergy, where no improper methods of choice are proven . . . ."[117] Thus the court limited church autonomy with a secular based check to protect individuals against organizational abuse.

The *Kedroff* Court recognized that free religious exercise is interdependent with a church's right to control property. Under this analysis, a legislature or court cannot always deal with the property dispute without intruding on free exercise. Although *Kedroff* formally concerned property rights, the Court declared that "the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint a ruling hierarch of the archdiocese of North America."[118] The incidental effect on property control was insufficient

115. State court cases prior to *Kedroff* often referred to national policies on religious freedom. *E.g.*, Hundley v. Collins, 131 Ala. 234, 244, 32 So. 575, 579 (1902); Morris St. Baptist Church v. Dart, 67 S.C. 338, 341, 45 S.E. 753, 754 (1903); Nance v. Busby, 91 Tenn. 303, 325-26, 18 S.W. 874, 879 (1892). Courts sometimes made direct reference to the first amendment's guarantee of religious freedom as a basis for nonintrusion into the religious domain. *E.g.*, Clapp v. Krug, 232 Ky. 303, 304, 22 S.W.2d 1025, 1026 (1929); Moustakis v. Hellenic Orthodox Soc'y, 261 Mass. 462, 466, 159 N.E. 453, 455 (1928).

116. *E.g.*, Holiman v. Dovers, 236 Ark. 460, 366 S.W.2d 197, *supplementing opinion at* 236 Ark. 211, 366 S.W.2d 197 (1963); Sorrenson v. Logan, 32 Ill. App. 2d 294, 177 N.E.2d 713 (1961); Huber v. Thorn, 189 Kan. 631, 371 P.2d 143 (1962); Vogler v. Salem Primitive Baptist Church, 415 S.W.2d 72 (Ky. 1967); Cantrell v. Anderson, 390 S.W.2d 176 (Ky. 1965); Davis v. Sher, 356 Mich. 291, 97 N.W.2d 137 (1959). These cases all employ a departure-from-doctrine test; none mentions *Kedroff* or the possibility of a constitutional problem with evaluating conformity with church doctrine.

117. 344 U.S. at 116.

118. *Id.* at 115.

to justify state intrusion.[119] Perhaps the conclusion implicitly recognized that the distinction between religious and property rights is sometimes illusory and merely a pragmatic way to resolve aspects of a dispute that affect the orderliness of society. A court, of course, determines a result, whether the Constitution compels the acceptance of a church body's authority or permits another standard, perhaps a judicially created one. The distinction between property and religious issues merely helps decide how much flexibility the court has in settling the dispute.

Kedroff is a major case. Not only does it anchor *Watson*'s general policy to a judicially enforceable constitutional rule,[120] it incorporates the major aspects of the preceding cases—judicial deference with the qualifications suggested in *Bouldin* and articulated in *Gonzalez*—and does not reject any parts of those holdings. It recognizes the necessity of religious autonomy for church organizations, but still acknowledges a marginal role for judicial review and perhaps other state action to secure the expectations of church members.

E. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church

In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*[121] the Supreme Court rendered the modern landmark decision on church property disputes. *Kedroff* had launched the modern analysis by raising the constitutional dimension and speaking approvingly of prior decisions. *Presbyterian Church* applied the first amendment to a typical internal church dispute. Although it did not apply *Watson*'s method of resolution, it elevated to constitutional principle *Watson*'s rule of noninterference with church doctrine.[122]

In *Presbyterian Church* two Savannah, Georgia, congregations voted to disaffiliate from the Presbyterian Church of the United States, pri-

119. Justice Frankfurter emphasizes this point in his concurring opinion:

> St. Nicholas Cathedral is not just a piece of real estate. . . . A cathedral is the seat and center of ecclesiastical authority. St. Nicholas Cathedral is an archiepiscopal see of one of the great religious organizations. What is at stake here is the power to exercise religious authority. That is the essence of this controversy.

Id. at 121 (Frankfurter, J., concurring).

120. One commentator argues that the *Kedroff* Court could have avoided invoking the free exercise clause by basing its decision on an unconstitutional taking of property from the Moscow church. *See* Note, *Judicial Intervention in Church Property Disputes, supra* note 3, at 1128-30.

121. 393 U.S. 440 (1969).

122. *Id.* at 447.

marily because they opposed politically liberal stands that the denomination had taken.[123] After intrachurch proceedings failed to produce reconciliation, the dissenters claimed ownership of church property. In the Georgia courts they successfully argued that the denomination's conduct constituted substantial departures from doctrine in force at the time of affiliation.[124] The Georgia courts, which still adhered to the departure-from-doctrine rule, found that the implied trust favoring the denomination had terminated.[125] The Supreme Court reversed.

The Court recognized the factual parallel with *Watson* and endorsed *Watson*'s concern for religious freedom. It concluded that "[t]he logic of [the *Watson*] language leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes."[126] More specifically, the Court stated that *Kedroff* had "converted the principle of *Watson* as qualified by *Gonzalez* into a constitutional rule."[127]

The Court nonetheless noted that courts could decide church property disputes if they could do so without resolving underlying doctrinal controversies.[128] The opinion also marks the first use of the phrase "neutral principles" in church property cases—"[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."[129] No further elaboration was offered. Although later Court opinions have treated neutral principles as a methodology sepa-

123. *Id.* at 442-43. The complaints concerned liberalization of such doctrinal matters as foreordination and the ordination of women as ministers and elders as well as the liberal stands taken by the denomination on civil disobedience and opposition to the Vietnam War. Presbyterian Church v. Eastern Heights Presbyterian Church, 224 Ga. 61, 62-64, 159 S.E.2d 690, 692-93 (1968), *summarized in* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 442 n.1 (1969).

124. In the trial court, a jury made the initial determination, and, on appeal, the Georgia Supreme Court affirmed. Presbyterian Church v. Eastern Heights Presbyterian Church, 224 Ga. 61, 62-63, 159 S.E.2d 690, 692-93 (1968).

125. The Georgia Supreme Court held that the test was "substantial abandonment" of the original tenets of faith and practice, and stated that "substantial" was synonymous with "fundamental," "material," "vital," and "important." *Id.* at 70, 159 S.E.2d at 696. The court noted that this test was less burdensome on the local church than a test requiring a showing of complete abandonment. *Id.* The court therefore overruled a prior Georgia case adopting the complete abandonment test. Mack v. Kime, 129 Ga. 1, 58 S.E. 184 (1907). Georgia decisions, however, had not strictly applied the *Mack* test. *See* Casad, *supra* note 3, at 58.

126. 393 U.S. at 447 (emphasis in original).

127. *Id.* at 447.

128. *Id.* at 449.

129. *Id.*

rate from *Watson*'s methodology of compulsory deference,[130] the Court probably would not have made such an innovation without being more specific about what it was doing. In context, the Court appears to be stating only that the civil judiciary can resolve at least some church property disputes without resorting to doctrinal inquiry. Thus the passage could easily be a descriptive statement about the *Watson* methodology rather than a statement of a new methodology.[131]

The Court specifically invalidated the departure-from-doctrine element in Georgia's implied trust theory.[132] The test's fatal flaws were the requirements that courts interpret church doctrine and that they assess its relative significance to the religion.[133] Given the Court's explicit ban on doctrinal inquiry, either flaw would seem to be fatal. The Court made its ban on departure-from-doctrine absolute[134] by declaring that courts could not use *Gonzalez* to invoke the test as evidence of arbitrary decisionmaking or bad faith.[135]

On remand, the Georgia Supreme Court held that without the departure-from-doctrine element, the entire implied trust theory must fall.[136] Finding no other basis for a trust favoring the denomination, the court looked to legal title, found that it rested with the local churches, and made this fact dispositive.[137]

Presbyterian Church thus constitutionalized *Watson*'s prohibition on

130. Jones v. Wolf, 443 U.S. 595, 599, 602-03 (1979); Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 723 n.15 (1976); Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring).

131. On the confusion created by the Court's language, see, e.g., Casad, *supra* note 3, at 68; *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 128-29 & n.19 (1969).

132. 393 U.S. at 449-50.

133. *Id.* at 450.

134. In a concurring opinion, Justice Harlan agreed that the departure-from-doctrine approach is unconstitutional, but made a separate statement about express trusts. He stated that an individual may grant property to a church and attach enforceable conditions that limit doctrinal change. *Id.* at 452 (Harlan, J., concurring). The examples Justice Harlan gave, however, indicate that the conditions he had in mind would not involve a court in a doctrinal inquiry—that the church never ordain women or amend specific articles of the Confession of Faith. Even these conditions, however, could conceivably give rise to doctrinal dispute. For example, the church could claim to be clarifying or rewording an article, but still face charges that it had made a substantive change. In such a case, presumably the Court's rule against judicial review of doctrinal questions would apply. *See* Casad, *supra* note 3, at 60-61.

135. 393 U.S. at 450-51.

136. Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 260, 167 S.E.2d 658, 659 (1969), *cert. denied*, 396 U.S. 1041 (1970).

137. *Id.* at 260-61.

doctrinal inquiry and accepted the *Gonzalez* exceptions for marginal review. More specifically, it outlawed the departure-from-doctrine inquiry. The decision, however, did not speak to the rest of *Watson*'s holding. The Court made no reference to a rule of compulsory deference and did not categorize churches as either congregational or hierarchical. Thus the case did not foreclose other methods for dispute resolution.

The Court's constitutional concerns focused on protecting church autonomy to permit free development of doctrine and to avoid implicating secular interests in matters of ecclesiastical concern. By eliminating one weapon formerly available to dissidents, *Presbyterian Church* weakened doctrinal stability, but enhanced institutional stability. By assuming the implied consent of members to church governance, the Court reconciled its institutional emphasis with the reliance interests of church members. Only its approval of the *Gonzalez* exceptions showed a direct concern for dissidents.

The Court made clear that it viewed the major problem as one of ambiguity in legal documents and church documents. It therefore called upon the state, the churches, and individuals to structure their relationships so that civil courts could resolve property disputes without engaging in forbidden ecclesiastical inquiry.[138] Courts, of course, must resolve these disputes to insure the civil order of society, but *Presbyterian Church* may imply that courts cannot decide these cases according to the expectations of churches and their members if the evidence necessary to resolve ambiguities is constitutionally off limits.

F. Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.

Shortly after the Court decided *Presbyterian Church*, it remanded a case to the Maryland Court of Appeals for further consideration in light of the recent decision.[139] On remand, the state court affirmed its prior opinion,[140] and the Supreme Court agreed per curiam.[141] The

138. 393 U.S. at 449.

139. Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 249 Md. 650, 241 A.2d 691 (1968), *vacated and remanded*, 393 U.S. 528 (1969).

140. Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 254 Md. 162, 254 A.2d 162 (1969).

141. Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970).

case, *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, marks the first time the Court approved a state court decision purporting to apply neutral principles. Perhaps more significant is a concurring opinion by Justice Brennan that seeks to summarize the current state of the law on church property dispute.[142] In approving both the *Watson* and neutral principles methods, Justice Brennan emphasized that the first amendment affords the states broad discretion in formulating a method of resolution.

In *Maryland & Virginia Eldership* two local congregations withdrew from the general church and claimed ownership of church property. On remand from the Supreme Court, the Maryland court affirmed its prior decision favoring the local churches and declared that its reasoning included no consideration of doctrinal issues.[143] The court focused on *Presbyterian Church*'s reference to neutral principles and asserted that its prior opinion had anticipated the recent Supreme Court decision.[144]

The court looked to the state statute, the express language of the property deeds, the local church charters as well as the constitutions of the Eldership and the general church. The first three sources vested property control in the local churches, and the constitutions failed to place control of the property in the general church. According to the court, it applied neutral principles because none of the inquiries required a determination on any theological or doctrinal matter.[145] The court, however, recognized the need to explain its reliance on the statute. The Maryland Religious Corporation Law placed control of church property in the local churches.[146] Recognizing the first amendment challenge, the court noted that a religious corporation with local control could still contract to adopt a hierarchical polity and effectively transfer control to the denomination.[147]

142. *Id.* at 368.

143. Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 254 Md. 162, 172-73, 254 A.2d 162, 169 (1969).

144. *Id.* at 166, 254 A.2d at 165.

145. *Id.* at 173, 254 A.2d at 169.

146. MD. ANN. CODE art. 23, §§ 256-70 (Michie 1973 replacement vol.). The statutes have since been revised, but essentially without substantive change as they relate to this discussion. MD. CORP. & ASS'NS CODE ANN. §§ 5-301 to -313 (Michie 1975 & cum. supp. 1979).

147. Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 254 Md. 162, 172-73, 254 A.2d 162, 169-70 (1969) (quoting Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 249 Md. 650, 673-74, 241 A.2d 691, 704-05 (1968)).

In a brief per curiam opinion, the Supreme Court affirmed.[148] The Court merely noted the sources on which the state decision relied, made a specific reference to the challenge to the statute's constitutionality as applied, and concluded that the Maryland court's resolution involved no inquiry into religious doctrine.

The decision's status as a per curiam opinion raises some question about which aspects of the Maryland opinion received full validation. The Court's summary of the state court's methodology, however, suggests a general approval.[149] In applying a neutral principles approach, the state court asked not where the locus of authority lay, but who owned the property. Thus the Court apparently approved a method that differed from *Watson*.

The Court's conclusion that no doctrinal inquiry was present has several implications. It affirms that courts can interpret secular provisions of church documents, apparently on the assumption that they can be isolated from doctrinal inquiry. More intriguing is the approval of the way that the Maryland court interpreted two church deeds. The document vested title in the general church "in the event the congregation of the Church of God at Sharpsburg, Maryland, ceases to function as a church organization . . . ."[150] One deed of the other local church likewise gave the property to the general church "if the [local] church should become extinct or cease to be . . . ."[151] According to the state court, these provisions did not give title to the general church should the local church disaffiliate.[152] Although the reading is certainly acceptable, a religious question is arguably involved—whether a church that withdraws from a general church ceases to exist. From the general church's viewpoint, apostasy might be the equivalent of nonexistence. Although the language may appear in a legal document, its meaning

148. 396 U.S. 367 (1970).

149. In resolving a church property dispute . . . the Maryland Court of Appeals relied upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property.

Id. at 367 (footnote omitted).

150. Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 249 Md. 650, 665, 241 A.2d 691, 700 (1968) (emphasis omitted).

151. *Id.* (emphasis omitted).

152. *Id.*; *accord,* Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 254 Md. 162, 169, 254 A.2d 162, 167 (1969).

might still hinge on doctrine. The problem illustrates the difficulty in separating doctrinal from secular language.

The Court's approval of the application of the Maryland statute is also noteworthy. The statute effectively mandated a congregational polity unless the church took the initiative to create another arrangement.[153] The Court may have believed that state requirements concerning property ownership involved no religious intrusion. The thrust of Supreme Court cases, however, suggests that the Court would not take so narrow a view, but would recognize the relationship between property ownership, church polity, and religious freedom.[154] Alternatively, the Court may have determined that the church polity was congregational and that the statute therefore did no violence to it. If this were the Court's reasoning, the opinion gives no indication that the Court took this course. The Maryland court's interpretation of the statute, however, seems an acceptable one for the Court to have approved.[155] The state court essentially viewed the statute as a device for assuring civil order in the absence of other arrangements by the church. Local ownership would prevail only if the absence of other arrangements compelled a court to resolve an ambiguous state of affairs. The statute would create a presumption when other evidence is lacking. A church's freedom to arrange its affairs would remain unfettered, but church failure to take responsibility would invoke a provision for determining property ownership and preserving civil order.[156]

The case thus suggests that the first amendment gives courts some latitude in devising resolutions for church disputes. Whether the Maryland approach reflected the expectations of churches and their mem-

153. MD. ANN. CODE art. 23, §§ 256-70 (Michie 1973 replacement vol.). The statutes have since been revised, but essentially without substantive change as they relate to this discussion. MD. CORP. & ASS'NS CODE ANN. §§ 5-301 to -313 (Michie 1975 & cum. supp. 1979).

154. *See* notes 118-19 *supra* and accompanying text.

155. Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 254 Md. 162, 166-67, 254 A.2d 162, 166 (1969) (quoting Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 249 Md. 650, 656, 241 A.2d 691, 695-96 (1969)).

156. For an extensive discussion of religious corporation laws, see Kauper & Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499 (1973). Although these statutes seem to regulate churches, they establish conditions under which churches can enjoy the autonomy guaranteed by the first amendment. The statutes give churches the benefits of incorporation, but still permit the flexibility needed to accommodate each church's peculiar structure. *See* Giannella, *supra* note 9, at 536-37. On the constitutionality of religious corporation statutes, see Kauper & Ellis, *supra*, at 1557-74.

bers was unaddressed. At best, the Maryland court assumed that legal and secular documents combined with the church's failure to upset the statutory arrangement reflected expectations.

Of more significance than the per curiam opinion is a concurring opinion by Justice Brennan in which Justices Douglas and Marshall joined.[157] The frequently quoted concurrence makes no reference to the Maryland case, but instead sets out an innovative summary of the law. According to Justice Brennan, states need not conform to the *Watson* methodology.[158] They can adopt any approach for settling church property disputes provided it entails no consideration of doctrinal matters.[159] "Doctrinal matters" include the ritual and liturgy of worship and the tenets of faith.[160]

Elsewhere in the opinion, Justice Brennan made clear that ecclesiastical polity must remain entirely within church control.[161] *Watson*'s deference to a church's internal decisional mechanism—whether the church is congregational or hierarchical—was recognized.[162] Justice Brennan also agreed that an express condition might attach to property's use and control, as in the case of an express trust; the condition, however, would be judicially enforceable only if a court could address it without considering doctrinal matters.[163]

The concurrence would permit a court following *Watson* to identify the church's governing body, but not to determine whether it had the power under religious law to control the property in question. The latter inquiry would violate the first amendment because it "frequently necessitates the interpretation of ambiguous language and usage."[164] According to Justice Brennan, the first amendment also limits a court in identifying the governing body; the court can make the identification only if it does not resolve doctrinal questions or inquire extensively into church polity.[165]

Justice Brennan also described neutral principles as an alternative to

157. 396 U.S. at 368 (Brennan, J., concurring).
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 370 (Brennan, J., concurring).
162. *Id.* at 368-69 (Brennan, J., concurring).
163. *Id.* at 369 n.2 (Brennan, J., concurring).
164. *Id.* at 369 (Brennan, J., concurring).
165. *Id.* at 370 (Brennan, J., concurring).

the *Watson* approach.[166] He equated it with the formal title doctrine and thus created some ambiguity.[167] Justice Brennan first stated that a court could "determine ownership by studying deeds, reverter clauses, and general state corporation laws."[168] The lack of reference to secular provisions in church documents suggested the analysis would be limited to ascertaining legal title and trusts that are expressly set out in legal documents. Justice Brennan, however, then illustrated that the ban on doctrinal inquiry limits neutral principles: "For example, provisions in deeds or in a denomination's constitution for the reversion of local church property to the general church, if conditioned upon a finding of departure from doctrine, could be civilly enforced."[169] The sentence suggests provisions of church documents susceptible to a secular reading are also permissible sources of information. A narrower reading would limit the sources' use to construing the conditions and reversions that accompany express trusts. Later decisions bear out the broader interpretation,[170] but the ambiguity in Justice Brennan's language suggests that the neutral principles doctrine was not entirely formulated at the time of *Maryland & Virginia Eldership*.

The endorsement of the formal title doctrine is curiously brief. The concurring opinion marks the first time that any justices gave it express approval.[171] The highly legalistic nature of the test might have created the incentive for an elaboration on how it squared with any concern for meeting the expectations of the parties. Satisfying those expectations might well require a court to look to evidence beyond the words of the document.[172]

Justice Brennan also suggested that the *Watson* and neutral princi-

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. Jones v. Wolf, 443 U.S. 595, 604 (1979).
171. Previously, courts had occasionally looked to formal title. *E.g.*, First English Lutheran Church v. Evangelical Lutheran Synod, 135 F.2d 701 (10th Cir.), *cert. denied*, 320 U.S. 757 (1943); Master v. Second Parish, 124 F.2d 622 (1st Cir. 1941); Bonacum v. Murphy, 71 Neb. 463, 104 N.W. 180 (1905).
172. For this reason, several courts have rejected the formal title doctrine. *E.g.*, Lowe v. First Presbyterian Church, 56 Ill. 2d 404, 408, 308 N.E.2d 801, 803, *cert. denied*, 419 U.S. 895 (1974); Presbytery of Cimarron v. Westminster Presbyterian Church, 515 P.2d 211, 216-17 (Okla. 1973), *cert. denied*, 416 U.S. 961 (1974); Presbytery of Seattle v. Rohrbaugh, 79 Wash. 2d 367, 372, 485 P.2d 615, 619 (1971), *cert. denied*, 405 U.S. 996 (1972).

ples methods were complementary.[173] Thus, a neutral principles court that encountered a doctrinal snag might resort to the *Watson* method, and a *Watson* court that faced a doctrinal question might turn to neutral principles. If both methods led to a doctrinal matter, presumably courts could resort to some undescribed third method. Justice Brennan did not limit approved methodologies to two. Another alternative would be to make a decision under *Watson* or neutral principles, but only on whatever evidence was not constitutionally off limits. Justice Brennan's language, however, presumed that recourse to other methods was the appropriate procedure.[174]

Justice Brennan's concurrence also mentioned an additional approach—special statutes that govern property arrangements without requiring reference to doctrine.[175] He made clear that the statutes must reflect ecclesiastical polity rather than dictate it.[176] He left unanswered whether under any circumstances a statute might dictate a solution when the church's method of resolution is unclear. The obvious parallel is the Maryland statute, which might create a presumption of a particular polity in the absence of other evidence. Not until *Jones v. Wolf*[177] did a Court majority explicitly permit this sort of statutory presumption.

Despite its ambiguities, then, the Brennan concurrence marked an important step in judicial thinking about church property disputes. It revealed members of the Court willing to give considerable latitude to the states in devising methods of dispute resolution. The constitutional ban on doctrinal inquiry, according to the concurring justices, did not mandate adherence to a particular methodology. At the same time, the Justices gave specific approval to the *Watson* methodology as consonant with the Constitution.

G. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich

Although *Maryland & Virginia Eldership* indicated that states had

173. 396 U.S. at 370 n.4 (Brennan, J., concurring).

174. *See id.*

175. *Id.* at 370.

176. *Id.* Justice Brennan cited as illustrations, however, two cases that invalidated statutes as unconstitutional. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Goodson v. Northside Bible Church, 261 F. Supp. 99 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967).

177. 443 U.S. 595 (1979).

latitude in designing methods for dispute resolution, *Serbian Eastern Orthodox Diocese for the United States v. Milivojevich*[178] demonstrated that limitations on latitude still existed. *Serbian* held that the limitations imposed by the first amendment were, in one respect, narrower than had previously been believed. The Court held unconstitutional judicial review of internal church decisions for arbitrariness, a standard of review first accepted in *Gonzalez*.[179] As a setting for the holding, the Court selected a factually complex case that concerned not the defection of a single local congregation, but the schism of a hierarchical church.

The Serbian Orthodox Church, based in Belgrade, Yugoslavia, is a hierarchical church, and the Holy Assembly and Holy Synod are its highest authorities. After a protracted dispute, these bodies defrocked Dionisijie Milivojevich, the Bishop of the American-Canadian Diocese. They also reorganized his diocese into three dioceses. In the Illinois courts,[180] Milivojevich successfully argued that he should retain control of diocesan property. He asserted that the defrockment failed to conform to the procedure prescribed in the church constitution and that the diocesan reorganization was beyond the jurisdictional authority of the mother church's tribunals. The Supreme Court reversed and held that courts must defer to the rulings of a church's highest tribunals on matters of "discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[181] The Court also confirmed *Watson*'s ruling that civil courts cannot challenge church tribunals on the jurisdiction they claim.[182] In issuing this broad holding, the Court outlawed civil review for arbitrariness, a review that *Gonzalez* would have permitted.

Although *Kedroff*[183] and *Presbyterian Church*[184] both gave general approval to *Watson*'s principles, *Serbian* marks the first time since *Wat-*

178. 426 U.S. 696 (1976).

179. Gonzalez v. Roman Catholic Archbishop, 280 U.S. at 16.

180. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 60 Ill. 2d 477, 328 N.E.2d 268 (1975); Serbian Eastern Orthodox Diocese for the United States v. Ocokolich, 72 Ill. App. 2d 444, 219 N.E.2d 343 (1966). The dispute produced other litigation. Draskovich v. Pasalich, 280 N.E.2d 69 (Ind. Ct. App. 1972); Serbian Orthodox Church Congregation of St. Demetrius v. Keleman, 21 Ohio St. 2d 154, 256 N.E.2d 212, *cert. denied*, 400 U.S. 827 (1970); Dragelivich v. Rajsich, 24 Ohio App. 2d 59, 263 N.E.2d 778 (1970).

181. 426 U.S. at 713.

182. *Id.* at 713-14.

183. Kedroff v. St. Nicholas Cathedral, 344 U.S. at 110-16.

184. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. at 445-47.

son that the Court approvingly described the specifics of the *Watson* methodology, at least as it applies to hierarchical churches.[185] The Court emphasized *Watson*'s statement that the final authority of church judicatories is "of the essence of these religious unions and of their right to establish tribunals . . . ."[186] Thus the focus was on the rights of the church as an institution.

The *Serbian* Court also lodged a severe challenge to the *Gonzalez* qualifications on *Watson*. Noting that it had never given the holding "concrete content" or applied the exception, the Court held that an arbitrariness exception is inconsistent with the constitutional requirement of deferral on religious questions.[187] According to the Court, an arbitrariness inquiry—defined as "an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations"[188]—entails an unconstitutional examination of either church procedural law or church substantive criteria. The Court analogized to *Watson*'s rejection of inquiries into the jurisdiction of tribunals; *Watson* argued that the investigation would lead to a construction of church laws.[189] The *Serbian* Court recognized that *Gonzalez* presumed to protect the expectations of church members, but the Court also recognized that such expectations are not necessarily reasonable. The Court declared that ecclesiastical decisions "are to be accepted as matters of faith whether or not rational or measurable by objective criteria."[190] Consequently, the Court saw no role for the constitutional concept of due process, which is a secular notion.[191]

The Supreme Court also overruled the Illinois court's challenge to the Belgrade hierarchy's tripartite division of the diocese.[192] Although the Illinois court certainly was aware that *Watson* had outlawed challenges to a tribunal's jurisdiction, it argued that here the tribunal acted "in clear and palpable excess of its own jurisdiction,"[193] thus indicating

185. 426 U.S. at 710-11, 724-25 (quoting Watson v. Jones, 80 U.S. (13 Wall.) at 727).

186. *Id.* at 711 (quoting Watson v. Jones, 80 U.S. (13 Wall.) at 729).

187. *Id.* at 712-13.

188. *Id.* at 713.

189. *Id.* at 713-14 (quoting Watson v. Jones, 80 U.S. (13 Wall.) at 733-34).

190. *Id.* at 714-15.

191. "Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance." *Id.* at 715.

192. *Id.* at 720-24.

193. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 60 Ill. 2d 477, 509, 328 N.E.2d 268, 284 (1975).

invocation of the *Gonzalez* rule.[194] The Court, however, glided over the invocation and held that such matters rest solely with the church government.[195]

Serbian dealt with an undisputedly hierarchical church, but it set out rules that would seem to apply to all forms of church polity. Although the Court specifically limited its holding to cases concerning hierarchical churches,[196] it disclosed no rationale for this limitation. The limitation therefore may have been the result of traditional judicial conservatism in deciding only the case before the bar or it may have meant that the Court had reservations about complete deferral to congregational churches.

The degree of deferral to hierarchical churches concerned some members of the Court. Justice White wrote a brief concurrence to state the role of independent judicial judgment.[197] According to Justice White, courts determine whether or not a church is hierarchical and whether a church body like the American-Canadian Diocese is part of a hierarchical church, regardless of the opinions of church authorities on the subject. He thus reserved some basic questions of church polity for the civil court's determination. Justice Rehnquist, accompanied by Justice Stevens, issued a dissent that challenged the extent of judicial

194. The court cited Schweiker v. Husser, 146 Ill. 399, 415, 34 N.E. 1022, 1030 (1893), which recited the essential *Gonzalez* rule, but failed to find a violation in the case at bar.

195. 426 U.S. at 721. The Court said that the Illinois decision was not explicitly based on the *Gonzalez* exception, but was based on a "neutral principles" analysis that erroneously substituted the court's interpretation of church constitutions for that of the church authorities. *Id.* The Illinois court, however, analyzed the church documents to determine whether or not church authorities had acted arbitrarily in asserting jurisdiction.

The Court also strongly suggested that the Illinois court was wrong in its analysis of church jurisdiction. *Id.* at 721-24. The Court, however, made the puzzling statement that "[t]he constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity." *Id.* at 723. The statement could easily imply that sometimes a court may look to the jurisdiction of a church tribunal. This conclusion, however, fails to comport with the rest of the opinion. In a footnote tied to the sentence, the Court noted that the formal title doctrine had not been invoked in the case. *Id.* at 723 n.15. Even if it were, however, the Court would have construed secular provisions not to ascertain a tribunal's jurisdiction, but instead to determine the owner of the property. The placement of the footnote, then, raises unanswered questions. The only possible, consistent interpretation would hold that the provisions of a church document are never sufficiently express to permit a jurisdictional inquiry. The wording, however, seems to suggest more. Exactly what it implies remains an enigma.

196. *Id.* at 724.

197. *Id.* at 725.

deference.[198] Justice Rehnquist argued that an inquiry into arbitrariness is not a great jump from the inquiries that a court can permissibly make in discerning the decision that a church tribunal has made.[199] He thus argued that some factual inquiry is inevitable, that the determination of these controversies requires some criterion, and that the rule of law that forbids arbitrariness is a proper criterion.

Under the pre-*Kedroff* common-law doctrine, Justice Rehnquist argued, the Illinois courts correctly addressed a question assumed in *Watson*—"whether the members of the American-Canadian Diocese *had* bound themselves to abide by the decisions of the Mother Church in the matters at issue here."[200] He thus looked to the members' expectations to justify the *Gonzalez* inquiry. As for the post-*Kedroff* constitutional cases, Justice Rehnquist viewed them as requiring that courts not favor a particular doctrine or sect.[201] He apparently believed that courts can make determinations about internal religious organizations providing they do not violate the constitutional requirements and instead apply neutral principles. He even suggested that deferral on such matters, which is not accorded secular voluntary organizations, creates an establishment clause problem.[202]

Serbian marked the first time that at least some Court members displayed uneasiness with the *Watson* method. The facts of the case forced the Court to accept consequences that flow from recognizing that the nonentanglement principle extends beyond doctrine to polity.

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198. *Id.* at 725-35. A few years after *Serbian*, however, Justice Rehnquist approvingly cited *Serbian* for the proposition that: "[T]he Constitution places a higher value on religious freedom than it does upon neutral resolution of disputes which may arise between factions within a church." Rehnquist, *The Adversary Society*, 33 U. MIAMI L. REV. 1, 5 (1978). In reply, Professor Tribe invoked *Serbian* to illustrate a "pluralistic fallacy" militating against judicial review. According to Tribe, the fallacy of internal fairness is "[the assumption] without any real inquiry that the internal processes of the group to which litigants are remitted will give fair consideration to the interests and rights of such litigants." Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply to Justice Rehnquist*, 33 U. MIAMI L. REV. 43, 47 (1978). Tribe's discussion of *Serbian* seems critical. *Id.* at 49-50. His discussion of the case in his treatise, however, seems neutral, if not positive. L. TRIBE, *supra* note 3, § 14-12, at 878-80.

199. 426 U.S. at 726-27 (Rehnquist, J., dissenting).

200. *Id.* at 732 n.* (Rehnquist, J., dissenting) (emphasis in original).

201. *Id.* at 733 (Rehnquist, J., dissenting).

202. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.

Id. at 734 (Rehnquist, J., dissenting).

The breadth of ecclesiastical immunity forbade an arbitrariness test and raised doubts about review for fraud and collusion, traditional tools of the courts. Thus the nonentanglement principle resulted in an extensive loss of civil judicial power.

The constitutional concern justifying immunity extended beyond civil interference to the hazard of civil interference.[203] The Court, however, failed to identify the point at which the hazard is outweighed by the threat of unwarranted church domination over its members. A precise balancing test may prove impossible because determining when the threat becomes unacceptably imminent is an inherently imprecise undertaking. The Court identified unacceptable threats in a less analytic way. It declared that some judicial inquiries were permissible, at least until doctrinal matters intrude—for example, identifying the church as hierarchial—and it entirely outlawed other inquiries—for example, those concerning internal church organization and procedural regularity.

Justice Rehnquist recognized the artificiality of the distinction between permissible and impermissible topics for inquiry and proposed outlawing inquiry only when a court must look to church doctrine. Justice Rehnquist's test would permit broader judicial review, but would increase the hazard of unwitting intrusion. In striking a balance between the threat of unwarranted church domination and the desirability of church autonomy, however, he failed to explain why his test offered the preferable balance. Perhaps an awareness of the unsatisfactory nature of these tests explains why the majority limited its holding to hierarchical churches, the case at hand.

Both the majority and the dissenters justified their holdings in terms of member expectations. The majority assumed that members accept the decisions of church authority as an act of faith.[204] The dissent, however, was willing to examine and determine church polity to ascertain the expectations of members.[205] It accepted *Gonzalez*'s inquiries as

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203. "Even when rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Id.* at 709. "If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Id.* at 710 (quoting Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. at 449).

204. *Id.* at 714-15.

205. *Id.* at 733-34 (Rehnquist, J., dissenting).

a permissible method to define the outer limits of what a court will assume church members have submitted to. For the dissent, then, the expectations of members are a proper topic for factual inquiry.

The majority dashed any hopes that neutral principles as a part of a *Watson* test could permit broader constitutional review to better ascertain the legitimate expectations of churches and their members. The Illinois court had described its inquiry into internal church organizations and jurisdiction as an application of neutral principles.[206] It apparently defined neutral principles as inquiry not based on doctrine or favoritism toward one faction. The Court's veto of the Illinois methodology on *Watson*-style grounds suggests that, at least here, the phrase "neutral principles," as employed in *Presbyterian Church*,[207] did not broaden judicial review under the *Watson* methodology. Neutral principles thus offered only a separate methodology. Yet, thus far, majority opinions of the Court had only briefly adverted to neutral principles as an acceptable alternative to *Watson* and had not given it explicit approval.[208]

With *Serbian*, then, the limitations of the *Watson* inquiry became uncomfortably apparent. The stage was set for a direct discussion of neutral principles' role as an alternative methodology.

H. Jones v. Wolf

In *Jones v. Wolf*[209] the Supreme Court explicitly approved neutral principles as an alternative to *Watson*'s total deference approach. In a 5-4 decision[210] the Court affirmed its indication in *Maryland & Virginia*

206. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 60 Ill. 2d 477, 504-05, 328 N.E.2d 268, 282-83 (1975). The Illinois court does not explicitly describe its methodology as neutral principles, but the Supreme Court is correct in recognizing that the inquiry into church documents goes beyond *Watson* and seeks to interpret church documents without entanglement in religious matters. *See* 426 U.S. at 721.

207. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).

208. In addition to the reference in *Presbyterian Church*, 393 U.S. at 449, the only other reference to neutral principles in a majority opinion is in *Serbian*. The *Serbian* majority uses the term to describe the rejected methodology of the Illinois court as "purported neutral principles." 426 U.S. at 721. In a footnote, the majority states that "[n]o claim is made that the 'formal title' doctrine by which church property disputes may be decided in civil courts is to be applied in this case." *Id.* at 723 n.15. The statement might be read as implicitly approving this version of neutral principles. The lack of a reference to alternatives such as broader versions of neutral principles may suggest that the Court did not recognize such versions.

209. 443 U.S. 595 (1979).

210. Justice Blackmun wrote the majority opinion in which Justices Brennan, Marshall, Rehn-

Eldership that the first amendment permits states some latitude in selecting a methodology for dispute resolution. The dissent, however, argued that departure from *Watson* as the sole methodology would result both in unconstitutional intrusions into church affairs and in decisions that did not fairly reflect the expectations of the parties.[211]

The Vineville Presbyterian Church of Macon, Georgia, decided by majority vote to separate from the Presbyterian Church in the United States and to join the Presbyterian Church in America. In the ensuing conflict over church property,[212] the Georgia courts cited *Maryland & Virginia Eldership* and applied the neutral principles test.[213] The deeds conveyed the property to the local church, and no state statute or legal or church document gave the general church an interest in the property. The state supreme court therefore awarded ownership to the local church as represented by the majority faction.[214] The Supreme Court essentially agreed with the Georgia court's method and remanded the

quist, and Stevens joined. Justices Rehnquist and Stevens had dissented in *Serbian*. The remaining three had joined the *Serbian* majority. Justice Powell wrote the dissenting opinion in which Justices Burger, Stewart, and White joined. Chief Justice Burger had concurred in the judgment in *Serbian*, but had not written an opinion. Justices Stewart and Powell had joined the *Serbian* majority. Justice White had joined in the views of the *Serbian* majority, but had written a brief concurring opinion to emphasize that courts need not defer to church authorities in determining whether or not a church is hierarchical and whether or not a faction is part of a church. No generalization seems to explain the alignment of the justices in *Jones*.

211. 443 U.S. at 610-21 (Powell, J., dissenting).

212. The minority faction had originally brought an action in federal court, but the complaint failed for lack of jurisdiction. Lucas v. Hope, 515 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

213. Jones v. Wolf, 241 Ga. 208, 243 S.E.2d 860 (1978).

214. The Georgia Supreme Court adopted a formal title approach in its decision on remand after the United States Supreme Court decision in *Presbyterian Church*. Presbyterian Church v. Eastern Heights Presbyterian Church, 255 Ga. 259, 167 S.E.2d 658 (1969). *See* text accompanying notes 136-37 *supra*. In Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 868 (1976), the court expanded its version of neutral principles to permit examination of statutes, corporate charters, deeds, and church constitutions, provided no inquiry is made into religious doctrine. For a synopsis, see Jones v. Wolf, 443 U.S. 595, 599-601 (1979).

In Jones v. Wolf, 241 Ga. 208, 211, 243 S.E.2d 860, 863-64 (1978), the Georgia court noted that all deeds named the trustees for the Vineville church as grantees, except in one instance in which the deed named the local church, itself, as grantee. The local church's corporate charter and Georgia statutes suggested nothing to the contrary. The court also found no language in the denomination's book of order creating either an express or implied trust over local church property, although some provisions dealt with the authority of denominational church courts over matters of faith or internal church structure. The court contrasted these provisions with those in *Carnes*. In *Carnes* the book of discipline of the United Methodist Church specifically gave the denomination a trust over local church property.

case for further proceedings.[215]

The Supreme Court accepted the neutral principles approach, but held that any of various approaches is permissible.[216] According to the Court, the Constitution requires only that the method not resolve disputes on the basis of religious doctrine or practice and that it defer to the resolution of such issues by the hierarchical church's highest authority. The Court, however, failed to suggest the nature of approaches other than *Watson* or neutral principles; instead it emphasized the advantages of neutral principles. According to the Court, the advantages lie in the use of secular concepts of trust and property law, which are familiar to civil lawyers and which do not implicate forbidden religious questions.[217] The Court also argued that reliance on the private law system supplies flexibility in ordering property arrangements that reflect the intentions of the parties. The Court recognized that occasionally a neutral principles inquiry might lead a court to a document provision involving doctrinal controversy. The Court would then defer to church authority to resolve the religious issue.[218] As the Court noted, however, this occasional problem in application will gradually disappear as churches restructure property relationships to avoid dependence on ecclesiastical questions in resolving disputes.[219]

Although the Court reaffirmed the acceptability of *Watson* deference, it rejected the dissent's argument[220] that only such complete deference is constitutional. The majority countered that compulsory deference, unlike neutral principles, requires a review of church polity or doctrine to determine where authority lies within the church as well as whether the church has made a determination and what that determination is. According to the Court, then, a neutral principles examination of religious documents is no more unconstitutional than investigatory excursions under *Watson*.[221] The Court clearly implied

215. Jones v. Wolf, 443 U.S. 595, *on remand*, Jones v. Wolf, 244 Ga. 388, 260 S.E.2d 84 (1979), *cert. denied*, Jones v. Wolf, 444 U.S. 1080 (1980).

216. "Indeed, 'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.' " *Id.* at 602 (quoting Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (emphasis in original)).

217. *Id.* at 603.

218. *Id.* at 604.

219. *Id.*

220. *Id.* at 610-21 (Powell, J., dissenting).

221. *Id.* at 605-06.

that these matters involve no issue of doctrinal controversy; thus, examination of church polity does not necessarily result in unconstitutional entanglement.[222] As in the past, the Court identified specific types of inquiries as constitutionally permissible or impermissible rather than formulate an analytical rule. Even this approach, however, fails to furnish precision: The Court limited the *Watson* method by banning any "searching inquiry" to determine the form of church governance.[223]

The *Jones* Court also dealt with a critical aspect of the neutral principles approach—when a court finds that property belongs to the local congregation and the local congregation has divided, which faction constitutes the church and possesses the property? The Georgia court had awarded the property to the majority faction without explanation.[224] The Court therefore remanded the case for an articulated resolution of the issue, but it also offered guidance.

The Court asserted the constitutionality of a presumptive rule of majority representation rebuttable "upon a showing that the identity of the local church is to be determined by some other means."[225] In the presumption's favor, the Court noted that religious societies generally employ majority rule in their governance and that, as a general rule, courts can identify the majority faction without confronting questions of doctrine or polity.[226] The presumption, however, must be rebuttable lest it impair free exercise rights or entangle the civil courts in religious controversy. The Court also held that a state may employ other methods of identifying the true local church. For example, it may rule that the identity of the local church is to be determined according to the laws and regulations of the hierarchical church.[227] Under this rule, the state court would have to defer to the determination of the Augusta-Macon Presbytery.[228]

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222. *Id.*

223. *Id.* at 605.

224. Jones v. Wolf, 241 Ga. 208, 212, 243 S.E.2d 860, 864 (1978). The court merely reported that the trial court concluded that legal title was vested in the local congregation represented by the majority faction.

225. 443 U.S. at 607.

226. *Id.* As authority for the general use of majority rule in religious societies, the Court relies on Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872). *Bouldin*, however, deals with a congregational church; *Jones* deals with the local church that was part of a hierarchical church and that voted to join another hierarchical church, the Presbyterian Church in America. 443 U.S. at 598.

227. 443 U.S. at 608-09.

228. The Court noted that Georgia statutes might require that decisions about church property ownership be made according to the terms of church government and, in the case of a hierarchical

Jones v. Wolf is a 5-4 decision. The precarious balance requires thoughtful consideration of the dissent's position. Writing for the dissenters,[229] Justice Powell argued that neutral principles unconstitutionally increases judicial involvement in church controversies. According to Justice Powell, the rule acts as a restrictive rule of evidence in that it limits courts to examining language written in secular legal property terms and forbids consideration of other language that might speak to the allocation of authority within the church polity.[230] The dissent argued that refusal to consider such evidence can permit courts to reverse the decisions of church authorities and thus unconstitutionally interfere with the resolution of religious disputes.[231]

The dissent further faulted the majority's treatment of the factionalized local congregation.[232] It argued that a state court could create a presumption favoring majority rule and require the church to have voting rules related explicitly to property disputes to overcome the presumption. Because this approach might overrule an intrachurch decision based on more general rules, the approach interferes with first amendment rights.

The dissent, therefore, would require courts to abide by the *Watson* method because only complete deferral avoids interference with religious governance and protects the rights of church members who have

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church, according to the laws of the denomination. *Id.* at 608-09 (citing GA. CODE ANN. §§ 22-5507, 22-5508 (1980)). According to the Court, the provisions of the Presbyterian Church book of order concerning the identity of the true congregation were so pervaded with issues of church doctrine and policy that if the statutes applied, the Georgia court would have to defer to the determination of the denomination's authorities on the application of the provisions. 443 U.S. at 608-09. On remand, the Georgia court stated that the provisions of the book of order dealt with identifying the local congregation in matters of doctrinal disputes but not in determining property rights. Jones v. Wolf, 244 Ga. 388, 389, 260 S.E.2d 84, 85 (1979), *cert. denied*, 444 U.S. 1080 (1980).

229. 443 U.S. at 610-21 (Powell, J., dissenting).

230. *Id.* at 612-13 (Powell, J., dissenting).

231. The neutral-principles approach appears to assume that the requirements of the Constitution will be satisfied if civil courts are forbidden to consider certain types of evidence. The First Amendment's Religion Clauses, however, are meant to protect churches and their members from civil law interference, not to protect the courts from having to decide difficult evidentiary questions. Thus the evidentiary rules to be applied in cases involving intrachurch disputes over church property should be fashioned to avoid interference with the resolution of the dispute within the accepted church government. The neutral-principles approach consists instead of a rule of evidence that ensures that in some cases the courts will impose a form of church government and a doctrinal resolution at odds with that reached by the church's own authority.

Id. at 613-14 n.2 (Powell, J., dissenting).

232. *Id.* at 614-16 (Powell, J., dissenting).

submitted to that governance.[233]

The *Jones* majority took a broader view of what the Constitution permits the states to do to resolve church property disputes. Although the Court did not limit the states to two possible methodologies, it gave its approval to two. According to *Jones*, states can assume either that church members submit to hierarchical authority in property matters or that statements in secular terminology appearing in civil and internal church documents are accurate in their descriptions of property ownership. Although the Court took care in approving only methods that limited interference in ecclesiastical and doctrinal affairs, it approved two methods that could yield very different results when applied to the same dispute.[234] Perhaps, then, the Court was uncertain whether the judiciary could attain accuracy in church property cases. The dissent, however, avoided the question of accuracy. Because it argued that neutral principles is unconstitutionally intrusive the dissent would limit courts to one methodology and one possible result.

I. *Conclusion*

At the root of these cases is the difficult task of resolving a property dispute without the excessive entanglement that comes from deciding the underlying religious controversy. Before *Kedroff*, the limits of judicial competence and the concerns fostered by the first amendment called for the distinction between issues of property and issues of doctrine; since *Kedroff*, the Constitution has mandated it. The distinction is born of pragmatism—the need of an orderly society to settle property disputes without doing violence to the Constitution. Avoidance of the essential religious controversy, however, has severely challenged courts to develop a constitutionally permissible methodology that also deals fairly with the parties' expectations. The Supreme Court answered the challenge by approving methods that apparently steer clear of religious issues but still reflect arguably valid assumptions about the expectations of the church and its members.

The *Watson* Court described the relationships within a church as es-

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233. *Id.* at 617-18 (Powell, J., dissenting).

234. *Jones v. Wolf* offers a typical illustration. The dissenting justices, applying the *Watson* method, would have deferred to the decision of the regional Presbytery and ordered a judgment for the loyalist minority faction. *Id.* at 620-21 (Powell, J., dissenting). On remand, the Georgia court applied neutral principles and found for the majority faction. Jones v. Wolf, 244 Ga. 388, 390, 260 S.E.2d 84, 85 (1979), *cert. denied*, 444 U.S. 1080 (1980).

sentially the same as those within a secular voluntary association. By portraying the relationships in terms of a traditional legal model, the Court asserted the secular nature of the inquiry and thus legitimized judicial intervention in church affairs. Although the solution offered some insights and a not unreasonable approach to the problem, it failed to furnish a perfectly suitable answer.[235]

Concern about judicial intrusion into the religious domain limited the evidence that a civil court could consider in resolving the religious

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235. The cases recognize churches as voluntary associations, and, at least after *Kedroff*, they recognize that churches must have a law of religious associations, as opposed to a law of private associations, because of the constitutional concern for church autonomy. The cases have frequently used the language of contract and trust law perhaps because they reflect an undeveloped notion of how groups and members interrelate and because they are building blocks for the law of associations.

Although an element of member submission to church authority is certainly present, the agreement's contours are rarely delineated and are frequently tacit. In some churches, particularly those accepting infant members, a member may formally agree to submission and membership. Members unschooled in ecclesiastical affairs may likely lack a full understanding of their commitment. Rules for contract remedies do not closely apply. The remedy in a church property dispute is an all or nothing victory or defeat for the respective factions. The contract theory fails to explain the extreme deference that the courts pay to the interpretation of rules by the organization as opposed to the disputing member. Moreover, the Constitution precludes, as evidence, critical information necessary to confidently ascertain intent or expectations. *See* Chafee, *supra* note 4, at 1001-07; *Developments in the Law, supra* note 4, at 1001-02. For analyses favorable to contract theory, see C. ZOLLMAN, *supra* note 3, at 223-26; Bernard, *Churches, Members, and the Role of Courts: Toward a Contractual Analysis*, 51 NOTRE DAME LAW. 545, 558 (1976) (but admitting that "the contract framework does not presume to realistically reflect an individual's relation to his church").

The trust concept is also artificial. As early as *Watson*, the Court was unwilling to find a trust within a hierarchical church unless the trust was express. Although a charitable institution has responsibilities in using its assets, the trust notion does not necessarily describe its relationship to property. For example, Professor Scott states:

> The truth is that it cannot be stated dogmatically either that a charitable corporation is or that it is not a trustee. . . . Thus where property is left by will to a charitable corporation, whether it may be used for the general purposes of the corporation or whether the devise or bequest is subject to restrictions as to its use, and the property is conveyed by the executor to the corporation, the corporation is not thereafter bound to account as if it were a testamentary trustee.

4 A.W. SCOTT, THE LAW OF TRUSTS § 348.1, at 2778 (3d ed. 1967).

As Professor Chafee recognized, the relationship between members and a voluntary association conforms to its own model: There is a law of voluntary associations, which views the member-church relationship as analogous to the relation between a shareholder and a corporation or a partner and the partnership. Chafee, *supra* note 4, at 1007-08. The first amendment, however, requires that special rules apply to the church lest secular intrusion violate the Constitution. Although laws governing church disputes have strong kinship with the law of voluntary associations, they should recognize their unique status as church law. *See* Giannella, *supra* note 9, at 535-37.

society's internal dispute.[236] The Supreme Court, therefore, rendered the proscribed evidence unnecessary by assuming that church members submitted entirely to church authority on all religious matters. The end result was virtually complete internal autonomy. The assumption thus permitted the Court to treat churches like private associations, but without the bother of sifting through the evidence that might confirm or reject such extreme autonomy. The assumption thus twisted the methodology.

From at least the time of the Court's decision in *Gonzalez* to *Serbian*, the Court assumed that fraud, collusion, and arbitrariness set outer limits on the assumed submission of church members. When *Serbian* disposed of the check on arbitrariness and cast doubt on review for fraud or collusion, the immunity of church authority grew even stronger. Neutral principles challenged this autonomy by offering a methodology based on traditional property law. It has required a court to assume that formal legal title, as modified or changed by secular provisions in various documents, reflects the expectations of the parties. The ban on religious intrusion, however, modifies the traditional civil law methodology by excluding evidence that could illuminate the parties' intentions and expectations. The methodology, thus, is rigid. It offers virtually no flexibility for a court that wishes to employ evidence and law to fashion a just result and avoid a harsh one.

Both *Watson* deference and neutral principles derive from traditional methods for dispute resolution. Perhaps the traditional roots enhance their legitimacy. The methods, however, have been stylized to accommodate the special nature of church disputes. Both omit constitutionally offensive aspects of the inquiry and use assumptions about expectations to preserve the methodologies' integrity. Even with the assumptions in place, however, each methodology cannot function without sometimes considering forbidden information. A property deed, for example, may incorporate religious concepts or the identity of

236. Courts are also generally reluctant to interfere in the internal affairs of private groups. The reluctance stems from a pluralistic desire to preserve autonomy and diversity, the complexity and burdensomeness of inquiries into organizational rules, the resentment that judicial intrusion can produce and its limited prospects for success, and the fundamental role of free association in a system that relies on freedom of expression and assembly. *See* L. TRIBE, *supra* note 3, § 14-13, at 881-82. The immediate practical burdens of adjudicating a church dispute can be overwhelming. In *Serbian*, for example, the trial involved over 100 witnesses, nearly 600 multipage exhibits, over 1200 pages of transcript, and over 100 days of courtroom time. Brief for Petitioner at 26, Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696 (1976).

hierarchical authority may prove elusive without a searching look at religious documents. In these cases, the court must abandon its now illicit approach and adopt a different methodology.

The Supreme Court cases thus disclose broad first amendment immunity for churches.[237] The fear of interfering with church autonomy has banned civil interpretation of doctrine, polity, and practice. The accepted methodologies for judicial resolution, however, evoke questions about first amendment entanglement and about the parties' expectations. The next section of this Article evaluates complete deference and neutral principles on these grounds.

II. *WATSON* AND NEUTRAL PRINCIPLES: A CRITICAL ANALYSIS

A. *Satisfying the First Amendment*

In the post-*Kedroff* cases the first amendment has become the primary standard for evaluating judicial decisions in church property disputes. Although the religion clauses determine the validity of the court decision, they do not directly favor either the historically established church or the dissenters. Instead, they guarantee religious freedom to both factions. To satisfy the constitutional requirement, then, a judicial test must favor neither side and must not permit the court to make determinations on doctrine or polity.[238] The test, moreover, must not create too great a hazard of unconstitutional behavior. It must avoid the threat of excessive entanglement as well as excessive entanglement itself. The approved tests, *Watson* and neutral principles, purport to satisfy the constitutional standard. Although each claims to find for a given faction lest it curtail that faction's religious rights,[239] neither successfully deals with the first amendment's mandates.

Inadequacies in the Supreme Court's method of constitutional analysis partially account for the Court's determination that the existing tests are valid. The Court views first amendment precepts as absolutes in church property disputes as it does in other areas.[240] It therefore deter-

237. On judicial concern for the institutional stability of churches, see Casad, *supra* note 3, at 64-65.

238. *See* notes 17-22 *supra* and accompanying text.

239. The free exercise clause approves or rejects tests and does not prescribe them. Any test makes a choice among competing claims to religious freedom. *Cf.* Kauper, *supra* note 3, at 376-77 (the *Presbyterian Church* Court made such a choice, and even the departure-from-doctrine standard sought to protect the expectations of the church's benefactors).

240. *See* notes 23-28 *supra* and accompanying text.

mines whether or not a judicial test violates the absolute constitutional mandate of free exercise but fails to articulate the policy considerations that underlie the determination. Analyses of complete deference, neutral principles, and their variations, then, are conclusionary and do not directly grapple with the internal constitutional analysis. An articulation of the analysis might assist in evaluating the merits of the two accepted tests. An articulation might also offer insights in close cases over specific aspects of the tests—for example, the continued viability of the remaining *Gonzalez* qualification of *Watson*.[241]

Instead of openly relying on such an analysis, however, the Court has declared constitutionally impermissible certain inquiries that it finds in clear violation of the Constitution—for example, the departure-from-doctrine test[242]—or inquiries that it views as unconstitutional because of a great risk of excessive entanglement—for example, an inquiry into a church tribunal's jurisdiction.[243] Given the speculative nature of these determinations, the lack of an analytical approach is understandable. Nonetheless, the existing approach sometimes forbids a full evaluation by banning the examination of an issue that would not endanger first amendment rights in the specific case. For example, Justice Rehnquist's dissent in *Serbian* raises the possibility of a church tribunal that claims to act authoritatively despite the lack of a quorum; he argues that the *Serbian* majority would forbid an inquiry into such arbitrariness.[244] Perhaps in such a clear cut case, a judicial inquiry would not violate the religion clauses.[245] (Other facts in the case, of course, might make the matter less clear cut.) The current approach also permits inquiries in areas in which the risk of constitutional violation is high in a specific case. For example, a neutral principles examination of church documents may create a high probability of intrusion

241. The Court continues to leave open the question whether the civil judiciary can review an authoritative church decision for fraud or collusion. *See* Jones v. Wolf, 443 U.S. 595, 609 n.8 (1979).

242. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449-50 (1969).

243. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 713-14 (1976) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 733-34 (1872)).

244. *Id.* at 727 (Rehnquist, J., dissenting).

245. The difference between forbidden and permissible governmental intrusion into a religious organization to protect individual members from fraud and oppression must ultimately be a difference of degree—but the difference of degree between the examples Justice Rehnquist offered in dissent and the facts of the *Serbian Orthodox* case seem wide enough to constitute differences in kind.

L. TRIBE, *supra* note 3, § 14-12, at 880.

into church affairs that are immune from judicial review.[246] The bulk of this section discusses the ways in which the Supreme Court has ignored dangers inherent in the methodologies it has approved. The lack of an articulated analysis also creates a related problem of evaluation. Because the constitutional dangers in *Watson* and neutral principles are so apparent, the inadequacy of the analysis renders impossible a persuasive distinction between the accepted methodologies and their unacceptable variants. The section also addresses this concern.

1. *The Risk of Illicit Inquiry*

Both *Watson* and neutral principles risk intrusion into constitutionally forbidden areas. The risk, moreover, may be as great as that posed by inquiries that the Court has rejected.

Because the *Watson* method seeks the identity of the ultimate church authority, it deals with a matter at the core of ecclesiastical affairs. The *Jones* majority banned too searching an inquiry in making the identification.[247] Nonetheless, the risk of an illicit inquiry looms large because the *Watson* method permits recourse to church documents and practices and raises the possibility of judicial misinterpretation.

Compare the ban on determining whether or not an authoritative church body enjoys jurisdiction over a certain matter, such as church property ownership. A court sometimes might be able to define accurately the allocation of internal church authority, but the cases since *Watson* strictly forbid the inquiry.[248] According to the Court, the frequent necessity of construing ambiguous religious law and usage creates an unacceptable risk.[249] The same risk, however, seems to attach to attempts under *Watson* to identify the highest ecclesiastical decisionmaker.[250] Both inquiries are of a related nature, and both require

246. *See* Jones v. Wolf, 443 U.S. at 612-13 (Powell, J., dissenting).

247. Jones v. Wolf, 443 U.S. at 605.

248. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 713-14 (1976).

249. *Id.*

250. [In some cases] the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." [quoting Powell, J., dissenting, at 619-20]. In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity" [quoting Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. at 723].

Jones v. Wolf, 443 U.S. 595, 605 (1979).

recourse to the same sorts of documents and practices.

The only difference is that in a jurisdictional dispute, the court presumably has already identified the tribunals that claim jurisdiction—for example, the respective tribunals of a local church and a denomination or the competing tribunals of a schismatic hierarchy. Arguably a court minimizes the risk of unconstitutional intrusion in solving the jurisdictional issue by deferring to the decision of a church authority.[251] Two considerations, however, suggest caution. First, the case's primary controversy may focus on which of two tribunals has correctly asserted authority; a schism, as in *Serbian*,[252] and arguably a *Bouldin*-style congregational split[253] offer illustrations. Second, the identification of church authority is frequently intertwined with the question of jurisdiction; it is therefore difficult to argue that one finding precedes the other. An illustrative case is *Presbyterian Church* in which the local church claimed a congregational polity and the general church claimed a hierarchical polity.[254] In any case, no evidence suggests that a *Watson* search for church authority is more risk free than the ascertainment of jurisdiction.

One response to this argument might be that if the *Watson* inquiry is permissible, then the jurisdictional inquiry should also be permissible. This proposal would shave the margin of constitutional error that the current rule purports to maintain. It would also require substantial rethinking of constitutional learning about church and state. The important point, however, is that the approved *Watson* method contains inherent constitutional problems that courts have ignored. As a result, no bright line separates inquiries that create too great a hazard of un-

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

Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872) (quoted in Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 714 (1976)).

252. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696 (1976). *See, e.g.*, Draskovich v. Pasalich, 151 Ind. App. 397, 280 N.E.2d 69 (1972), *cert. denied*, 414 U.S. 976 (1973); Macedono-Bulgarian Orthodox Church "St. Clement Ohridski" v. Macedonian Patriotic Org. "Fatherland," 27 Mich. App. 713, 184 N.W.2d 233 (1970).

253. Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872). *See also* Baker v. Fales, 16 Mass. 487 (1820).

254. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969). *See also* 1977 UTAH L. REV. 138, 144 (problem arising when an autonomous church affiliates with a hierarchical church).

constitutional conduct and inquiries that do not. The distinction therefore seems unsuitably artificial.

The neutral principles method suffers from a similar constitutional weakness. Just as a *Watson* court must resort to ecclesiastical documents, a neutral principles court must also examine documents and risk illicit inquiry, particularly if it goes beyond bare legal title. For example, suppose that a local church of a Christian denomination decides to disaffiliate and become interdenominational.[255] The denomination's book of order provides: "Whenever a particular church has become extinct by reason of dispersal of its members, the abandonment of its work, or other cause, such property as it may have may be sold or disposed of as the denomination may direct in conformity with the constitution of the denomination." The local church's articles of incorporation provide that its purpose is "the establishment of one or more places of worship and the dissemination of Christian doctrine." The denomination might concede that the local church continues to disseminate Christian doctrine, but argue that the word "work," as used in the book of order, refers to the work of the denomination.

Whether or not a court should construe the controverted word or defer to the interpretation of the denomination is a close question. Because no rule clearly defines the limits of intrusion, risky inquiries and unwitting entanglements can plague a court that seeks to separate the secular wheat from the religious chaff. In the example, I would argue for deference, because the work of a local church depends on the denomination's definition of its religious mission. In the alternative, I would argue that "work," in the context of the book of order, means the work of the denomination and does not refer to the general language in the articles of incorporation.[256]

In answering the criticism that neutral principles risks illicit inquiry, the *Jones* Court would argue that such difficulties are "occasional problems in application"[257] while *Watson*'s problem is central to the

255. The following illustration is loosely based upon an issue in Presbytery of Riverside v. Community Church of Palm Springs, 89 Cal. App. 3d 910, 152 Cal. Rptr. 854, *cert. denied*, 444 U.S. 974 (1979).

256. In the case upon which the illustration is based, the court relied on the definition of "work" furnished by the articles of incorporation and held that the local church still carried on that work despite its withdrawal from the denomination, the United Presbyterian Church in the United States of America. Therefore, the court held, the church had not become extinct under the terms of the denomination's book of order. *Id.* at 930, 152 Cal. Rptr. at 866.

257. Jones v. Wolf, 443 U.S. 595, 604 (1979).

method. But to argue that in practice either complete deference or neutral principles offers less risk of interpretative error than the other requires reliance on unacceptably speculative grounds.

2. *Imposing a Secular Standard*

Both methods raise a more fundamental first amendment problem. They sometimes impose a secularly created test on a church controversy.

Suppose a church fails to provide for property allocation in case of a division. Under the *Watson* method, a court would identify the body recognized as decisionmaker by all parties before the dispute.[258] This reliance on history, albeit recent history, freezes church development at a stage prior to a fundamental change in the parties' relationship. The continuing validity of the prior arrangement is a judicial assumption that a process with legitimacy in normal times retains legitimacy in abnormal times. In a church split, however, one faction usually asserts the illegitimacy of the other faction's procedures or related conduct. The judicial assumption certainly is convenient; without it, a court might be hard pressed to identify an authoritative decisionmaker. A church division frequently stems from substantial disagreement over religious issues or issues with a religious element. According to the courts,[259] these matters should be the subject of ecclesiastical adjudication rather than civil adjudication; however, the factions differ in their recognition of the appropriate church authority. This reality severely limits a civil court from constitutionally allocating church authority after a serious internal dispute has arisen.

Whether or not this difficulty rises to a judicially cognizable violation of the first amendment is debatable, because the constitutional test is imprecise. Arguably, the court's interpretation of the continuing validity of the church's prior arrangement is the sort of interpretation that courts typically make, and the inevitable risk of misinterpretation accompanies it. This risk, however, raises the constitutional issue. If the risk of imposing a judicially devised solution is too great, the hazard of

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258. *See* Note, *Judicial Intervention in Disputes Over the Use of Church Property, supra* note 3, at 1162-64 (advocating the living-relationship test to determine whether church is subject to hierarchical authority); *cf.* State *ex rel.* Morrow v. Hill, 51 Ohio St. 2d 74, 364 N.E.2d 1156 (1977) (applying living-relationship test in dispute over authentic trustees and minister).

259. *E.g.,* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447 (1969).

unwarranted judicial intrusion becomes unacceptable.[260] Under the same rationale, judicial review of a church tribunal's jurisdiction[261] and of its conformity with its own procedures[262] creates an unacceptable risk. Because the line between acceptable and unacceptable risk is not a bright one and a strong policy favors avoiding risk, a judicially cognizable violation of the Constitution is likely present. In any case, the shortcomings of the *Watson* methodology here provoke doubts about the advisability of its continued use.

The *Watson* approach, moreover, may subtly favor the faction in command of the church's adjudicatory mechanism. Because a *Watson* court relies on a church's internal determinations, members also have limited motivation to civilly litigate to avoid the ruling of the church mechanism. The lack of close judicial review makes members less likely to reject or torture the meaning of church rules in hopes that a civil court will accept the favorable interpretation if the adjudicating church body rejects it.

Although conflict of interest is a secular concept, the potential partisanship of the decisionmaker in a church dispute also justifies discomfort.[263] Even if the conflict creates no judicially cognizable first amendment issue, the *Watson* rule still threatens to tilt the scales against the dissidents.

The *Jones* dissent hinted at solicitude for preserving and advancing existing church institutions.[264] In critiquing neutral principles, it noted the burdens that would beset a church trying to restate its property relationships in the terminology of the civil law. The dissent warned that requiring the restatement in legal terms might inhibit the formation of churches by forcing organizers to confront issues that might never arise.

260. *See* notes 23-28 *supra* and accompanying text.

261. *See* Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. at 713-14; text accompanying notes 53, 54, 189 *supra*.

262. 426 U.S. at 713-15.

263. "It is perfectly patent that the most important ecclesiastical trials, like trials for impeachment of civil officers, are sometimes characterized by a great want of justice and fairness and deeply imbued with a spirit of bitterness and malevolence." C. ZOLLMAN, *supra* note 3, at 206. "[A]n ecclesiastical court . . . is proverbially influenced more by prejudice and passion than any other species of judicial tribunal." 10 AM. L. REG. (19 U. PA. L. REV.) 308, 309-10 (1871) (Redfield, J.). Despite the great possibility of bias in the tribunal of a private association, it receives more tolerance there than it would in a trial court. Courts generally require a clear showing of prejudice before they will invoke bias to upset an association's action. *See Developments in the Law*, *supra* note 4, at 1034-35.

264. Jones v. Wolf, 443 U.S. 595, 613-14 n.2 (1979).

It also warned that the restatement of polity and property arrangements could precipitate church property disputes. The dissent thus implied that *Watson* better promotes church growth and unity, because it avoids creating circumstances that motivate church members to seek full information about the nature of their affiliation.

The dissent's concern, however, is inappropriate. Members who exercise their rights to join a church or continue their affiliation should do so based on a full knowledge of the implications. *Watson*'s subtle favoring of the faction in command of church machinery, its indifference to potential conflict of interest, and the *Jones* dissent's preference for institutional stability over knowledgeable exercise of religious rights may not constitute judicially cognizable first amendment violations. They do, however, impair the underlying spirit of free exercise and nonestablishment.

Just as *Watson* raises a constitutional problem when it imposes on a church a dispute settlement mechanism that the church devised prior to division, neutral principles also raises a constitutional problem. Like *Watson*, it imposes a state created rule that may sometimes interfere with church polity and doctrine. Even if a neutral principles court advertently avoids ambiguities and religious concepts, it assumes that nonreligious language is sufficient evidence of religious determinations about property. The bare legal title doctrine is most offensive from this viewpoint. The court lacks any indication that the church's attorneys were doing any more than placing legal title in a judicially cognizable and conveniently identifiable entity, individual, or group of individuals.

A more expansive version of neutral principles that also examines internal church documents does not promise much greater accuracy. In seeking specific language governing property ownership, the court assumes that lack of such language requires resort to bare legal title or to state-manufactured presumptions about property control. Even if specific language is lacking, however, the church may have made provision for property control. The determinative language may lie elsewhere; perhaps in a provision infected with religious concepts, perhaps in words identifying a tribunal as the ultimate authority in church affairs, or perhaps in a provision asserting local church affiliation with the denomination. To the ecclesiastical eye, such language may clearly imply where property control lies. In these cases, neutral principles would impose an alien scheme of doctrine and polity. By discarding

the church's internal resolution or method of resolution, it imposes a form of governance and curtails the church's free exercise rights. This is the argument of the *Jones* dissenters.[265] The *Jones* majority emphasized the ease with which a church can conform its legal documents and secular provisions in church documents to authentic church polity.[266] The ease of achieving conformity, however, does not guarantee conformity.

The possible divergence between a neutral principles determination and the church's actual property arrangements is well illustrated by the *Jones* discussion on identifying the local faction that is entitled to the property.[267] The Vineville Presbyterian Church had developed no mechanism for resolving the issue, most likely because it traditionally viewed itself as part of a hierarchical church. The Supreme Court approved Georgia's apparent adoption of a presumption of majority rule.[268] The Court noted that majority rule is generally employed in the governance of religious societies (citing *Bouldin*,[269] which dealt with a congregational church), that a majority is easily identifiable, and that a presumption of majority rule can easily be overcome by evidence to the contrary. The traditional Presbyterian church structure at issue in *Jones*, however, furnished no basis for a presumption resting on the conduct of congregational churches,[270] and the lack of a church-devised mechanism for resolving disputes at the local level meant that the presumption would likely prevail, as it ultimately did.

Although presumptions in civil cases enjoy wide latitude in claiming that a rational connection underlies the presumption,[271] perhaps the validity of such presumptions should require closer examination when first amendment rights are at issue. In the *Jones* case a rational connection is lacking. Even if the presumption's questionable basis (reliance on the common structure of a congregational church) was adequate to pass judicial muster,[272] the damage to the spirit of the first amendment

265. *Id.* at 613.

266. *Id.* at 603-04.

267. *Id.* at 606-10.

268. *See* note 228 *supra*.

269. Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872).

270. In a congregational church, however, elders, as opposed to the general membership, may have full charge of management and control over church affairs. *E.g.,* Murrell v. Bentley, 39 Tenn. App. 563, 286 S.W.2d 359 (1954). The elders, of course, may be subject to removal by the membership. *E.g.,* Bentley v. Shanks, 48 Tenn. App. 512, 348 S.W.2d 900 (1960).

271. *See* C. McCormick, Law of Evidence § 344, at 818 (2d ed. E. Cleary gen. ed. 1972).

272. Even if the Court had assumed that the presumption rested on typical governance in

should still cause concern; the court is interfering with the church's right to exercise its autonomy.[273]

As *Jones* illustrates, neutral principles may efficiently resolve ambi-

secular organizations or on general democratic principles, the objection would remain. Churches may not share the same values as other institutions in society. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1385 (1967) (criticizing judicial approval of orthodox values rather than balancing the imposition of those values against nonconforming values based on religious belief). The author states: "[There is] judicial acquiescence in the sometimes unpalatable fact that democratic government acts to reinforce the generally accepted values of a given society and not merely the fundamental ones which relate to its political structure." *Id.*

Majority rule is not an inherent principle in religious organizations. Even with respect to elections within the church hierarchy, Roman Catholic Church officials and scholars did not develop it until the twelfth and thirteenth centuries. Majority rule came as an alternative to unanimity and to giving greater weight to the votes of electors with greater qualifications and merits. Approval of the principle required developing the notion of qualified and unqualified candidates (as an alternative to relying on the respective qualifications of the electors), the delegation of election to another person or committee, the notion of a corporate body acting through a majority, and confidence in the vote of the greater number of electors over the fewer number of electors. *See* McCallin, *The Development of a Legal Theory of Majority Rule in Elections*, 16 ST. LOUIS U.L.J. 1 (1971). The various alternatives to majority rule cannot be dismissed out of hand as wrong or highly unlikely for a church to adopt.

273. According to current scholarly learning, a civil presumption requires no rational connection between fact proved and fact presumed; social policy and convenience can also serve as a presumption's basis. *See* Advisory Committee on Federal Rules of Evidence, *Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates*, 46 F.R.D. 161, 215-17 (1969); note 272 *supra*. *But see* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5129, at 626-37 (1977).

The Supreme Court cases do not permit absolute certainty for these assertions. Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929), invalidated a Georgia statute for want of a rational connection between the fact proved and fact presumed when the presumption shifted the burden of persuasion. Commentators have criticized the holding as inconsistent with prior case law (Mobile, J. & K.C. R.R. v. Turnipseed, 219 U.S. 35 (1910)) and implicitly inconsistent with Dick v. New York Life Ins. Co., 359 U.S. 437 (1959), which employed without challenge a common-law rule shifting to the defending insurance company in an accidental death case the burden of persuading the court that the death of the insured was due to suicide. Commentators therefore argue that *Henderson* lacks vitality. *See, e.g.*, C. MCCORMICK, *supra* note 271, § 344, at 819; Advisory Committee, *supra*, at 216-17.

As recently as 1958, however, the Court approvingly cited *Henderson*. Speiser v. Randall, 357 U.S. 513, 524 (1958). In Lavine v. Milne, 424 U.S. 577, 584-85 n.9 (1976), the Court upheld the legislative allocation of a burden of persuasion in another context and stated that it was not basing its decision on *Henderson* and that it was not examining whether it would today decide *Henderson* as it had. The Court thus has not explicitly overruled *Henderson*. In Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), the Court upheld various presumptions under the Coal Mining Health and Safety Act of 1969. The Court stated that the test for constitutionality of presumptions arising in civil statutes involving matters of economic regulation is that there be "some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be purely arbitrary mandate." 428 U.S. at 28 (quoting *Turnipseed*, 219 U.S. at 43). The Court found that the presumptions passed

guities in church doctrine and practice, but the standard it employs may bear no relationship to ecclesiastical reality. Because of the limited evidence upon which it relies, the method may resort to inappropriate criteria and effectively override the free exercise rights of the parties.

3. *The Underlying Pragmatic Analysis*

The preceding discussion demonstrates that both *Watson* and neutral principles risk impermissible intrusion into church affairs. Neither offers a well defined, restrictive rule on evidence or inquiry that promises a comfortable margin of error to reduce the danger of unconstitutional methodology. Although each claims not to interfere with free exercise, each may substitute a secular standard for a religious standard. *Watson* uses a questionable historical method, and neutral principles relies on a restricted evidence "legal" method. Society does not expect courts always to ascertain a dispute's authentic solution. Rather, courts should employ a process that maximizes the possibility of achieving that goal or a close approximation within constitutional and statutory limitations. In church property dispute cases, however, the method's deficiencies suggest a high risk of poor approximations and constitutionally questionable conduct. The analysis certainly does not indicate the superiority of one method over the other.

Many of the constitutional concerns raised here have yet to receive

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the test. Given the lack of further discussion, it might be unfair to assume that the Court rejected social policy and convenience as legitimate, independent grounds for civil presumptions.

Despite their rejection of *Henderson*, however, the commentators suggest that the Constitution imposes some outer limit on the creation of presumptions in civil cases. C. McCORMICK, *supra* note 271, § 344, at 818; 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 301[01], at 301-26 to -27 (1979). The Weinstein treatise states: "In particularly sensitive, constitutionally guaranteed areas, the effect of a presumption may unconstitutionally interfere with an 'interest of transcending value,' such as freedom of speech." *Id.* (quoting *Speiser*, 357 U.S. at 513, and citing New York Times Co. v. Sullivan, 376 U.S. 254, 283-84 (1964)). Both cases deal with free speech. *Speiser* involved a shift in the burden of persuasion but not by use of a presumption. The *New York Times* Court constitutionally limited the state's power to award damages for libel in an action by a public official against critics of the official's conduct and stated: "While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is 'presumed.' Such a presumption is inconsistent with the federal rule." 376 U.S. at 283-84 (citation omitted). Thus, if a court permits a presumption in a matter touching on free exercise and purports to justify it with a rational connection argument, the rational connection should have some substance. The *Jones* Court may have recognized some of the underlying concern in assuming that the majority rule was rebuttable and that any method of overcoming the presumption could "not impair free-exercise rights or entangle the civil courts in matters of religious controversy." 443 U.S. at 607-08.

acknowledgement by the courts. Concerns about the *Watson* test remain particularly unrecognized; they are, however, real ones. The judicial inattention itself suggests insights into both the existing formal analysis and the unarticulated constitutional analysis.

No convincing argument exists that the inquiries permitted and the inquiries prohibited differ substantially in the constitutional risk that they respectively pose. To avoid the constitutional difficulties, the methodologies work on the assumption that the judicial inquiry lacks a religious dimension. As demonstrated, however, the assumption proves false.

The distinction between permissible and impermissible inquiries is based on pragmatism. The state has a legitimate interest in preserving an orderly society and persuading its members that the rule of law prevails. A court, therefore, may act to insure that title and ownership of land are settled. The judicial process offers a nonviolent way to give disputes a final disposition and to identify the property owner; it gives security to the property owner, enhances free alienability of property, and permits an injured party to seek a responsible owner.[274]

In the pursuit of social order, the reasons for limited judicial review of internal church disputes are particularly persuasive. In this setting, the threat of violent challenge to the civil peace seems slight, although not absent,[275] and the concrete danger of impairing religious rights outweighs the very general goal of an orderly society. Moreover, curtailing religious freedom in a society that reveres it impairs societal legitimacy.

Given the need for some judicial review, courts require a methodology so they can render legally consistent determinations. The religious basis of the conflicts defies judicial efforts to disregard it. Constitutionally questionable intrusions therefore seem unavoidable for a method-

274. *See* Note, *Judicial Intervention in Church Property Disputes*, *supra* note 3, at 1130.

275. *E.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 679, 685 (1872) (elders aligned with minority faction refused to permit congregation's majority to use church premises even after receiving court order; court therefore ordered marshall to take control of church); Carnes v. Smith, 236 Ga. 30, 32-33, 222 S.E.2d 322, 324, *cert. denied*, 429 U.S. 868 (1976) (sheriff was called to remove district superintendent from the church); Calvary Presbyterian Church v. Presbytery of Baltimore, 39 Md. 405, 416, 386 A.2d 357, 363 (Ct. Spec. App. 1978) (police summoned by church members to request denominational authorities to leave); Murrell v. Bentley, 39 Tenn. App. 563, 570-71, 286 S.W.2d 359, 362-63 (1954) (fistfight in church); *Two in Synanon Get Year in Snake Attack on Lawyer*, N.Y. Times, Oct. 15, 1980, at 8, col. 6; *Texas Preacher Who Shot 3 is Released on $15,000 Bail*, N.Y. Times, Dec. 10, 1980, at A14, col. 6.

ology that seeks accuracy. Strong reasons justify minimizing the degree of intrusion—the Constitution's expressed interest in religious freedom and church autonomy, the limits of judicial competency, the risk of inadvertent interference, and the availability of internal church mechanisms for dispute resolution.[276] Another reason may be a belief that such a mechanism will operate in good faith either because of integrity or because of fear of bad publicity, which is so damaging to a voluntary religious association. A methodology, therefore, should permit no more intrusion than is absolutely necessary to permit it to function.

Watson deference and neutral principles are responses to the need for methods of limited review that respect religious freedom and the rule of law. This need apparently justifies accepting methods that either intrude or risk intruding into religious affairs. The desirability of limiting intrusions to the greatest extent possible results in a ban on possible components of the approved methods—for example, a jurisdictional inquiry, a review of arbitrariness by church decisionmakers, or an examination of document provisions infused with doctrinal meaning. Because courts have used these methods for some time, they apparently believe that absence of the banned components still allows the methods to function without serious impairment of their perceived legitimacy.

The ultimate justification, then, for accepting *Watson* and neutral principles is pragmatic. Courts need a way to resolve church property disputes, preferably a way that minimizes judicial intrusion into church affairs. The ultimate justification for permitting some intrusions to remain incorporated in the methods and for rejecting others is also pragmatic. The true test is not the degree of harm they threaten, but their indispensability in making a method functional.

The *Gonzalez* exceptions for fraud and collusion are illustrative.[277] To reject them is to hold that the *Watson* method can avoid inquiry into bad faith and still function without serious impairment of legitimacy. Several reasons might support this conclusion—the fear of misinterpreting or overriding ecclesiastical conduct, the fear that lack of good faith would not necessarily invalidate church action under church rules, and the probable infrequency of cases in which bad faith is an issue. On the other hand, advocates might argue that the *Gonzalez* ex-

276. *See Developments in the Law, supra* note 4, at 990-94 (discussing these concerns in broad terms as they apply to voluntary associations).

277. *See* text accompanying notes 187-205 *supra*.

ceptions are indispensable to *Watson*'s functioning. According to this argument, society insists on good faith in religious associations and sharply questions a judicial method that overlooks bad faith. Resolution of the matter depends on judicial evaluation of these considerations. Thus, the analysis turns not on whether the *Gonzalez* exceptions would unconstitutionally intrude on religious rights, but on whether the exceptions permit intrusions that are indispensable to the functioning of the *Watson* method.[278]

Because the true analysis is pragmatic, the formal Supreme Court analysis has a false ring. As previously discussed, the Supreme Court cases have justified the approved methods by asserting that they fulfill the expectations of churches and their members. The assertion, however, is questionable. From the perspective of the foregoing analysis, the degree to which assumptions about expectations are valid is also important. In assessing complete deference and neutral principles, an important consideration is their perceived legitimacy. The methods can be assumed to have severely impaired legitimacy if they fail even roughly to fulfill the fair expectations of the parties. The expectations that the methodologies assume and purport to satisfy receive attention next.

B. *Meeting the Parties' Expectations*

In *Serbian* Justice Brennan asserted that "it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria."[279] Although the statement arises in a discussion of hierarchical churches, it could also reach to congregational churches. In both cases, however, the assumption is too sweeping, even if it is assumed that

278. The notion of indispensable intrusions is related to the requirement that government use the least restrictive means to a compelling end when its conduct interferes with free exercise. *See, e.g.,* Sherbert v. Verner, 374 U.S. 398, 406-07 (1963); L. TRIBE, *supra* note 3, § 14-10, at 846-59. The requirement is a corollary to requiring a compelling interest to justify state action. *See, e.g.,* McDaniel v. Paty, 435 U.S. 618, 628-29 (1978) (plurality opinion); *id.* at 634 n.8 (Brennan, J., concurring); Wisconsin v. Yoder, 406 U.S. 205, 215-29 (1972).

Although courts have used these analyses in free exercise cases, the concerns also bear on establishment clause matters. As Professor Tribe notes, "government actions have been deemed either violative of the anti-establishment principle or not—the balancing process in that setting has been incorporated into the definitions of the terms themselves." L. TRIBE, *supra* note 3, § 14-10, at 846-47 n.1.

279. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 714-15 (1976) (citation omitted).

members are fully informed about their church's doctrine and polity. An assumption of absolute submission holds true only if the member submits to the decisionmaker—tribunal or congregational majority—on all matters and accepts the decisionmaker's right to define its own jurisdiction, to flout procedures and substantive rules, and to attend to the church's guiding principles and spirit only as it sees fit. If the submission is less than complete or if the church authority's discretion has bounds, a *Watson* court could easily fail to enforce the member's expectations. Complete deference places no checks on abuse of discretion, except perhaps in the case of bad faith, a difficult matter to prove. As for any ambiguity surrounding the membership's precise expectations, the church decisionmaker gains an automatic victory.

Neutral principles offers no guarantee that legal documents and selected provisions in church documents furnish a complete picture of the informed member's expectations, much less the church's. As the *Jones* dissent emphasized, neutral principles operates as a restrictive rule of evidence.[280]

The problem of discerning expectations grows in difficulty with the recognition that church members are not fully informed about the substance of their relationship with their church. Even members who make a sincere effort to stay apprised of church doctrine and polity may view the official ownership of property and its disposition in case of schism as peripheral matters that do not merit close attention. In asserting the expectations of the typical church member, then, a court may be inventing expectations by relying too heavily on formal documents, church practices, or surmise.[281]

A reading of church documents and close attention to church practices might serve as a basis for identifying expectations. Such an inquiry, however, might disclose what a reasonable secular person might

280. Jones v. Wolf, 443 U.S. 595, 611-13 (1979) (Powell, J., dissenting).

281. Note, *Judicial Intervention in Disputes Over the Use of Church Property*, *supra* note 3, at 1161-62, discusses excessive reliance by some *Watson* courts on formal documents and practices in ascertaining church polity. The same concern applies to courts that use neutral principles. For example, in Crumbley v. Solomon, 243 Ga. 343, 345, 254 S.E.2d 330, 332 (1979), the Georgia Supreme Court determined that the Holiness Baptist Association is hierarchical on the basis of an examination of the minutes of its annual meetings. A dissenting judge, however, pointed out that the determination "flagrantly collides with the traditional well known reality that a Baptist Church prides itself in being a 'congregational church.'" 243 Ga. at 347, 254 S.E.2d at 334 (Jordan, J., dissenting). Without an independent examination, we cannot determine which view is correct. Yet, if the dissent is correct, the case illustrates how formal statements can override the expectations of church members.

expect; it would not necessarily determine the expectations of a church member with a religious understanding formed by personal religious experience.[282] In *Presbyterian Church*, for example, the local congregation claimed that the denomination had abandoned the true faith.[283] For the church member, the disposition of property might well turn on whether or not the local majority's determination was correct; that determination, in turn, would depend on the member's understanding of the Presbyterian Church's doctrine and perspective on church involvement in secular life. The church member's expectations would not necessarily comport with the determination of the denominational judicatory. The church member's expectations, moreover, might easily be that the Presbyterian tradition, which is less hierarchical than other churches,[284] does not give complete authority to the highest church judicatory in these cases. A court, however, might study formal church doctrine and documents and reach a different conclusion, in part because it lacks a "feel" for the church.[285] To make matters even more difficult, church members may honestly have different expectations, and a civil court of limited competency could not make an accurate assessment of the competing viewpoints.

At issue, then, is not simply a court's technical competence to understand religious concepts, but the ability of a secular tribunal to discern the legitimate expectations of a believer. A counterargument, however, might assert that the apprehension over judicial competence is overblown. A court may have ecclesiastical precedent to guide it and might even consider appointing a master. The arguments that challenge judicial competence in the church setting seem to apply in other areas; for example, discerning the expectations of members of secular associations such as fraternal organizations with an elaborate lore.[286] The criticism of court involvement, however, is more telling as it applies to religious organizations because, there, a constitutional prohibition bans

282. *Cf.* Master v. Second Parish of Portland, 124 F.2d 622, 627 (1st Cir. 1941), *critiqued in* Note, *Judicial Intervention in Disputes Over Church Property, supra* note 3, at 1163 n.109 (stating that a church agreement should be read not "through the eyeglasses of experts," but "from the viewpoint of the local folks . . . .").

283. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 442 & n.1 (1969).

284. *See* note 31 *supra*.

285. *See* note 281 *supra*.

286. *See* C. ZOLLMAN, *supra* note 3, at 210.

a full-scale inquiry. Because the stakes are higher, the tolerance for judicial error should be less.

A court cannot fashion rules that will accurately and constitutionally enforce the expectations of believers. The *Watson* test, the neutral principles test, and even the departure-from-doctrine test presume to resolve disputes in accord with member expectations. Their respective criteria, however, prove inadequate for the task because they intrude into constitutionally protected areas and rely on untenable assumptions about membership expectations.

At the heart of the problem is insufficient evidence. Concerns about judicial competence and religious freedom forbid courts from considering highly relevant evidence. *Watson* and neutral principles unsuccessfully seek to avoid the difficulty by looking to nonreligious language and concepts and by using assumptions about expectations to justify the restrictive inquiry. The *Watson* method assumes the member's total obedience to church authority in all church related affairs, an assumption that may or may not be valid for a given church. The insistence on taking ecclesiastical decisions as the court finds them could be viewed as a best guess approximation of expectations. No reason, however, justifies assuming that the methodology will produce an acceptable approximation. Neutral principles assumes that secular provisions about ownership reflect expectations or a close approximation. Again, the assumption lacks persuasive support.

Particularly disconcerting is the Supreme Court's acceptance of both neutral principles and compulsory deference as alternative tests. The acceptance suggests that one method is not significantly better than the other. If applied to a garden variety case like *Jones*, the methods can yield diametrically opposite results. The highest church authority, for example, might decree that the property belongs to the denomination, and the neutral principles analysis of the deed and of provisions in other documents might award the property to the local church. Thus, not only is neither method better than the other, but neither method is particularly successful in ascertaining expectations.

This discussion has assumed the existence of a set of expectations that a court equipped with an ideal methodology could identify as the legitimate expectations of all parties. A church, however, may have been so remiss in structuring internal mechanisms for dispute resolution and in identifying property rights that a court could not ascertain

legitimate expectations because no defensible basis for any exists.[287] Neither *Watson* nor neutral principles grapples with the problem because each identifies a basis for expectations, whether or not it in fact exists.[288]

Formulations of church property ownership and church authority over property decisions are generally constructed so that resort to judicially impenetrable religious language and practice is essential. The solution lies in requiring churches to formulate answers to property questions in language that requires no reference to religious language and custom. Churches must translate their expectations into language that a civil court can readily and constitutionally comprehend.[289] This solution receives attention in the next section.

III. The Secular Documents Method: A Proposed Solution

In the search for a solution, the neutral principles approach points in the right direction. The *Jones* Court validated roughly the right approach, but for the wrong reason. The primary advantage of neutral principles lies in its reliance on legal documents and on language in internal church documents that sounds like it belongs in such legal documents as deeds and articles of incorporation. Neutral principles is wrong in its assumptions that these provisions reflect church expectations.

Suppose that a legislature or court insisted that religious organizations translate their property arrangements into a secular tongue. If a church and its members understood that a court would enforce only secular provisions, they would have a powerful incentive to reach a clear agreement about property allocation and to ensure that the legal arrangements reflect their expectations. Neutral principles implicitly conveys this message, but only implicitly.[290]

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287. *See* Kauper, *supra* note 3, at 371-72 & n.76.

288. The departure-from-doctrine test also claimed that it was based on protecting the expectations of the church founders. *See* notes 56-57 *supra*. *See also* Schnorr's Appeal, 67 Pa. 138, 147 (1870) ("The guarantee of religious freedom . . . does not guarantee freedom to steal churches. . . . [I]t does not confer upon [church members] the right of taking away the property consecrated to other uses by those who may now be sleeping in their graves.").

289. *See* Jones v. Wolf, 443 U.S. 595, 606 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).

290. *See* Jones v. Wolf, 443 U.S. 595, 606 (1979) (churches can foreordain the outcome of a neutral principles adjudication by revising provisions in deeds, corporate charters, and church constitutions). *See also* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian

I propose going one step further and permitting judicial enforcement to back up only those secular provisions appearing in deeds, corporation papers, and other legal documents. This approach is the secular documents method. Unlike neutral principles, it directly requires churches and their members to explain their property arrangements in language that a court can construe without constitutional hazard; otherwise the parties face the alternative of a court-devised solution based on presumptions that do not purport to rely on the parties' expectations. Also, unlike neutral principles, the secular documents method would avoid the problem inherent in pulling secular provisions out of the religious documents with the risk of reading them out of context and missing their religious import. Because the secular documents method does not rely on internal church documents, it does not require determining whether or not a church is hierarchical as a prelude to examining denominational documents. The proposed method still permits churches to arrange their affairs as they wish; however, it forbids their use of religious language as a shield.

Could a secular document incorporate by reference a church document? An affirmative answer risks defeating in part the purpose of the proposed secular documents method. A qualified affirmative answer, however, is possible. Suppose a deed places title in the hands of a board of trustees but subjects their control to a specified provision in the church's by-laws. If the specified provision is in secular language, a court can permit the incorporation. If the deed restriction subjects trustee control to the church by-laws in general, a court would be well advised to refuse to construe the church document. The risks of intrusion and misinterpretation loom too large and defeat the purpose of the secular documents rule.[291] References beyond the secular document simply for the purpose of convenience are acceptable—for example, to reduce the frequency of necessary revisions to the secular documents. Thus, in the above illustration, reference to a specified provision in the church's by-laws avoids the need to revise the deed every time the pro-

Church, 393 U.S. 440, 449 (1969) (in rejecting departure-from-doctrine and applying the first amendment, the Court noted that relationships involving church property must be structured so that civil courts need not resolve ecclesiastical questions).

291. This approach is in line with the standard neutral principles method, which looks only to those provisions in church documents that expressly deal with control of property. *See, e.g.,* Jones v. Wolf, 443 U.S. 595, 600-01 (1979) (discussing Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 868 (1976)).

vision undergoes amendment. Incorporations for other purposes are unacceptable.

Although the secular documents method would eliminate much of the ambiguity attending religious disputes, the possibility of ambiguity would remain as it frequently does in any secular setting. Suppose a church fails to comply with the insistence on secular language in secular documents or it attempts to comply, but creates ambiguity through poor drafting. A court should begin its analysis by noting that the obligation to explain property arrangements in secular language falls on the church. If notions of religious doctrine so infect a provision that the court could not consider it, the court should ignore the provision and rely on remaining provisions. Alternatively, it might decide that without the provision, remaining provisions either make little sense or obviously fail to describe even roughly the intent of the drafters. To resolve the problem of the unclear document, the court could rely on presumptions.

Suppose, for example, that in *Jones* a provision in the articles of incorporation of the local church stated that any property disputes would be decided by the denominational presbytery, provided that the presbytery continued its fidelity to the traditional doctrines of the church. The court should ignore this provision because a doctrinal question is central to its meaning. The court might then rely on other provisions in secular documents. Another provision might declare that all matters not treated by other sections of the articles of incorporation fall within the jurisdiction of the local elders or session. The court might decide that to permit the session to decide the dispute would not comport even roughly with the drafters' intent. If the court so decided, it might then determine the decisionmaker by relying on a presumption, such as majority rule by the local congregation.[292]

The actual decision in *Jones* offers another illustration. The Georgia Supreme Court[293] recognized a presumption favoring majority rule when the evidence fails to disclose which faction of the local congregation possesses church property.[294] Although both the neutral principles and secular documents methods might employ this presumption in sim-

292. *See* notes 267-73 *supra* and notes 295-96 *infra* and accompanying text.

293. Jones v. Wolf, 244 Ga. 388, 388-89, 260 S.E.2d 84, 84-85 (1979), *cert. denied*, 444 U.S. 1080 (1980). *See* notes 267-73 *supra* and accompanying text.

294. Jones v. Wolf, 443 U.S. 595, 606-09 (1979).

ilar circumstances, each would justify the presumption on a different basis.

In *Jones* the court permitted a presumption as an estimate of the expectations of the parties. A rational basis, however, is lacking for a presumption of majority rule in the local congregation of a traditionally hierarchical church.[295] Under the proposed secular documents methods, such a presumption would serve as a final stop gap measure. It would seek not to resolve ambiguities according to the presumed expectations of the parties, but to permit efficient resolution of a problem that the court must resolve in some manner. Any other rationale for the presumption would permit the court to make a judgment about religious doctrines and polities based on only a secular understanding. Gaining that understanding would likely involve judgments and examinations that tread on the first amendment's spirit, if not its letter.

A pragmatic basis for the presumption avoids unconstitutional conduct. The result, however, is the same and may be at variance with the authentic religious prescription. The concern raised is at least modified by the rationale. Once the method receives the state's approval, moreover, the drafters of the church's documents would understand the pragmatic analysis to which the court would resort in the face of ambiguity. They therefore would understand the risk associated with poor drafting or failure to revise existing documents. This approach still may prove harsh on good faith error; occasional but avoidable injustices, however, must be weighed against the benefits deriving from the proposed method. The method motivates churches to clarify and articulate expectations and, in case of dispute, offers a means of resolution that avoids first amendment intrusion. Moreover, it is honest about its pragmatic rationale for accepting presumptions and does not attempt to assert a rational basis when none exists.[296]

295. *See* notes 267-73 *supra* and accompanying text.

296. *See* notes 267-73 *supra* and accompanying text. The argument against the presumption permitted in *Jones* is that the Supreme Court apparently relied on a rational connection between a presumption of majority rule and the fact that congregational churches usually rely on majority rule. We argued that this rational connection is nonexistent or at least too attenuated to employ when operating in the first amendment area. The proposed secular documents method, however, does not purport to rely on a rational basis. Instead, the state employs a presumption to resolve an impasse. To be sure, if a rational connection is essential to satisfy the constitution, then this justification for a presumption fails. Yet, if any justification other than rational connection is permissible, the breaking of an impasse would seem to be a persuasive one.

In the context under discussion, two considerations support this argument. First, although majority rule is not the only method that local churches use to resolve disputes, it is an accepted

The fact pattern in *Carnes v. Smith*,[297] a pre-*Jones* Georgia case, offers another illustration. The deed to the property of the Noah's Ark Methodist Church was in the name of specified individuals as "trustees of the Methodist Episcopal Church at Mount Pleasant Academy . . . their Successors in office as such forever in fee simple."[298] Since 1852, the local church had been affiliated with the Methodist Episcopal Church and its successor, the United Methodist Church. In 1969 the local church withdrew from the denomination and claimed ownership of the property. In the resulting dispute the Georgia Supreme Court applied for the first time the neutral principles test that it later applied in *Jones*. Because the United Methodist Church is hierarchical, the court held that the local church was subject to denominational law. The court also noted that under Georgia statutes, church property must be held "according to the mode of church government or rules of discipline" and that trustees "shall be subject to the authority of the church or religious society."[299] The court therefore looked to the United Methodist Church book of discipline. According to the court, provisions written in secular language established an implied trust over the property in favor of the denomination.[300] Three dissenters would have

method. The same might be said for rule by local eldership. As long as a court or legislature creates a presumption involving these or similar methods, it is not acting irrationally. Rather, it is establishing a sensible, although not perfect way to solve a knotty problem. Second, the court employs such a presumption only because the local church failed in its responsibilities to state its methodology in secular terms. Thus the church is not an entirely innocent victim.

297. 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 868 (1976).

298. *Id.* at 30, 222 S.E.2d at 324.

299. *Id.* at 38, 222 S.E.2d at 327-28 (quoting respectively GA. CODE ANN. §§ 22-5507, -5508 (1977)).

300. *Id.* at 38-39, 222 S.E.2d at 328. The phrase "implied trust" was not used in the same artificial way that it was used and rejected in *Watson*. The United Methodist book of discipline required that every instrument conveying property to a local church contain a specified express trust clause favoring the denomination. The book of discipline further provided that in the absence of such a clause an implied trust results in favor of the denomination if any of three "indications" are present. The indications are:

> (a) the conveyance of the property to the trustees of a local church or agency or any predecessor to the United Methodist Church; (b) the use of the name, customs, and polity of any predecessor to the United Methodist Church in such a way as to be thus known to the community as a part of such denomination; (c) the acceptance of the pastorate of ministers appointed by the superintendent of the District or Annual Conference of any predecessor to the United Methodist Church.

In *Carnes* the Georgia court found all three indications present. In Jones v. Wolf, 443 U.S. 595, 600 n.2 (1979), the Supreme Court partly quoted and partly paraphrased these provisions, apparently because it saw them as an illustration of the sort of provisions that a court could apply without violating the first amendment.

applied the formal title version of neutral principles and would have found the local church to be the trust's sole beneficiary.[301]

Depending on its interpretation of the deed and its use of presumptions, a secular documents court might have decided for either the local church or the denomination. A court might find the deed's language to be ambiguous. Although doubtless the language was initially intended to refer to the Noah's Ark church, it could seek to transfer control to any local church that succeeded it as the official denominational church. In case of the demise of all affiliated churches at Mount Pleasant Academy, the United Methodist Church could arguably use the property as it wished—perhaps to establish a new local church. A perplexed secular documents court could settle the matter by indulging in a presumption favoring either the denomination or the local church. Again, the presumption would have a pragmatic basis; that is, the court could not persuasively establish a rational basis for a presumption favoring either party. To resolve the dispute and insure judicial consistency, a secular documents court would either apply the presumption that prior courts with similar cases have applied or, if no presumption has previously arisen in the jurisdiction, establish a presumption for present and future use. The parties would have to endure the presumption, because they had failed to make clear their intentions.[302]

The secular documents method would also avoid the necessity of judicial perusal and construction of internal church documents, although here the disciplinary provisions seem capable of secular interpretation. The Georgia statutes would not necessarily rule out the proposed methodology. Although church law should govern the holding of church property and the conduct of trustees, a court could declare that the only permissible method of determining church law is reading its secular translation in secular documents. Other evidence of church law, such as the meaning of a book of discipline, is beyond judicial competence. This approach also saves a court from having to determine whether or not the local church's relationship to the general church subjects it to the latter's laws. The secular documents must make clear the relationship and its consequences.

Any concern about employing presumptions extends to the entire proposed approach. A rule restricting evidence is open to the criticism

301. 236 Ga. at 43, 222 S.E.2d at 330 (Undercofler, J., dissenting).

302. *See* notes 292-96 *supra* and accompanying text.

that it limits the court's ability to ascertain the expectations of the parties.[303] In church property disputes, however, much of the crucial evidence is constitutionally off limits, and the accessible evidence offers little hope of painting a complete picture. Extending the constitutional boundary to increase the amount of permissible evidence still leaves important evidence beyond the boundary; moreover, the probability of accuracy is not necessarily improved. In addition, the evidence that is currently permissible may be constitutionally questionable.

An exception to the rule's restricted inquiry might be extrinsic evidence of fraud or mutual mistake. At issue is not the bad faith of the official interpreter of church doctrine, but bad faith in drafting legal documents and in complying with their restrictions on transfer. Suppose, for example, that trustees hold title to property for the local congregation and, without the congregation's authority, transfer title to the denomination. The trustees might argue: "Our interpretation of church doctrine authorizes us to make the transfer and even requires us to do so." To lodge a successful challenge, the congregation could not raise a competing interpretation of denominational authority. Instead, it would seek to prove that the trustees acted out of bad faith, as opposed to religious conviction. The trustees might also argue: "We have the right to transfer this property as we see fit, because the legal documents place no restrictions on our discretion." The congregation could counter by pointing to the nature of the trustee's relationship and arguing that they are implicitly required to act in good faith. Fraud and collusion often are not easy matters to prove because a thin rationalization by errant trustees may suffice to create sufficient doubt about the charge. Under the suggested rule, then, the local congregation would be aware of the trustees' power and would assume some risk in making the appointment and presuming good character.

The secular documents method gives churches maximum opportunity to eliminate ambiguity about the control and disposition of property. Because the method insists on a statement of expectations in terminology familiar to a civil court, it gives the church and its member

303. The restrictive approach to evidence proposed here superficially goes against the grain of modern learning. *See, e.g.*, J. CALAMARI & J. PERILLO, LAW OF CONTRACTS § 3-3, at 110 (2d ed. 1977) ("The whole thrust of our law for over a century has been directed to the eradication of exclusionary rules of evidence in civil cases."); E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE xi (5th ed. J. Weinstein 1976) (Federal Rules of Civil Procedure are generally biased in favor of admissibility).

two choices—comply and greatly reduce the risk of judicial misinterpretation of expectations or risk a resolution that claims not to realize expectations but to settle the dispute. The secular documents method nevertheless fails to insure fully against disappointed expectations of those who comply. Disputes may still turn on controversies that the judiciary may not touch. For example, church members may argue that uncanonical methods resulted in the election of new trustees. The court could not assess the methodology or the significance of the alleged deviations to determine the election's validity. It must simply look to the legal documents and judge the ensuing property disputes according to the method previously discussed.

Not all church members, of course, may have actual knowledge of the contents of the legal documents.[304] Members, however, may just as easily lack actual knowledge of the secular provisions of church documents or of the internal church mechanisms for resolving disputes. Notice is an unsolvable problem. The proposed method offers some improvement by requiring church members to place the rules of property ownership in secular language and on the public record; it thus affords constructive notice. The secular language requirement recognizes that few church members are canon lawyers. Not all church members are civil lawyers either. The secular language requirement, however, removes one barrier to understanding and improves the opportunity for full notice.

A related problem is that some churches may be unaware that the legislature or the courts have altered the method of resolving church property disputes. The lack of actual knowledge can easily jeopardize a church's internal arrangements. This problem, too, is not wholly solvable. Once the first court decision or first statute adopting the secular documents method appears, the churches have at least constructive notice. They are in no different a situation than a secular voluntary association or business association that must keep abreast of legal developments. Moreover, the risk of changing law already exists. A court today, for example, might abandon complete deference in favor of neutral principles or discard the formal title method in favor of a broader version of neutral principles. Courts that have made such changes seem simply to change their rule with rarely any consideration of

304. *See* note 281 *supra* and accompanying text.

whether the new rule should be prospective only.[305] Whether or not the secular documents rule becomes a possibility, then, churches must bear the responsibility of keeping their legal information up-to-date. The possibility of changing legal methods, moreover, motivates a church to reevaluate the articulation of its property arrangements or the arrangements themselves. A decision to change either the arrangements or its articulation increases the chances that the membership will gain actual knowledge of their property interests and their potential disposition.

The advantages of the secular documents method are obvious. It promises a reduction in ambiguity and in the risk of unconstitutional intrusion. As a variant of neutral principles, it shares the same basic flaws. The method relies on a very formalistic approach that examines limited evidence, and the lack of equitable discretion offers a pitfall for the ill-informed and unwary. The secular documents approach may reduce the risk of ambiguity because of its nonreliance on religious documents, but it may possibly increase the risk of arbitrariness because of its reliance on very limited evidence. The risks, however, stem from the church's failure to clarify the desired property arrangement. The ability to minimize adverse risk points to the striking advantage of the secular documents method: It declines to rely on unwarranted membership expectations. Instead, it requires the church to disclose the intent and shows the church exactly how to do so. As with neutral principles, the method is flexible enough to permit the church to devise any arrangement for property control.

The cost of implementation is also a consideration. To insure accurate statements of property control, many churches would have to revise their deeds, articles of incorporation, and other documents. In addition to the matter of accompanying legal fees is the matter of stirring internal dissension by airing the issue of property control.[306]

305. In *Jones v. Wolf* the Supreme Court stated that the case presented no claim that retroactive application of a neutral principles approach infringed on first amendment rights. 443 U.S. at 606 n.4. The Court noted that the Georgia Supreme Court had stated its intent to employ neutral principles in both Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969), and Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 868 (1976). In the former case, however, the court employed the formal title method without advance warning. In *Carnes* the Georgia court adopted a broader neutral principles approach also without advance warning. Thus, although the *Jones* Court was correct with respect to the particular case before it, the earlier Georgia case applied respective new rules without prior notice.

306. *See* text accompanying note 264 *supra*.

These objections, however, have limited validity. The current neutral principles doctrine threatens churches that fail to reflect reality in their secular documents and in the secular provisions in church documents. The risk of a state court deciding to switch to neutral principles poses a danger even to churches in states in which the *Watson* method currently reigns.[307] A prudent church, then, would incur similar administrative costs under the current system. As for stirring up dissension, it is the price of clarifying the rights of parties and giving notice to those who have rights and to those who do not.

IV. Conclusion

The current methods for resolving church property disputes assume that a judicial rule can harmonize constitutional mandates on public policy with traditional rules for settling private disputes. As this Article has argued, however, the harmony attained relies on contrivance in reconciling the need to avoid judicial intrusion with the need to satisfy the expectations of churches and their members. Candor requires admitting the pragmatic basis for approving the accepted methods. Courts should admit that *Watson* and neutral principles exist to preserve the social order and yet to permit no more judicial intrusion than is necessary to function and to still enjoy perceived legitimacy. Such candor, however, also requires admitting that, upon examination, the methods lose their perceived legitimacy. They are not particularly successful in avoiding intrusion into church affairs or in identifying the parties' expectations.

The proposed secular documents method is candid. It tells the

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307. Courts may change methodology more than once. For example, the Georgia Supreme Court abandoned the departure-from-doctrine test in favor of formal legal title in Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969). It then adopted a broader neutral principles test in Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 868 (1976).

An Indiana appellate court declined to use the *Watson* method in favor of formal title in Price v. Merryman, 147 Ind. App. 295, 259 N.E.2d 883 (1970), *cert. denied*, 404 U.S. 852 (1971). The Indiana state supreme court then appeared to adopt a broader neutral principles method in Smart v. Yearly Conference of the Wesleyan Methodist Church of Am., 257 Ind. 17, 271 N.E.2d 713 (1971). *See* United Methodist Church v. St. Louis Crossing Independent Methodist Church, 150 Ind. App. 574, 276 N.E.2d 916 (1971).

The Ohio Supreme Court adopted a formal title approach in Serbian Orthodox Church Congregation of St. Demetrium v. Keleman, 21 Ohio St. 2d 154, 256 N.E.2d 212, *cert. denied*, 400 U.S. 827 (1970). It seemed to abandon this method in favor of a *Watson* approach in State *ex rel.* Morrow v. Hill, 51 Ohio St. 2d 74, 364 N.E.2d 1156 (1977).

churches exactly how the civil judiciary will decide cases so that churches can generally predict the outcome of any dispute. It not only permits churches to define their expectations with a free hand, but also puts churches on notice that they must assume the responsibility or risk the consequences. In addition, the simplified nature of the method and its reliance on limited evidence ease the judicial task.

The secular documents method still carries some potential for unfairness because it leaves little room for equity and could harm small churches that fail to keep abreast of the law. It also incurs costs for churches that must revise legal documents to reflect expectations. A partial response is that neutral principles, an accepted method, suffers the same deficiencies as well as still others. The *Watson* method is no better, primarily because it conforms churches to a preconceived organizational framework. Comparisons aside, the secular documents method at least gives a church a fighting chance to control its own affairs. Given the problems inherent in establishing a modus vivendi between satisfying constitutional demands and doing private justice, no more can be expected.

Despite the long line of cases, the Supreme Court has enunciated few firm holdings. As a general principle, the Court has held that courts cannot resolve church property disputes on the basis of religious doctrine and practice.[308] It has also held that, in a hierarchical church, a civil court must defer to the highest church court's resolution concerning issues of doctrine and polity.[309] The *Watson* method thus has received formal approval only in disputes concerning hierarchical churches.[310] As for neutral principles, the Court has approved the method "at least in general outline."[311] *Jones*, which concerned a traditionally hierarchical church, approved reliance on statutes and on language in secular and religious documents entailing no inquiry into religious doctrine.[312] *Jones* states that the Court also approved the

308. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447 (1969).

309. Serbian Eastern Orthodox Diocese for the United States v. Milivojevich, 426 U.S. 696, 724-25 (1976).

310. *See* Protestant Episcopal Church v. Graves, 83 N.J. 572, __, 417 A.2d 19, 24 (1980) (holding that New Jersey follows *Watson*, but still stating "[o]nly where no hierarchical control is involved, should the neutral principles of law principle be called into play.").

311. Jones v. Wolf, 443 U.S. 595, 602 (1979).

312. *Id.* at 602-03.

method in *Maryland & Virginia Eldership*, a per curiam decision.[313] In a confusing opinion, the Maryland high court identified the church as congregational with regard to property and hierarchical with regard to polity;[314] the distinction seems contrary to the ban on determinations about ecclesiastical jurisdiction. Caution would argue in favor of recognizing express Supreme Court approval of neutral principles only as it applies to hierarchical churches. Whether these distinctions comprise a plausible pattern is open to broad speculation. In any case, the Supreme Court has retained considerable leeway for imposing limitations on current rules and for developing new rules. It may use its discretion to formulate a new, more justifiable rule or to continue to wrestle with methods that have already proven inadequate.

313. *Id.*

314. Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 249 Md. 650, 241 A.2d 691, 699 (1968), *vacated and remanded*, 393 U.S. 528, *aff'd*, 254 Md. 162, 254 A.2d 162 (1969), *appeal dismissed*, 396 U.S. 367 (1970). The second Maryland Court of Appeals decision did not address the prior decision's statement on the divided jurisdiction of the local and general churches. Nor did the Supreme Court's decision address the statement.