Hands Off! Civil Court Involvement in Conflicts Over Religious Property

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In this Article, Professor Kent Greenawalt explores how civil courts can constitutionally resolve conflicts over religious property. Although the practical and theoretical significance of this part of First Amendment law has often been overlooked, issues concerning church property continue to raise difficulties for both the courts charged with their resolution and the church members who wish to avoid the courts' intervention entirely. This Article argues that the general approach of noninvolvement that the Supreme Court has advocated in this area is consonant with broader themes in religion clause adjudication. Within this more general approach, Professor Greenawalt considers the two alternative approaches approved of by the Supreme Court—the "polity-deference" and "neutral principles" approaches, and examines the justifications underlying both, their fairness or unfairness, and the practical barriers each poses for churches attempting to order their affairs as they choose. Ultimately, Professor Greenawalt concludes that while the general "hands off" approach to church governance advocated by the Supreme Court is fundamentally sound, aspects of both the alternatives permitted under such an approach raise serious problems. As a result, he argues, the Supreme Court should treat as unconstitutional the "polity-deference" approach, as well as certain versions of the "neutral principles" approach.

INTRODUCTION: CHURCH DISPUTES IN THEIR CONSTITUTIONAL SETTING

When a religious group divides into different factions, each claiming to represent the true faith, how can a civil court resolve ensuing disputes? Religious organizations, like other groups in society, regulate themselves, and the principles of internal governance they have chosen are diverse. For example, a Quaker meeting, with its requirement of unanimity, differs greatly from the hierarchy of the Roman Catholic Church. Some disagreements that arise within religious groups are so intense and intractable that members may seek the assistance of civil courts. Most commonly a group splits, and irreconcilable factions all claim to possess the

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group's property. If matters are not to be left to private force, civil courts must achieve a resolution of the dispute. But are ordinary courts fit to decide the issues that have divided members of the group?

This issue of fitness turns out to be a very important aspect of the law of the First Amendment's religion clauses. Each year, state and federal courts face many cases in which they decide who controls church property. The disputes are between either local and national organizations, or local factions, one of which may be allied to the national group. Exactly what courts should decide depends substantially on judgments about what they can decide both competently and fairly.

The practical and theoretical significance of this part of First Amendment law is often overlooked. The reason for this is simple. The Supreme Court has not issued a full opinion on the subject since 1979, choosing instead to leave other courts to work within the broad parameters it has set. The practical significance of decisions within these parameters is amply shown both by continuing litigation and by the steps religious organizations take to order their affairs to yield the consequences they want. The theoretical significance of this subject is more complex.

The Supreme Court's basic constitutional approach, established in three cases decided between 1969 and 1979, is that secular courts must not determine questions of religious doctrine and practice. Not only must they refrain from deciding which doctrines and practices are correct or wise, they must also avoid deciding which are faithful to a group's traditions. Rather, they must choose between deferring to judgments made by a group's hierarchy or using neutral principles of law, relying on documents that do not require controversial interpretations of doctrines or practices. It is this fundamental approach of noninvolvement to which this Article's title "Hands Off" refers: Government must keep out of internal problems of religious bodies when those problems concern religious understandings.

1. The following data show the approximate number of reported cases in both federal and state courts over a period of fifty years (amassed through a Westlaw search). The numbers reflect each time a different court had to address the issue of church property; thus, appeals are counted separately. From 1948 to 1957, there were approximately 166 cases; from 1958–1967, roughly 109; from 1968–1977, 115 cases; from 1978–1987, 123 cases; from 1988–1997, 81. (This search was done in Oct. 1998, in the "ALLCASES" database).

2. Other federal constitutional standards in the church-state area allow a range of acceptable interpretations of state constitutions to state courts, and some latitude for legislative choice. What is special about this particular area is that courts are left to employ one of two mutually incompatible principles of decision, each deemed acceptable by the Supreme Court.

At first glance, this requirement of noninvolvement emerges as an isolated strand of constitutional law, not tightly connected to any other doctrines. The Supreme Court has based the requirement on the Free Exercise and Establishment Clauses, but the Court has never derived it from standard free exercise and establishment tests. The approach did not follow directly from the free exercise "compelling interest test" the Court employed from 1963 to 1990, nor does it follow from any free exercise principle that religious claimants should be treated like all others.\(^4\) The Court has not related the approach to the standard establishment test, now in disarray,\(^5\) that a law's validity depends on its having both a secular purpose and a primary effect that does not advance or inhibit religion, and on its not unduly entangling the state with religion. Nor do other branches of constitutional adjudication replicate the approach for church property cases. Yet church property cases are not some detached fragment of constitutional law, remote from other doctrines. Most importantly, they reflect both the dominant theme of religion clause adjudication that too much intertwining of government and religion is unhealthy, and the overarching attention to equality in modern constitutional law.

My purpose in this Article is to assess judicial approaches to control of religious property, to evaluate the alternative approaches, and to explain how these problems relate to broader First Amendment principles. I begin by analyzing the Supreme Court's major cases, the first of which was decided in 1872. After setting out the basic problems that an approach to church property cases must address, I consider in some detail the two alternative approaches that the Supreme Court has approved: the "polity-deference" and "neutral principles" approaches. I then explore the underlying justifications for each approach, the elements of fairness and unfairness each exhibits, and some practical barriers each may pose both for individuals who want to protect their spiritual and financial investments in particular religious bodies and for religious bodies wishing to order their affairs as they choose. To illustrate the variability

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4. For 27 years, the Supreme Court spoke as if the government needed a compelling interest to apply restrictions against people who have strong reasons of religious conscience to engage in forbidden behavior. In 1990, it abandoned this approach in Employment Division v. Smith, 494 U.S. 872, 878–82 (1990) (announcing that religious claimants have no special ground to be exempt from valid laws of general application). In 1993, Congress adopted legislation to reinstate the compelling interest test. In June 1997, the Supreme Court held that Congress lacked power under the Fourteenth Amendment to impose this standard on the states. See City of Boerne v. Flores, 117 S. Ct. 2157, 2168–72 (1997). For those seeking free exercise exemptions from ordinary legal requirements, the courts have never applied the compelling interest test as stringently against the government as they have in the constitutional domains of equal protection and free speech. However, for cases of religious classification and of discrimination against religion, the courts have used a stringent compelling interest test. See Kent Greenawalt, Quo Vadis: The Status and Prospects of Tests Under the Religion Clauses, 1995 Sup. Ct. Rev. 323, 329–35 (1996).

5. See Greenawalt, supra note 4, at 359–79.
of conclusions that courts adopting neutral principles may reach, I sketch the results of a number of cases involving Episcopalian and Presbyterian churches.

I conclude that the Supreme Court's "hands-off" approach to governance of church property is fundamentally sound, but that aspects of each of the two dominant alternatives the Court has allowed state and federal courts to use do raise serious problems. Most notably, a rule to defer entirely to decisions within church hierarchies is too rigid; in contrast, a "neutral principles" approach introduces greater flexibility, but, under certain interpretations, precludes too much that is relevant to the lives of religious groups. I offer recommendations for choices that state courts should make under the prevailing constitutional regime, and suggest that the Supreme Court should make certain revisions to that regime, treating as unconstitutional the "standard" version of polity-deference and certain versions of neutral principles. These revisions or modifications would allow greater sensitivity to the concerns of religious groups and their members, while compromising only slightly, if at all, the sound aspiration to keep civil courts out of religious affairs.

This area exemplifies a typical aspect of constitutional adjudication—an imperfect fit of criteria of sound doctrines and actual doctrinal possibilities. When one sets out to imagine the requisites of an ideal constitutional standard for this subject, coming up with criteria is not difficult. Unfortunately, some of these criteria are fully attainable only by sacrificing others. This exercise reveals that the needed analysis of competing doctrinal possibilities is not the ingenious solution to a challenging puzzle, but requires delicate judgments that reach to the core of relations between religious groups and governments.

Before describing the development of legal principles, I need to enter an important caution. All the important cases involve various Christian churches, and I refer to churches in general, but whatever standards apply to churches also apply to all analogous religious groups—Jewish, Muslim, Buddhist, Hindu, and so on. The concern here is not just one of terminology. As the variety of religious practices within the country continues to increase, so will the number of cases involving non-Christian groups. The standards for engagement of civil law with Christian churches will also apply to other religious groups with which most judges are much less familiar.

I. THE LESSONS OF HISTORY: THE INAPPROPRIATENESS OF CIVIL COURTS RESOLVING RELIGIOUS ISSUES

Present principles governing property disputes originated over a century ago. Their earlier pedigree is one major reason why these principles are set apart from the standard approaches of modern free exercise and establishment law, which developed later. Following a number of state cases, the Supreme Court dealt extensively with the problem of church
property disputes in 1872, in *Watson v. Jones*. Examination of that case and its progeny up to the central 1969 case of *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* not only illuminates the roots and complexities of civil court involvement in church disputes, but also helps set out the most important questions and reveals serious difficulties in answering them that have remained with us. Among the important questions are: (1) what degree of civil court examination into church affairs is warranted; (2) what doctrinal approaches civil courts should adopt if they are to steer clear of excessive involvement in religion; (3) whether civil courts should avoid debatable issues of church government as well as issues of doctrine and practice; and (4) whether there is any room to place religious conditions in express trusts. In turn, some of the difficulties include: (1) the stark differentiation in treatment between hierarchical and congregational churches that *Watson* suggests; (2) the impossibility of courts satisfying members' expectations and refraining from any religious judgments; and (3) the dangers of both rigidity and undue flexibility in the categorization of church governments.


*Watson v. Jones* has proved to be the source of much of the constitutional law concerning church property disputes. After outlining its facts, I focus on the Court's basis for announcing that civil courts should not resolve cases by adjudicating doctrinal disagreements. I then describe the Court's threefold categorization of relevant cases and sketch some problems raised by the opinion.

*Watson* itself involved a division within the Presbyterian Church that occurred as a consequence of the Civil War. The Supreme Court Reporter, who found the facts and prior legal proceedings complicated enough to warrant twenty pages in the United States Reports, took the precaution of italicizing the names of adherents to one faction so that readers would not be irremediably confused. From the beginning of the war, the General Assembly, the highest body of the national Presbyterian Church in the United States of America, had urged citizens to support the federal government, and later favored the Emancipation Proclamation. In May 1865, just after the end of the war, the General Assembly instructed church organizations that applicants for membership from southern states who had supported the Confederacy or had accepted the doctrine that Negro slavery is a divine institution "should be required to repent and forsake these sins" before being received.  

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6. 80 U.S. (13 Wall.) 679 (1872).
9. Id. at 691.
In Kentucky, a slave state that had split during the war, with part remaining within the Union, church bodies at all levels divided between groups aligning themselves with the General Assembly and those asserting that the Assembly's stances on slavery and the war were erroneous and heretical. Within the state Synod (the statewide organization), the Louisville Presbytery (the local regional organization), and the Walnut Street Church, pro-slavery and anti-slavery factions each claimed to be the true representatives of the Presbyterian Church. The conflict in Watson v. Jones turned on the use of local church property. Initially, the pro-slavery faction contested the election of anti-slavery elders for the local church. If the election, which had been carried out according to the direction of a synodical committee, was valid, it tipped the balance among the elders towards the anti-slavery group. Kentucky's highest court, the Court of Appeals, held that because the General Assembly, Synod, and Presbytery had violated the national church constitution by their anti-slavery measures, their acts were void. Consequently, the court invalidated the election, and the pro-slavery balance among elders and trustees continued in the Walnut Street Church.

Following this resolution in state court, Indiana members of the anti-slavery group, claiming diversity of citizenship as their basis for federal jurisdiction, sued in the federal circuit court. They claimed that the pro-slavery elders had effectively seceded from the national church, leaving an anti-slavery member as the sole lawful elder. Having determined that this case involved different issues from the state case, and thus was not settled by it, the circuit court ruled for the anti-slavery group. On appeal, the Supreme Court agreed. The Court relied on grounds that were strongly influenced by a constitutional perspective about appropriate relations between church and state, but did not rest explicitly upon requirements of the federal or any state constitution. The Justices treated the central issue as one falling within the general common law, as to which, under then prevailing doctrine, federal courts could use their own best judgment, rather than follow state court decisions.

The crucial question was whether the national church, which would otherwise maintain control of the local church property under an implied trust, could forfeit that control because of a failure to adhere to basic principles of the religion. The Supreme Court acknowledged that in England, courts were free not only to make such judgments about the

10. See id. at 692.
11. See id. at 693–94.
12. See id.
13. See id. at 694.
14. See id. at 695–96.
15. See id. at 697–700.
16. This doctrine was established in Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842).
Established Church, which was intertwined in various respects with the
government, but also about dissenting churches.  

Contrasting England, where even dissenting churches are not free
"in the sense in which we apply the term in this country . . . ,” the Court
remarked that here, all people enjoy “the full and free right to entertain
any religious belief, to practice any religious principle, and to teach any
religious doctrine . . . . The law knows no heresy and is committed to the
support of no dogma, the establishment of no sect.” 19 In the United
States, with its fundamental principles of free exercise of religion and
nonestablishment, courts should not make an implied trust in favor of a
general church depend on faithfulness to preexisting doctrines and prac-
tices. 20 People who organize voluntary religious associations give “im-
plied consent” to the governments of those associations. It would subvert
these religious bodies if aggrieved members could later have recourse to
civil courts, where judges are much less competent to determine ques-
tions of ecclesiastical law and religious faith. 21 The Court quoted a state
court opinion that expressed its general political philosophy: “[T]he
structure of our government has, for the preservation of Civil Liberty,
rescued the Temporal Institutions from religious interference. On the
other hand, it has secured Religious liberty from the invasion of the Civil
Authority.” 22  

In the course of eloquently propounding its underlying understand-
ing of freedom of religion and nonestablishment, the Court initially di-
vided questions concerning rights to church property into three cat-
egories, two of which continue to guide courts. A case falls within the
first category when a deed or will respecting the property provides “by the
express terms” that it is to be “devoted to the teaching, support, or spread
of some specific form of religious doctrine or belief.” 23 For the other two
categories, no express trust is relevant. The second category includes
property held by a religious congregation that “is strictly independent of
other ecclesiastical associations” and “owes no . . . obligation to any
higher authority.” 24 In the third category are instances when the congre-
gation holding the property “is but a subordinate member of some gen-
eral church organization in which there are superior ecclesiastical tribu-
nals with a general and ultimate power of control more or less complete,
in some supreme judiciary over the whole membership of that general
organization.” 25

19. Id. at 728; see M.H. Ogilvie, Church Property Disputes: Some Organizing
doctrine and Canadian approaches).
21. See id. at 729.
22. Id. at 730 (citing Harmon v. Dreher, 17 S.C. Eq. (Speers Eq.) 87, 120 (1843)).
23. Id. at 722.
24. Id. at 722, 724–26.
25. Id. at 722–23.
About the first category, the Court said that individuals may dedicate property by express trust to sustaining definite religious doctrines or principles, and, in line with the general doctrine of equity governing charities, courts can prevent property from being divested from the trust. For example, were property given for "exclusive use of those who believe in the doctrine of the Holy Trinity," courts could prevent the property from being used to disseminate Unitarian doctrine.  

Though the task may be a delicate one and a difficult one, it will be the duty of the court... when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust.  

As we shall see, the Court's approach to this first class of cases has been substantially undercut by the language of modern decisions. For the second category, churches with a strictly congregational or independent organization that hold property without any express trust, the Court indicated that "the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations." Suppose a minority of a congregational church claims that the majority has departed radically from a traditional understanding of religious principles. If the ordinary standard for making decisions is majority rule, courts should accept judgments made in that way, and not expel a majority that "may have changed in some respect their views of religious truth."  

The third class of cases, according to the Court, is the most frequent and important, and it is into this class that Watson falls. There is no express trust, and the local congregation is a member of a larger, more substantial religious organization. For these cases, the Court said the appropriate rule is that, "whenever 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..." Applying this rule, the Court accorded the General Assembly the final say about Presbyterian doctrine and practice, and, as a consequence, the anti-slavery group succeeded in Watson v. Jones.

27. Id. at 723.  
28. Id. at 724. In the early case of Craigdallie v. Aikman, 3 Eng. Rep. 601 (H.L. 1813), aff'd, 4 Eng. Rep. 435 (H.L. 1820), the House of Lords had said courts should follow express trusts when they existed. The case is discussed in Ogilvie, supra note 19, at 382-83.  
29. See infra text accompanying notes 63-102.  
31. Id.  
32. See id. at 726.  
33. Id. at 727.
CIVIL COURTS AND RELIGIOUS PROPERTY

The bases for the Court's approach are not hard to grasp. If civil courts were to deny church property to a body that would otherwise control it because the body has been guilty of a "departure from doctrine," civil courts would address matters for which they are woefully ill-suited, and the legal rule would frustrate changes in religious understandings. The Court did not mention a further concern. Controversy is not always over religious doctrines alone; often it involves political implications as well. Civil courts will note those implications, and local courts, in particular, may be expected to side with factions whose politics they favor.

Despite its essential soundness, the Court's opinion raises some persistent problems. First, why is the ultimate decision ceded to superior church bodies? The Court's treatment disregards both the import of substantive provisions in church constitutions and the possibility of a mix of authority (not unlike a federal system) in which neither a local nor a central body is the final authority on all questions. Suppose the highest church tribunal blatantly breaches the church constitution. According to ordinary social contract theory, citizen consent is given to governments so long as governments act within appropriate limits. In the American version of social contract, drawn heavily from Locke and reflected in the Declaration of Independence, consent to civil government is not absolute. Why should "implied consent" to authoritative church government be absolute? The answer cannot be that this is simply in the nature of church government. The answer, if one exists, must be either that civil courts are not competent to adjudicate internal limits on religious government, or that their efforts to do so will have untoward effects on religious liberty.

Related to this is the problem of divided power. Church members might set up a system in which a central authority arbitrates some matters, but not others. Not every church is as intentionally hierarchical as the Roman Catholic Church. Why should a civil court not investigate how, in each case, power is allocated? The Watson Court may assume that no church governments are of this sort, but it effectively restricts the options of church members either to keeping final authority in local congregations or to leaving ultimate decisions about authority to superior tribunals,34 even though some churches may prefer a more complex form of organization, with a division of national, regional, and local authority. Perhaps the Court worried that civil courts could not effectively discern and enforce the details of more complex forms.35

34. Of course, a church might divide final legislative and executive authority between national and more local bodies, with the boundaries patrolled by a church court in the manner in which the U.S. Supreme Court patrols the boundaries of many issues of federalism. If civil courts deferred to the church court, a church could have both divided authority and final resolution in a highest church body.

35. One wonders whether some lingering resentment over the southern states making claims about the limits of national governmental authority lay behind this preference for final decision by central organizations.
The Court's treatment of its first class of cases, express deeds and wills, is curiously dissonant with its treatment of the latter two. If courts may not competently resolve matters of doctrine and practice, even if these are part of a church constitution, how are those same courts competently to enforce express trusts? Standards will not be easier to apply because they appear in an express trust rather than church documents. Given what the Court says about implied trust, perhaps a court should enforce an express religious trust against an otherwise legitimate authority only if the breach of the express trust is transparently clear, as with the Supreme Court's example of Unitarians succeeding to funds devoted to Trinitarian worship.\textsuperscript{36} If this limited degree of protection is appropriate for express trusts, why should courts not also protect against acts of higher church authorities that blatantly violate standards found in authoritative church documents other than trusts? The Watson Court failed to explain why it seemed to approve such full civil enforcement of express trusts, while leaving governing bodies in hierarchical churches so unrestrained by documents of church governance.

B. Watson's Successors: Applications and Constitutionalization

In the cases that followed, the Supreme Court applied and developed the second and third categories of Watson v. Jones, and determined that the rule that courts could not assess departures from doctrine had constitutional status. Shortly after Watson, the Court considered a dispute over property between those who had been elected trustees and those who claimed that these trustees had been removed. The case, Bouldin v. Alexander,\textsuperscript{37} involved an independent congregation and fell within Watson's second category. In Bouldin, the Court held that the removal of the trustees had been irregular, and it wrote, "they cannot be removed from their trusteeship by a minority of the church society or meeting, without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules."\textsuperscript{38}

Nearly eighty years elapsed before the Supreme Court's next important religious property case, Kedroff v. St. Nicholas Cathedral.\textsuperscript{39} That case, and a related subsequent one, Kreshik v. St. Nicholas Cathedral,\textsuperscript{40} involved a dispute over the New York Cathedral of the Russian Orthodox Church. One claimant had been appointed Archbishop by the Supreme Church Authority of the Russian Orthodox Church in Moscow.\textsuperscript{41} His competitor had been appointed by a sobor (that is, a convention of church officials) from the American churches of the Russian Orthodox faith.\textsuperscript{42}

\begin{itemize}
  \item[36.] See id. at 723.
  \item[37.] 82 U.S. (15 Wall.) 131 (1872).
  \item[38.] Id. at 140.
  \item[39.] 344 U.S. 94 (1952).
  \item[40.] 363 U.S. 190 (1960).
  \item[41.] See Kedroff, 344 U.S. at 96.
  \item[42.] See id.
\end{itemize}
Kedroff differed from Watson and Bouldin in the state legislature's intervention in affairs of ecclesiastical government. A 1945 New York law designated the way in which leaders of the "Russian Church in America" would be selected. Why had the state legislators interposed in this extraordinary manner? They believed that the Orthodox Church in Russia was effectively controlled by the antireligious Communist government of the Soviet Union; in effect, they did not want Joseph Stalin choosing a New York archbishop. Most Orthodox worshipers in New York and the rest of the United States apparently agreed that Americans should choose their own archbishop.

The Supreme Court declared that the legislature's transfer of control of the New York churches from the central governing hierarchy of the Russian Orthodox Church "prohibits . . . the free exercise of religion," and violates "our rule of separation between church and state." Noting that what Watson v. Jones said about hierarchical churches applied to "questions of discipline, or of faith, or ecclesiastical rule, custom, or law," the Court concluded that the right to use St. Nicholas Cathedral "is strictly a matter of ecclesiastical government . . . ." The Court referred to Gonzalez v. Archbishop, in which it had said that, barring "'fraud, collusion, or arbitrariness,'" appointment to religious positions is determined by proper church tribunals. The Court concluded that "[f]reedom to select the clergy, where no improper methods of choice are proven, . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." Justice Frankfurter's concurring opinion emphasized the long and painful history of political interference with churches as a reason for holding the New York law invalid.

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44. See Kedroff, 344 U.S. at 106–07 n.10 (citing St. Nicholas Cathedral v. Kedroff, 96 N.E.2d 56 (N.Y. 1950)).
45. See id. at 121–23 (Frankfurter, J., concurring).
46. Id. at 107.
47. Id. at 110.
48. Id. at 115 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872)).
49. Id.
50. Id. at 116 n.23 (quoting Gonzalez v. Archbishop, 280 U.S. 1, 16 (1929)). In Gonzalez, the Court referred to the similar effect "given in the courts to determinations of the judicatory bodies established by clubs and civil associations." Gonzalez, 280 U.S. at 16–17.
51. Kedroff, 344 U.S. at 116. The Court rejected an argument that what New York had done was similar to a federal act requiring that officers of labor unions, as a condition of having their union recognized by the National Labor Relations Board, file affidavits that they were not affiliated with subversive organizations. According to the Court, displacing one church administration with another intruded on religious freedom, whereas the right of a union to deal with the government was not constitutionally protected. See id. at 117–19.
52. See id. at 123–26 (Frankfurter, J., concurring).
After *Kedroff*, New York courts under their own common law powers transferred control of St. Nicholas Cathedral to the independent Russian Church of America.\(^{53}\) Since *Watson v. Jones*, the authority of federal courts in relation to common law had shifted radically. For two decades, federal courts had been required to apply state law unless that law violated the federal Constitution.\(^{54}\) Thus, the Supreme Court could overturn the common law rulings of New York only if it had a constitutional basis. In *Kreshik*, it declared that the judicial transfer of control of church property violated the First Amendment.\(^{55}\)

Taken together, *Kedroff* and *Kreshik* answer important questions, but they also leave some puzzles. The *Kedroff* opinion does not make clear to what extent its invalidation of New York's statute concerns only the limits of legislative power, as compared to the limits of all government power. *Kreshik* indicates that judges as well as legislatures are restricted, but it remains doubtful whether judges are *as restricted* in this respect as members of the political branches are. The force of this question can be illustrated by a hypothetical more extreme than the situation the Court faced in *Kedroff* and *Kreshik*. There, the precise accommodation reached between the Russian Church and the Soviet government was murky; no one showed that the Moscow patriarch was simply a puppet of the Communist regime, and the Supreme Court characterized the situation as one in which "no improper methods of choice are proven . . . ."\(^{56}\)

Imagine, instead, the strongest case for nonrecognition of a religious appointment. A foreign country's dictator coerces the appointment of an archbishop within the United States by threatening to kill thousands of church members. Or, by a similar threat, the dictator coerces church officials in his own country to elect his favorite (atheist) candidate as patriarch, and the new patriarch then appoints an American archbishop. Although no judicial language covers such circumstances, one would expect American courts to refuse to recognize the validity of such appointments. Thus, in extreme circumstances, courts would (and should) resist foreign political coercion of church appointments within this country and find some means to determine substitute authorities. It may be, however, that legislatures can never establish general rules for picking church officials that supplant those hierarchical organizations have developed for themselves.\(^{57}\) Perhaps the lessons one should extract from the combination of *Kedroff* and *Kreshik* are: (1) that neither legislatures nor courts can refuse to recognize otherwise legitimate church appointments made

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54. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).
57. Ordinarily, how states divide powers within their own governments is not a question of federal constitutional law (as Justice Jackson pointed out in his dissent in *Kedroff*), but the dangers to religious exercise generated by legislative interference with choices of religious officials may create especially stringent restraints. See id. at 127–29 (Jackson, J., dissenting).
in ambiguous circumstances, when the degree and manner of external control are disputable; and (2) that only courts, not legislatures, can respond to unambiguous, egregious instances of foreign governments coercing the selection of religious authorities in an international hierarchical church.\(^{58}\) No subsequent case involving church property has presented the issue of legislative intervention, but the lessons I have drawn remain sensible. Presumably, they continue to represent valid constitutional principles.

II. THE MODERN FRAMEWORK

In three cases decided between 1969 and 1979, the Supreme Court built upon the common law foundations of *Watson v. Jones* to develop comprehensive constitutional restrictions on civil court involvement in church property disputes. Embracing the underlying “hands-off” understanding of *Watson*, the first of these cases indicates that courts must not decide which doctrines and practices are faithful to a tradition.\(^{59}\) The second of these cases establishes that this restriction applies to exercises of authority by church officials that arguably violate church rules of governance.\(^{60}\) The third effectively leaves courts to choose between two alternative approaches.\(^{61}\) Thus, they may follow *Watson* in deferring to the highest authorities of hierarchical churches, or, instead, apply neutral principles of law that do not require judgment about religious matters.\(^{62}\)

In this section, I first parse the three majority opinions. I then look at the views of individual Justices, which reveal that the now prevailing position was not then the preferred choice of a majority of Justices. Both efforts shed light on the strengths and weaknesses of competing approaches and on the law’s probable future. For the most part, the remainder of this Article involves careful examination of the two alternatives that courts may now choose.

The Supreme Court evidenced unusual unanimity for a religion case when, in 1969, it decided a Presbyterian Church conflict not unlike that resolved in *Watson v. Jones*. In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, local Georgia churches withdrew from the national church and claimed that they should retain local church property because the actions and pronouncements of the general church departed from the doctrines and practices

\(^{58}\) I am not addressing religious organizations that have been institutionally connected to a foreign government for some time. If members in the United States join in the understanding that key decisions about church authorities will be made by a particular government, they cannot later complain when that happens.

\(^{59}\) See Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 449 (1969).


\(^{62}\) See id. at 602–06.
in force at the time of affiliation. Their objections to actions of the general church included predominantly doctrinal matters, such as the teaching of "neo-orthodoxy alien to the Confession of Faith and Catechisms;" church practices, such as the ordaining of women as ministers and elders; and political and social stances, such as support of removing prayers from public schools and acceptance of the leadership of the National Council of Churches, which had advocated civil disobedience.

The Georgia trial court submitted the case to the jury on the theory that local church property is held in an implied trust for the benefit of the general church on the "condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches. Thus, the jury was instructed to determine whether the actions of the general church 'amount to a fundamental or substantial abandonment of the original tenets and doctrines of the [general church], so that the new tenets and doctrines are utterly variant from the purposes for which the [general church] was founded.' The jury returned a verdict for the local churches, and the Georgia Supreme Court sustained that judgment.

The Supreme Court took a contrary view. Its opinion by Justice Brennan noted that "special problems arise . . . when [property] disputes implicate controversies over church doctrine and practice." Quoting passages from *Watson v. Jones* which have "a clear constitutional ring," the opinion said, "[t]he logic of this language leaves the civil courts no role in determining ecclesiastical questions in the process of resolving property disputes." Justice Brennan pointed out that under the departure-from-doctrine standard, a court must first decide if a general church has substantially departed from prior doctrine and then decide whether the matter is important enough to warrant termination of the implied trust. Under this approach, civil courts must "determine matters at the very core of a religion," raising a hazard "of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." Courts may use neutral principles of law to resolve church property disputes, but they must not "resolv[e] underlying controversies over religious doctrine." Any such involvement goes beyond the narrow investigation of "fraud, collusion, or arbitrari-

63. See *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 442.
64. Id. at 442 n.1 (quoting *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 159 S.E.2d 690, 692 (Ga. 1968)).
65. Id. at 443-44.
66. See id. at 444.
67. Id. at 445.
68. Id. at 446, 447.
69. See id. at 450.
70. Id.
71. Id. at 449.
72. Id.
ness" suggested by Gonzalez. Without distinguishing the effect of the two religion clauses, the Court considered their joint operation to preclude states from using a departure-from-doctrine standard.

The opinion left a question about Watson v. Jones's first category, the express trust. Much of Justice Brennan's language is absolute, apparently precluding enforcement relating to specific doctrines and practices, even when these are embodied in express trusts, and one can easily see the pitfalls of civil judges' decisions about the status of "neo-orthodoxy," whatever the context. Justice Harlan joined the Court's opinion on the understanding that it did not forbid "civilian courts from enforcing a deed or will which expressly and clearly lays down conditions limiting a religious organization's use of the property which is granted." Since Justice Harlan's examples were conditions that women not be ordained and that specified articles of the Confession of Faith not be amended, we can infer that he would require that both the nature of the condition and the identification of breaches be clear. That is, the nature of the condition stated in the express trust must be one that can be easily grasped by someone who is not an adherent of the religion, and such an outsider must also be able to say whether it has been breached. Anyone, for example, can conclude that most major American Protestant denominations now allow women to be ordained.

What did the other Justices think about Justice Harlan's reservation and examples? One cannot say. They did not dispute his reservation, but neither did they incorporate it. Justices in the majority probably disagreed among themselves, or did not want to think hard about the question, or both. No subsequent Supreme Court decision directly discusses the possible validity of enforcing some express trusts.

73. Id. at 451.
74. See id. at 450-52.
75. Id. at 452 (Harlan, J., concurring).
76. The majority opinion, which Harlan joined, is one basis for my conclusion about the scope of his reservation about express trusts. The majority said, "[s]tates, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." Id. at 449. Civil courts were not to enforce even express trusts if that required delicate interpretation of doctrines and practices.
77. If a grant were conditioned on a church "remaining faithful to the basic teachings of John Calvin," the nature of the condition might be clear, but what would constitute a breach would not be. Commenting on the Canadian case of United Church of Canada v. Anderson [1991] 2 O.R.3d 304, M.H. Ogilvie suggests that the ordination of practicing homosexuals was at odds with the Basis of Union of the Church, which affirmed "the primacy of the Biblical standard for Christian life and of Christian heterosexual marriage as the proper forum for human sexuality." See M.H. Ogilvie, supra note 19, at 399-400. Given widely varied notions of bow the Bible should be interpreted and the question whether someone engaging in less than ideal, or even inappropriate, sexual relations should necessarily be barred from serving as clergy, I do not believe this "breach of express trust" (assuming the Basis of Union would qualify as such a trust) is sufficiently clear for a court in the United States to award property on that basis.
Within the next decade, the Court decided two other major cases clarifying just how civil courts may approach property disputes involving churches. The first of these, *Serbian Eastern Orthodox Diocese v. Milivojevich,* 78 involved a hierarchical church with its highest authority in Yugoslavia, then a Communist country. Although political issues did not appear in the foreground, Dionisije Milivojevich, a bishop suspended and subsequently removed by the Holy Synod and Holy Assembly of the Mother Church, did charge that those bodies were "communistic."79 The primary dispute was whether Milivojevich, who had been elected Bishop of the American-Canadian Diocese by the Holy Assembly of Bishops in 1939 (when Yugoslavia was a monarchy), or a bishop appointed in his stead by the same body in 1963, had the authority to control properties in Illinois.80 A secondary issue was whether the Holy Assembly had the authority to divide the American-Canadian Diocese into three new dioceses. The parties agreed that the Serbian Eastern Orthodox Church was hierarchical. Bishop Dionisije, supported by the Diocesan National Assembly, argued that his removal as bishop violated the penal law and constitution of the Mother Church.81 Reviewing a trial court determination based on the testimony of experts for each side, the Illinois Supreme Court concluded that the proceedings against Bishop Dionisije had indeed violated church law and that his removal was, therefore, "arbitrary" under the approach of *Gonzalez.*82

The United States Supreme Court declared that the Illinois courts had breached the First Amendment.83 The principles of *Watson v. Jones* and *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* Justice Brennan wrote, apply to church polity (or form of government) and administration as well as doctrine. For state courts to make a detailed assessment of relevant church rules and to adjudicate between disputed understandings is unconstitutional.

Where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them . . . 84

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79. Id. at 704.
80. See id. at 698, 702-03.
81. See id. at 706. As far as the creation of new dioceses was concerned, he argued that the central church did not have that power, given the provisions of the constitution of the American-Canadian Diocese, to which the central church had agreed. See id. at 704.
82. Serbian E. Orthodox Diocese v. Milivojevich, 328 N.E.2d 268, 280-82 (Ill. 1975). Purporting to apply neutral principles of law, the court examined the relevant church documents and concluded that the Holy Assembly lacked the authority to create new dioceses in North America without Diocesan approval. See id. at 282-84.
83. See *Serbian E. Orthodox Diocese,* 426 U.S. at 708-09.
84. Id. at 709.
Insofar as an "arbitrariness' exception" means "inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations," it is constitutionally foreclosed.85 The issue about the creation of dioceses demanded an interpretation of the constitutional provisions of the American-Canadian Diocese, which could not be made without "a searching and therefore impermissible inquiry into church polity."86

Justice Rehnquist, in dissent with Justice Stevens, would have affirmed the actions of the Illinois courts.87 He argued that those courts were not implementing their own religious views, but trying to settle who the real bishop of the church was.88 Justice Rehnquist argued that Watson v. Jones had indicated that religious organizations should be treated like other private voluntary associations.89 Regarding the Court's approach as one of blind deference, Justice Rehnquist wrote, "[t]o 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."90

In Jones v. Wolf,91 another Presbyterian church case, the Court indicated that civil courts need not defer to higher church authorities if they instead rely on authoritative documents that can be interpreted without invoking religious understandings. The response of the Georgia Supreme Court to the decision in Mary Elizabeth Blue Hull Memorial Presbyterian Church had been to abandon any rule of an implied trust for the general church; instead, courts were to rely on relevant documents to determine property rights.92 Jones v. Wolf presented an application of that method.93 Most of the local congregation of the Vineville Church in Macon, Georgia, had voted to withdraw from the Presbyterian Church in the United States and to join another denomination.94 The Augusta-Macon Presbytery of the Church responded by declaring the remaining minority faction to be the "true congregation," and members of that fac-


86. Serbian E. Orthodox Diocese, 426 U.S. at 723. Thus, despite the attempt of the state courts to rely on neutral principles of law, their resolution unacceptably determined ecclesiastical matters.

87. See id. at 725–35 (Rehnquist, J., dissenting).

88. See id. at 726 (Rehnquist, J., dissenting).

89. See id. at 728 (Rehnquist, J., dissenting) (citing Watson v. Jones, 80 U.S. (13 Wall.) 679, 714 (1872)).

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


92. See id. at 601.

93. See id.

94. See id. at 598.
tion sued to establish their right to the local church property. Applying neutral principles of law, the Georgia courts found that the property belonged to the local church, represented by the majority. Reviewing this disposition, the United States Supreme Court, in a five to four split, upheld Georgia’s general approach, but was uncertain about one stage of the state court’s resolution. The deeds conveyed property to the local church, and neither state statutes nor the corporate charter of the local church conferred an interest in the property on the general church. Nor did the Book of Church Order of the national Presbyterian Church have language creating a trust in favor of the general church. Examining these documents, the Georgia courts concluded that the local church held the property. Since this method required no resolution of issues of doctrine and church polity, the Supreme Court found it constitutionally permissible.

Having determined the local church’s right to the property, the state courts awarded it to the local majority. The Supreme Court found the basis for this last step to be unclear. Had the courts merely adopted an ordinary, acceptable, legal presumption that, absent a contrary indication, a majority represents a voluntary religious association, or had the courts relied on laws and regulations of the Presbyterian Church to determine who represents the local church? The latter reliance could require civil courts to resolve debatable matters of church polity—the very difficulty that doomed the efforts of the Illinois courts in *Serbian Eastern Orthodox Diocese.* An ordinary presumption of majority rule, however, would be entirely appropriate. The Supreme Court said that a presumptive rule of majority representation could be overcome by provisions in the corporate charter or constitution of the general church showing that the identity of the local church is to be established differently. What courts could not do was rely on “considerations of religious doctrine and polity.” It is not easy to mark the distinction between inquiries the Court allows and those it does not, but apparently courts cannot make determinations about religious polity unless those are clearly established by documents that can be interpreted apart from any religious understanding.

Justice Powell’s dissent objected that the Court’s opinion endorsed greater involvement of civil courts in church controversies than had ear-

96. See id. at 863–64.
97. See Jones, 443 U.S. at 602–03.
98. See Jones, 243 S.E.2d at 864.
99. See Jones, 443 U.S. at 601, 607–08.
100. In some articles, this case is shortened to “Serbian.” If one thinks of cases involving analogous churches, one does not think of abbreviated names of “Greek” or “Russian.”
101. See id. at 607–08.
102. Id. at 608.
103. See id. at 607–08.
lier decisions. According to him, "[t]he First Amendment's Religion Clauses . . . are meant to protect churches and their members from civil law interference, not to protect the courts from having to decide difficult evidentiary questions." Justice Powell argued that the neutral principles approach would yield results at odds with the doctrines and polity chosen by churches. He complained that the Court, although allowing an examination of church documents for evidence that a trust exists or that majority rule is not the controlling principle of representation for who represents the local church, failed to explain adequately the constitutional limits on using such evidence. For courts to regard in purely secular terms documents that are part of the ecclesiastical polity would distort the significance of church rules of governance. That is, lifting language about church governance out of its religious context might convey a misleading impression about the effect of that language. Powell and the three Justices joining him urged that, for hierarchical churches, states should be constitutionally required to defer to the decisions of the highest bodies within those churches.

For the majority, Justice Blackmun responded that the dissent's approach would require courts in every case to examine the basic polity of a church and to determine which unit, either national or local, has ultimate control over church property, a task that could be difficult when the locus of control is ambiguous. Against Powell's worry that "neutral principles" would force principles of governance that church members have not chosen, he argued that parties can ensure the results they want by expressing their understandings about control in formal documents. Many religious organizations, not surprisingly, have tried to put their property affairs in order, but the ordinary limitations of foresight about events and ambiguities of language, as well as uncertainties about how courts will make decisions, render this opportunity less than a perfect guarantee that relevant aspirations will be fulfilled. I explore some of these difficulties below.

Along with Serbian Eastern Orthodox Diocese, Jones v. Wolf leaves state courts a significant range of choice as to how they will handle church property disputes. But examination of the two majority opinions does not fairly reflect the divisions among the Justices, which help reveal possible alternatives for the future and the difficulties for the states of choosing wisely. A count of judicial votes reveals that only three Justices actually favored giving states a choice between neutral principles and

104. Id. at 613 n.2 (Powell, J., dissenting).
105. See id. at 610–14 (Powell, J., dissenting).
106. See id. at 613 (Powell, J., dissenting).
107. See id. at 614 (Powell, J., dissenting).
108. See id. at 614 (Powell, J., dissenting).
109. See id. at 605.
110. See id. at 605–06.
deference to hierarchical decisions.\textsuperscript{110} Four Justices, the dissenters in \textit{Jones v. Wolf}, rejected the neutral principles approach in favor of the deference mandated by \textit{Watson v. Jones} and \textit{Serbian Eastern Orthodox Diocese}. These Justices would have countenanced more involvement of the courts with ecclesiastical documents about church governance than the majority in \textit{Jones v. Wolf} was willing to accept.

Two Justices, Rehnquist and Stevens, as shown by the former's dissent in \textit{Serbian Eastern Orthodox Diocese}, thought courts should ground decisions on principles of a kind available to resolve disputes within other voluntary organizations.\textsuperscript{111} They were less concerned with courts avoiding all disputes about doctrine and ecclesiastical polity than the majority opinion in \textit{Jones v. Wolf} (which they joined) suggests.\textsuperscript{112} Rehnquist wrote in \textit{Serbian Eastern Orthodox Diocese} as if courts could treat the purposes and practices of religious organizations like those of other organizations.\textsuperscript{113} His opinion, for example, approved the Illinois court's conclusion that, "on the basis of testimony from experts on the canon law at issue, . . . the decision of the religious tribunal involved was rendered in violation of its own stated rules of procedure."\textsuperscript{114} He said that \textit{Watson v. Jones} merely recognized and applied "general rules as to the limited role which civil courts must have in settling private intraorganizational disputes,"\textsuperscript{115} and he discerned from earlier cases the principle that "the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect."\textsuperscript{116} The expressed views of these Justices favored an approach less "hands off" than what the Court appeared to endorse in \textit{Jones v. Wolf}.

It turns out that Chief Justice Rehnquist and Justice Stevens are the only Justices who remain from the Court that decided \textit{Jones v. Wolf}. Of course, their views were rejected by seven Justices in \textit{Serbian Eastern Orthodox Diocese}, and states have remained free to use a deference ap-

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\textsuperscript{110} The idea of such a choice had earlier been elaborated by Justice Brennan, concurring in Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 567, 368 (1970). That case upheld a Maryland court's decision to use neutral principles after \textit{Mary Elizabeth Blue Hull Mem't Presbyterian Church}. The Supreme Court sustained that approach per curiam, with Justice Brennan writing to suggest that a state might adopt various approaches.

The majority opinion in \textit{Jones v. Wolf} indicates a preference for neutral principles over deference. This preference emerges partly in the response to the dissent's claim that deference is constitutionally required.

\textsuperscript{111} See \textit{Serbian E. Orthodox Diocese}, 426 U.S. at 728.

\textsuperscript{112} Cf. \textit{Jones}, 443 U.S. at 603 (courts should not resolve issues of doctrine and polity). For a scholar's opinion that the Supreme Court has withdrawn too far in considering questions of religious belief and practice, across a wide spectrum of religion clause issues, see Samuel Levine, Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Belief and Practice, 25 Fordham Urb. L.J. 85 (1997).

\textsuperscript{113} See \textit{Serbian E. Orthodox Diocese}, 426 U.S. at 728-29.

\textsuperscript{114} Id. at 727.

\textsuperscript{115} Id. at 728.

\textsuperscript{116} Id. at 733.
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proach in the intervening twenty-two years. One cannot assume Chief Justice Rehnquist and Justice Stevens are waiting eagerly to disavow that approach and to adopt a version of neutral principles that is permissive in what it allows courts to do. Nevertheless, in thinking about what the Supreme Court might do in the future, one must consider that at the time the crucial decisions were rendered, only three Justices actually held the conviction that state courts should be able to choose between deference and neutral principles (as opposed to being required to use one approach or the other), and that the only two remaining Justices who approved neutral principles in *Jones v. Wolf* previously expressed aversion of that approach that was less restrictive of judicial examination of church documents than the gist of *Jones's* majority opinion. Since *Jones v. Wolf*, some basic principles of free exercise and establishment jurisprudence have undergone radical transformation. If the Justices decide that the principles governing church property cases inadequately serve the values of free exercise and nonestablishment, we should not suppose that they will cling tenaciously to what was said twenty years ago. The truism that language of prior Court opinions is never set in stone seems especially apt for *Serbian Eastern Orthodox Diocese* and *Jones v. Wolf*.

III. Surveying the Landscape of Doctrinal Possibilities: The Two Basic Approaches and Ideal Standards for Evaluating Them

Review of Supreme Court cases provides only a sketchy sense of this domain of church-state law. A look at appellate decisions, which develop alternatives among the options the Supreme Court has left open, reveals that the law is less straightforward than one might suppose from reading the Court's jurisprudence. In the remainder of this Article, I provide an account of what the courts have done in the last decade, suggest the strengths and weaknesses of various approaches, and ask which approaches are preferable in terms of the values at stake and which should be required under the First Amendment. To put these issues in perspective, it helps to clarify the major alternatives the Supreme Court has now provided, to highlight some crucial problems, and to suggest criteria for evaluating competing approaches. That is the landscape this section surveys.

As we have seen, the Supreme Court has suggested two basic approaches—a "polity" or "deference" approach and "neutral principles." The first of these approaches goes back to *Watson v. Jones*, and was employed in *Serbian Eastern Orthodox Diocese*. The second approach was accepted in *Jones v. Wolf*.

The "deference" approach is, more precisely, the most important component of a "polity" approach. A court initially decides what kind of polity or government a church has. Legal tradition, from which some courts have begun to deviate, acknowledges only two tracks: congregational, in which a local church controls its own destiny; and hierarchical,
in which authority is arranged in an ascending hierarchy. But this convenient dichotomy may not fit when a local church that has no authority superior to it has chosen to govern itself by rules that do not follow the democratic, congregational form. Much more importantly, the dichotomy may not serve very well for variations among church organizations involving a "superior" general church. It neither recognizes possible differences in ways the superior authorities are constituted (from the top down or by some form of representational government), nor attends to nuances in balances of authority between higher authorities and local churches. This Procrustean attitude risks giving central bodies more power than the members of some churches have assigned them.

Under the polity approach, if a church organization is congregational, courts assume that it governs itself like an ordinary voluntary association. If the church organization is hierarchical, courts treat the decisions of the highest church adjudicators as binding, and they defer to church decisions. It is a corollary of this rule, although not often stated, that people ordinarily should not get relief from civil courts if they have not sought review from the highest available church authorities. Although the highest judicial authority in a church might award property to a local church against the national legislature and executive, the typical consequence of deference is that local church property is held for the general church. As the Pennsylvania Supreme Court once put the rule, "[i]t has long been established in Pennsylvania that when a local church is a member of and subscribes to the doctrine and control of a hierarchically governed denomination, it cannot sever itself from such religious denomination without forfeiting its property to the parent denomination."118

There are crucial questions about the polity approach and its deference component. For example, how does a court decide what a church's polity is if its members dispute that? How much review is warranted if a church is congregational? May a church be hierarchical for some purposes but not others? Is deference appropriate for "ecclesiastical issues" even if not for "secular" issues? Can deference be defended as the best way to give effect to the intent of relevant people, or must it be justified in other terms?

The "neutral principles" approach calls on courts to use secular, neutral principles when they resolve church disputes. This means, at the outset, that the principles cannot be ones that are religious or ecclesiastical. The following issues are crucial to how neutral principles are applied in the typical case, in which a majority of the local church is contending for local property against a national church that in turn may be aligned with

117. See Weisberg, supra note 85, at 971, 973; David Young & Steven Tigges, Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes, 47 Ohio St. L.J. 475, 482 (1986).
a local minority loyal to it: What documents may courts examine? In particular, may courts examine primarily ecclesiastical documents, and how do they determine whether a document is primarily ecclesiastical? How stringently must courts avoid determination of disputed matters of church government and practice? How specific must indications be that crucial property interests lie in the hands of someone other than the formal title holder, usually the local church? How weighty must the argument against the title holder be for the competing claimants to succeed? If the argument concerns who constitutes the local church, to what extent may courts look at church documents in order to resolve disputed matters of governance? With neutral principles, as with polity-deference, lying in the background is the question of how that approach is to be justified.

Two points are important to note. First, once a court has engaged in a neutral principles analysis, it may conclude that there is an express or implied trust in favor of the general church. Given the ban on courts addressing religious issues, the nearly inevitable result would be that the general church would then triumph in a contest with a local church. The second, related point is that neutral principles might lead a court to conclude that a civil court should give great deference to a determination by a church court or other religious body. If a “secular” analysis of documents places authority in that manner, “neutral principles” leads to deference.

As we approach various doctrinal possibilities, we can conceive an ideal set of standards for church disputes over property, standards derived from the values of religious freedom, equality, nonestablishment, and fulfilling the intent of relevant persons. Such standards would: (1) accord churches significant autonomy of governance; (2) afford individuals freedom of religious worship; (3) give effect to the intent of people who donate money for the purchase of church property and who pay for its upkeep; (4) treat different religious groups in an evenhanded way, without favoring any particular doctrine or form of organization; (5) replicate the standards used in respect to other charitable and nonprofit organizations; and (6) keep courts out of determining ecclesiastical matters for which they are ill-suited. One needs only to state these criteria to recognize that no set of standards can accomplish all these objectives. Accomplishing some as fully as possible means sacrificing others. Since ample room exists for reasonable disagreement about which objectives are most important, both in general and in more specific contexts, no simple formula can tell us which approaches are best overall or constitutionally required.

With these preliminary observations, I will discuss first polity and deference, and then neutral principles. My attention will be on what cases indicate and scholars observe in an effort to determine which approaches are preferable in which contexts. My evaluations bring to bear the crite-
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rial for the ideal standards and the values they reflect. At the end, I com-
ment on what should be required under the Constitution.

IV. THE “POLITY-DEFERENCE” APPROACH

The opinions in Jones v. Wolf evince substantial disagreement over
the merits of the deference approach for hierarchical churches. A mi-
nority of four Justices asserts that it is constitutionally required; the major-
ity expresses a strong preference for neutral principles, though it treats
deference as constitutionally acceptable. In examining this approach, I
first consider a substantial difference in treatment between hierarchical
and congregational churches, concluding that despite possible defenses,
that difference cannot be justified. I then consider ways in which the
polity approach produces treatment of religious groups that differs from
that of nonreligious voluntary associations. Next, inquiring whether the
extreme deference to high church bodies that the polity approach re-
quires can be justified, I suggest that it does not follow from any view that
the expectations of members and donors should be fulfilled. I point out
that the state can have no legitimate policy of preferring the unity of
general churches over their separation. Finally, I discuss the problem of
how courts make the necessary judgment about what kind of polity a
church has. I note the possibility of nuanced judgments that a general
church has authority over some subjects and not others, and caution that
were courts to discern certain combinations of relative authority, the re-
sult could be to unsettle relations between national authorities and local
churches. My overall conclusion is that the polity-deference approach, in
its most straightforward form, has serious defects.

A. Comparative Treatment of Congregational and Hierarchical Churches

Taken as a whole, the traditional polity approach with its deference
component contains an anomaly that is so evidently impossible to justify,
it will almost certainly not survive. The anomaly is the different treatment
accorded congregational and hierarchical churches once their polity is
determined. Here is what Justice Brennan said about hierarchical
churches in Serbian Eastern Orthodox Diocese:

[N]o “arbitrariness” exception—in the sense of an inquiry
whether the decisions of the highest ecclesiastical tribunal of a
hierarchical church complied with church laws and regula-
tions—is consistent with the constitutional mandate that civil
courts are bound to accept the decisions of the highest judicato-
ries of a religious organization of hierarchical polity on matters
of discipline, faith, internal organization, or ecclesiastical rule,
custom, or law.

It is the essence of religious faith that ecclesiastical deci-
sions . . . are to be accepted as matters of faith whether or not
rational. . . . Constitutional concepts of due process, involving
secular notions of “fundamental fairness” or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.\textsuperscript{119}

A large gap separates this language from how courts have regarded congregational churches. Their processes of decision have been treated more or less like those of other voluntary associations, and thus the churches have had to conform to bylaws and fundamental principles of fair process.\textsuperscript{120} To some extent, greater review of congregational church decisions than hierarchical ones is inevitable to decide what counts as a majority vote, as the old Supreme Court case of \textit{Bouldin v. Alexander}\textsuperscript{121} clearly demonstrates. Suppose a minister has strong minority support, but realizes he is likely to be dismissed next Sunday by a majority of the congregation at a scheduled meeting. He schedules a worship service for Wednesday and privately urges his supporters to attend. At the service, he announces that a congregational meeting will follow. A majority of those attending the meeting vote to terminate the membership of everyone not present. At the “ordinary” Sunday meeting, a majority of those present vote to dismiss the minister. A civil court resolving which group controls church property would have to decide whether the Wednesday meeting effectively terminated the membership of most of the congregation. This case would be an easy one. The court would have recourse to church bylaws or ordinary democratic principles to conclude that a minority faction could not arrange what was virtually a secret meeting to vote the majority out. This problem of identifying an authoritative body rarely, if ever, arises for the adjudicators of hierarchical churches. One knows who they are, and when they have acted.\textsuperscript{122}

What is nettlesome about the hierarchical-congregational divide is that for congregational churches, courts have enforced church rules and democratic principles of governance that go beyond ascertaining a valid majority.\textsuperscript{123} If the bylaws require notice and a hearing before a member can be dismissed,\textsuperscript{124} a court will invalidate a dismissal made without

\textsuperscript{119} Serbian E. Orthodox Diocese, 426 U.S. at 713–15.

\textsuperscript{120} For the treatment of secular organizations, see, e.g., Dixon v. Club, Inc., 408 So. 2d 76, 79–82 (Ala. 1981) (discussing judicial treatment of the bylaws and constitutions of social clubs); Berke v. Hecht, 257 Cal. Rptr. 738, 740–42 (Cal. Ct. App. 1989) (discussing “[t]he rights and duties of members of a private voluntary association” and “the terms of the association’s constitution and bylaws”).

\textsuperscript{121} 82 U.S. (15 Wall.) 131 (1872).

\textsuperscript{122} I have earlier mentioned that a question can arise whether they have been coerced to act or have been coercively constituted by political forces outside the church. See text following note 56.

\textsuperscript{123} See, e.g., Trett v. Lambeth, 195 S.W.2d 524, 534 (Mo. Ct. App. 1946) (discussing the judiciary’s duty, “where property and civil rights are involved,” to determine the legal sufficiency of certain actions); Reid v. Gholson, 327 S.E.2d 107, 113 (Va. 1985) (discussing the ability of a “member of a congregational church” to seek “the aid of the court in protecting his civil and property rights”).

\textsuperscript{124} Some courts do not consider membership alone a sufficient secular interest to warrant the intervention of civil courts. But, as we have just seen, whether some people
notice or hearing, and it may require those, even if the church rules are silent on the subject. In 1985, the Supreme Court of Virginia said that for congregational churches,

the analogy to hierarchical churches breaks down because there is no body of ecclesiastical law to invoke, no internal tribunal to appeal to. A member of a congregational church, seeking the aid of the court in protecting his civil and property rights, may appeal only to the simple and fundamental principles of democratic government which are universally accepted in our society. These principles include the right to reasonable notice, the right to attend and advocate one’s views, and the right to an honest count of the votes.\textsuperscript{125}

Six years later, the Kansas Supreme Court quoted this language and continued:

A congregational church member has a right under common-law principles to a fairly conducted meeting on the question of expulsion, and that includes reasonable notice, the right to attend and speak against the proposed action . . . . It does not require formal evidence, the right to counsel, or the right to present witnesses (unless church rules so require).\textsuperscript{126}

These opinions afford protections the Supreme Court has suggested cannot be insisted upon for hierarchical tribunals, even if church rules provide them.\textsuperscript{127} Observers have recognized that this difference constitutes a kind of favoring of the institutional authorities of hierarchical churches.

A defender of the sharp distinction in treatment between hierarchical and congregational churches might offer historical or pragmatic arguments. Historically, ideas of secular democratic governance developed in close connection with ideas of democratic church governance.\textsuperscript{128} One might reasonably have assumed that members of congregational churches expected procedures that would be judged fair for secular gov-

\textsuperscript{125} Reid, 327 S.E.2d at 113.
\textsuperscript{127} One federal court, which deemed the approach of \textit{Serbian E. Orthodox Diocese} to have import for congregational churches, said that it was constitutionally irrelevant “that the local church may have departed arbitrarily from its established expulsion procedures in removing the plaintiffs . . . .” Nunn v. Black, 506 F. Supp. 444, 448 (W.D. Va. 1981), aff’d mem., 661 F.2d 925 (4th Cir. 1981). Another federal court, having noted this language, ruled that civil court inquiry into disciplinary measures of churches is improper unless there is fraud or collusion or “an extreme violation of the civil rights of a disciplined member.” First Baptist Church of Glen Este v. Ohio, 591 F. Supp. 676, 683 (S.D. Ohio 1983). It said civil courts could determine if the body imposing discipline was the body authorized to do so under a church constitution or bylaws. Someone who claims that internal disciplinary proceedings are tainted by fraud, collusion, or bad faith must meet a “higher ‘burden of proof’ typically applied to cases of fraud.” Id.
The idea of faith in decisions of particular officials, whether or not rendered according to due process, may have been more apposite for strongly hierarchical, nondemocratic churches.

Whatever its historical validity, this account of differential commitment to fair procedures does not describe modern understanding. For many issues, adherents of hierarchical churches in the United States are as attached to procedural justice as are members of congregational churches. Ideas of due process and liberal democratic governance have now affected most Americans' views of their relations to their churches, and many hierarchical churches have comprehensive rules to assure procedural protections for decisions such as dismissal from membership.

One might defend greater scrutiny of congregational decisions on the practical ground that abuse and unfairness are more likely in small, local bodies. The levels of decisionmaking in hierarchical churches may minimize the chance that someone will fail to get minimally fair consideration, or that people will "capture" its tribunals for perverse ends. Complexities of hierarchical governance are another factor. Civil courts may be less able to say just which procedures are crucial at what stage. Authority may be more intertwined with religious history and doctrine, and assessing the range of a bishop's power may be harder than determining how a congregational body should act. When all is said and done, differences in risks of outright abuse and complexities of review might justify somewhat greater deference to the decisions of the highest tribunals of hierarchical churches, but these differences do not warrant a stark dichotomy in how hierarchical and congregational churches are treated.

Some commentators have opposed extreme deference to the decisions of church hierarchies. Michael Galligan has argued that a rigid rule of deference frustrates free exercise, and has objected to the Court's seeming conclusion that "concepts of 'fundamental fairness' are 'secular' and irrelevant to church affairs." Judge Arlin Adams and William Hanlon have suggested that when two local factions are competing, unbounded deference to hierarchical bodies may deprive local church groups of protections given to members of other voluntary associations, and thus establish religion. Of course, deciding just which approach has the least tendency to establish religion is difficult, but these writers


131. Galligan, supra note 129, at 2023, 2025.

132. See Arlin M. Adams & William R. Hanlon, Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment, 128 U. Pa. L. Rev. 1291, 1294-95 (1980); see also Weisberg, supra note 85, at 969 (considering the claim that detached appellate tribunals in hierarchical denominations may be more objective than congregational judiciaries, but concluding that greater deference is unconstitutional).
correctly see that a sharp difference in treatment between hierarchical and congregational churches is not defensible.

B. Comparison with Nonreligious Associations

How far does the polity approach conform with approaches to non-religious, secular associations? At least some value inheres in courts treating church disputes as they treat those arising within secular associations. If different treatment seems favorable to religious organizations, one could argue that it establishes religion. If different treatment deprives participants in religious organizations of various rights that attach to membership in secular organizations, one could argue that this denies free exercise of religion. Needless to say, the same difference that enhances the power of hierarchical authorities may give members less protection.

The significance of achieving equal treatment of religious and secular organizations may seem greater now than it has in our earlier history. During the last two decades, the Supreme Court has constructed a principle barring discrimination by content as the centerpiece of free speech analysis, and it is moving toward a view of both the Free Exercise and Establishment Clauses under which a government acts constitutionally if it treats religious claimants and organizations like nonreligious ones. Varying treatment according to the underlying purposes of an organization is not necessarily unconstitutional, but special distinctions between religious and nonreligious groups need to be justified.

Comparing the treatment of religious bodies to that of secular organizations is difficult because cases similar to property disputes among churches rarely arise in other nonprofit organizations. Members of nonprofit corporations or the government often bring suit claiming that those controlling assets of the corporation are either incompetent or are diverting assets for personal use. Such claims of incompetence or corruption are not closely analogous to the church cases we are addressing; for a closer parallel, we have to imagine a dispute in which those in control are competent and not personally greedy, but have a vision of the aims of the association that differs sharply from the vision of those who sue. If the controlling members deviated far enough from the terms under which an association was founded (or under which major assets were given), a court would find that to be a breach of fiduciary duty. A court "would resolve the conflict by interpreting the relevant rules, agreements and conduct of the parties," and by inquiring about reasonable

To take an extreme example, if a large grant were given to finance the work of needy artists, the managers of the association would not be able to spend the money to assist needy scholars, even if they honestly believed that that was a higher priority, and that scholarship was a form of art.

In a more complicated actual case, New York's highest court reviewed the plan of the Multiple Sclerosis Service Organization of New York, Inc. (MSSO), to distribute its assets. MSSO had withdrawn from the National Multiple Sclerosis Society in 1965 because it wished to concentrate on rehabilitation, whereas the National Society focused mainly on research. When MSSO could no longer continue its major activities because of "dwindling finances and the advancing age of its members," a committee proposed to donate its remaining assets to other organizations. These organizations provided service to clients with irreversible and chronic medical conditions other than MS. The New York City Chapter of the National MS Society claimed that assets built on donations to help sufferers of MS should more appropriately go to it. The Appellate Division regarded the relevant state statute as adopting the traditional cy pres standard, under which assets must be distributed to organizations performing activities "as nearly as possible" to those of the dissolving charitable corporation. Since most donations had come from victims of MS and their relatives and friends, that court concluded that the assets should go to an organization helping those afflicted with MS. The Court of Appeals disagreed. The statute's phrase "engaged in activities substantially similar to" was meant to allow more latitude of choice than the old cy pres standard, and the statutory provisions were also designed to confer a substantial role on the board of the dissolving corporation in making the choice of beneficiaries. The point that mat-


137. See In re Multiple Sclerosis Serv. Org. of New York, Inc., 496 N.E.2d 861, 861 (N.Y. 1986); see also New Jersey Ass'n for Children with Learning Disabilities v. Burlington County Ass'n for Children with Learning Disabilities, 415 A.2d 1196, 1197 (N.J. 1980) (the Superior Court of New Jersey, Appellate Division, looked at relevant documents to conclude that property was held by the local section; it explicitly rejected the trial court's view that the case was governed by the principles applicable to hierarchical religious organizations).


139. See id. at 863.

140. See id.

141. Id.

142. Id. at 867.
ters for our purposes is that under either the common law *cy pres* standard or New York's less restrictive approach, courts will compare the purposes of various charitable organizations to see how closely they resemble each other. They would not undertake a similar inquiry about religious purposes.

Since all judicial approaches to religious disputes have varied somewhat from the standard approach to secular organizations, we need to inquire how the polity approach differs, and whether it differs more than do other approaches. We also need to ask whether an approach that eliminates differences between churches and other organizations is defensible.

For both hierarchical and congregational churches, the polity approach differs from how secular associations are treated in that courts will not say when a shift in dominant understanding of purpose has become too great. The polity approach also gives extraordinary treatment to religious associations in its absolute deference to the highest judicatures of hierarchical religious organizations. The consequence is that property will be held in trust for a national church if the highest national church authority says so. In certain respects, congregational churches are regarded like secular voluntary associations; courts make sure a true majority has acted, and enforce internal rules and (to some degree) fair procedures and democratic notions of governance.

Although the polity approach of *Watson v. Jones* and its successors does not fit approaches to secular associations very closely, the approach it replaced may have been even worse. Under the rejected standard, there was an implied trust for the general body of a hierarchical church only so long as it remained faithful to fundamental doctrines that had been accepted when property was donated or given in trust, or when a local church joined the general organization; a majority of a congregational church might also forfeit its control of property if it was guilty of a departure from doctrine. If money were given for specific purposes to a secular organization, courts would require that it be spent roughly in accord with those purposes, but they would not investigate in detail whether some ideas related to the basic purposes had shifted. The departure-from-doctrine approach could involve more severe scrutiny of an association's prevailing beliefs and practices than would the approach for ordinary secular associations.

Another odd feature for which there would be no parallel in secular cases concerned crucial moments in time. Suppose a church building was financed by local parishioners, and the local church then joined a national hierarchical denomination. Many years passed, and the money spent for upkeep and improvement of the church far exceeded the origi-

143. Nonetheless, the courts would presumably not accept a decision by the highest authorities to abandon religion altogether and convert efforts to another sphere of activity.

144. See Sirico, supra note 136, at 344–47.
nal expenditure. Even if the original church building had not been given in trust or donated, the departure-from-doctrine test used the date of joining the hierarchical organization to assess shifts in doctrine and practice.\textsuperscript{145} No matter that over the years both the general church and the majority of the local church had altered their views and practices substantially. Understandings at the time of joining controlled. The test gave short shrift to historical evolutions in doctrines and practices, importing a rigidity one would not expect with secular associations.\textsuperscript{146} Thus, the old departure-from-doctrine approach may have corresponded even less well with how secular organizations are treated than the modern polity approach.

Louis Sirico has commented that the deference component of the polity approach treats churches as alien; its “assumptions about the nature of church organization and about judicial competence describe an extremely autonomous organization that courts treat as more immune from judicial review than any other organization in American society.”\textsuperscript{147} Although Sirico is right that the courts would not be so hesitant to consider the procedures of internal governance of other organizations,\textsuperscript{148} perhaps we can imagine a secular analogue to their withdrawal from issues of religious doctrine.

Courts have rarely, if ever, dealt with splits in secular organizations over purpose, when the purposes involved promulgating ideas. Suppose that a national organization set up to protect “freedom of speech” shifts its position across a substantial spectrum. In contrast to earlier stands, it now supports stringent restrictions on sexually explicit speech and hate speech, on the ground that all such speech interferes with the “free speech” of members of audiences and those who are indirectly affected (e.g., women, in the case of pornography consumed by men). A “local” faithful to the old views withdraws from the national and claims that it should keep property donated to it. Suppose further that a court would be inclined to find that the property was given in trust for the national, were there not a powerful claim that it had deviated from the organization’s basic purposes. This problem resembles that which arises in religious cases.

The Supreme Court has strongly emphasized that the First Amendment bars government from making content distinctions among speech, favoring one position over another because of its content. Of course, the local’s claim here is not that its positions are morally and constitutionally more sound than those of the national organization, but

\textsuperscript{145} See Watson v. Jones, 80 U.S. (13 Wall.) 679, 734 (1872).
\textsuperscript{146} Cf. Sirico, supra note 136, at 351 (comparing judicial review accorded to religious associations’ internal decisionmaking to that applied to secular organizations).
\textsuperscript{147} Id. at 351; see id. at 353.
\textsuperscript{148} See also Adams & Hanlon, supra note 132, at 1294–95 (distinguishing deferential standard applied to religious hierarchical organizations’ internal decisions as exception to normal rules of property dispute resolution).
that its positions fit with the purpose of promoting free speech as under-
stood by those who donated property. Nevertheless, a court (or jury)
reaching a judgment about this will find it hard to avoid considering the
merits of the national's shift. Property may have been donated before
feminists developed the argument that pornography oppresses women.
A judge persuaded by this feminist argument might reason that the
donor would have regarded a shift in position on sexually explicit speech
as desirable, if she had been aware of the argument. On the other hand,
a judge who regards the argument as weak might decide that the national
organization must have given way to political pressure or been captured
by people who no longer sympathize with its basic purposes.

A court facing such a problem might take the view that it should not
decide which positions on particular issues fit with overall political pur-
poses because doing so would be too close to deciding which positions
are right. The court might come up with a rule of deferring to the deci-
sions of the highest authorities in hierarchical organizations on such
subjects. If so, when ideological positions were crucially at issue, we
would have a secular equivalent to a central aspect of the deference rule
for churches. One consequence would be that a defender of deference
for church decisions could deny that that approach differs from the ap-
proach for all secular organizations. He could claim that the treatment
is, or should be, similar for secular organizations that are relevantly
similar.

Whatever may be true for ideological secular organizations, there is
substantial divergence between judicial deference to higher ecclesiastical
bodies and judicial treatment of most secular associations. Whether
"neutral principles" fits any better with approaches to secular organiza-
tions is a question I reserve for the section on neutral principles.

C. A Contractual Approach?

The Watson and Serbian Eastern Orthodox Diocese Courts cast the de-
ference approach as one based on contractual principles: People join hier-
archical churches with the understanding that the highest bodies will set-
tle matters. But the idea that members give implied consent to whatever
the hierarchy does is not tenable for many members of many churches.
They may have consented, instead, to acceptance of the hierarchy's deci-
sions so long as the hierarchy observes the rules of the church. Even
without violating its own rules, the hierarchy may shift radically in some
respect. It may admit women or gays as priests for the first time, or fall
under the control of an atheist government. Do local church members
mean to adhere to hierarchical decisions in such altered conditions,
rather than to the principles prevailing when they decided to join, or to
local officials who refuse to follow the hierarchy? No confident general-
ization can capture what highly diverse local members have in mind.
However, Sirico has commented, "[i]n a country that extolls democracy,
most citizens would find it permissible but curious if all members of hierarchical churches engaged in complete submission to authority."  

If we stood back from the law compelling deference, we might conclude that much depends on the particular denomination involved. Roman Catholics may continue to have a sense that their main attachment is to an international church. In contrast, many Protestants now join a local church that seems suitable, with relatively little concern about the general denomination; they switch denominations freely and, regardless of denomination, may consider the congregational government of their local church as most important. Perhaps donors of property or large sums of money have more attachment to a central denomination than the average parishioner, but one can hardly assume that loyalty is to the general denomination, regardless of how doctrines shift, procedures are observed, or foreign political influences are brought to bear. And, as Michael Galligan has urged, "[s]ome churches resemble a federation of autonomous groups rather than a totally integrated entity. Even when a church is essentially hierarchical, agreements of union between specific churches and the central body may modify the amount of power granted church authorities." Any notion that loyalty would be to the general church in all circumstances is a fiction about the wishes of donors and contributors grounded upon the division of all church government into two rigid boxes.

Could one nevertheless defend deference as the best civil courts can do, given their incapacity to discern subtle loyalties of church members? Many people's long-term attachments do still lie with general churches, and these people may believe that the higher bodies of their churches, including perhaps their own structure of religious courts, can best satisfy their expectations. Perhaps disregarding procedural lapses is justified because identifying violations is often complicated in a hierarchical church structure, and procedural specifications may be merely guides rather than prerequisites for a valid decision. In light of these uncertainties, is deference to hierarchical judgment a workable rule that at least does reasonable justice to expectations?

149. Sirico, supra note 136, at 352.

150. See Roger Bennett, Note, Church Property Disputes in the Age of "Common-Core Protestantism": A Legislative Facts Rationale for Neutral Principles of Law, 57 Ind. L.J. 163, 171–73 (1982). In the area where I went to school, the "community" church happened to be Dutch Reformed. Most of the teenagers confirmed in the church, and many adult members, had little special feeling for the Dutch Reformed Church, as contrasted with the Presbyterian, Methodist, or Congregational denominations. In the era of Watson, church members cared more about their particular denominations. See id.

151. Galligan, supra note 129, at 2024 (footnote omitted).

152. The fact that property is held formally by local churches does not indicate primary loyalty, since many states once required that property be held in the name of local churches or local church corporations.

153. Nevertheless, the more elaborate codes present in many hierarchical churches make this doubtful.
At least in the modern world, this rationale rings hollow for many churches that count as hierarchical. For situations in which members claim that religious bodies have acted in blatant disregard of requisites established by the churches themselves, one would need to have a dim view about other approaches to conclude that absolute deference is the best way to satisfy the expectations of members.

D. Favoring Unity of the General Church?

Another conceivable reason for favoring the general church as much as the deference approach does is to promote unity or centralized government. Perhaps part of what was going on in *Watson v. Jones* was a distaste for secession. After all, the dissenting members of the local church made claims that resembled those the southern states had offered for withdrawing and creating a new political unit. In both instances, the seceders claimed that the national body had taken action that undermined its legitimacy. The Supreme Court may well have been hesitant to endorse this basis for withdrawal from a national church that had supported the federal government and shared its opposition to slavery. Whatever view may have been taken after the Civil War, a general opposition to separation could not now be defended.

Nor should legal rules of the state intentionally favor centralized church government over local power. The law should be as neutral as possible about forms of church governance; that principle derives from the basic idea of nonestablishment of religion. That principle is rightly dominant in our polity and should guide decisions. Were there to be any favoring, it should be for local participation and fair procedures. If one focused on desirable involvement of citizens in political life and recognized churches as one of the main sources of civic participation, one might favor participatory forms of church organization over forms in which decisions are made by "professionals" from the top down. This would generate a preference for congregational and presbyterian governance over more strictly hierarchical forms, and it would suggest a degree of scrutiny of the procedures of the highest judicatories of general churches. The model of extreme deference is hardly a democratic one. Both the dominant norm that the state should not favor any form of church government and a conceivable norm that the state should favor

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155. Very briefly, if the government is to allow religious liberty and avoid interference in religious organizations, it should not favor some forms of church government over others.
156. Presbyterian governance includes a graded system of representative ecclesiastical bodies exercising legislative and judicial powers. See *Merriam Webster's Collegiate Dictionary* 921 (10th ed. 1994). I am assuming that the highest representative body is understood to be limited in its authority. For a perceptive account of debates in the Presbyterian Church between fundamentalists and modernists during which aspects of the authority of the National General Assembly were sharply disputed, see Bradley J. Longfield, *The Presbyterian Controvery*, especially pp. 151–52 (1991).
participatory forms of church government condemn the deference approach.\textsuperscript{157}

E. Avoiding Ecclesiastical Questions: Determining the Form of Polity

As it has developed, the polity approach does allow civil courts for the most part to avoid ecclesiastical questions. For hierarchical churches, courts need only accept decisions of the hierarchy, and any greater intervention in congregational churches is based on democratic principles, not church doctrines. However, the polity approach requires an initial decision about the nature of a church’s government. Does that decision involve interpreting ecclesiastical matters? The crucial question is whether courts can identify principles of church government without reference to doctrine (or perhaps disputed doctrine).

For every Christian church and probably every religious organization, forms of government relate to doctrine. To take a familiar distinction, the Reformation tenet of the “priesthood of all believers” partly explains why Protestant denominations have more representative forms of church government than the Roman Catholic Church, within which the special religious authority of priests and bishops figures so prominently.\textsuperscript{158} In religious institutions, government is not independent of belief; rather, it reflects an understanding of how God relates to human beings and how human beings seek religious truth.

Nevertheless, civil courts may be able to identify principles of governance without inquiring into doctrine (or disputes about it). If, for example, final authority is squarely placed in local congregational churches to govern their own affairs, or clearly stated rules confer wide powers upon Roman Catholic bishops, courts can determine these features of govern-

\textsuperscript{157} In my view, the most for which an objective of strengthening participatory democracy within churches could properly be used is as a tie-breaker when a choice must be made, and no other defensible basis presents itself. Even this marginal use probably compromises the overriding principle of governmental neutrality regarding church organization. In Master v. Second Parish of Portland, 36 F. Supp. 918, 926–27 (D. Me. 1940), aff’d on other grounds, 124 F.2d 622 (1st Cir. 1941), the court interpreted the Maine Constitution as imposing an exclusive right to elect their own pastors on all churches. Such an imposition should be regarded as unconstitutional under federal law.

\textsuperscript{158} When I was in high school, the national Congregational denomination proposed to merge with the Evangelical and Reformed denominations, to form the United Church of Christ. My father was a vigorous opponent of the merger. For him, part of the heart of Congregationalism was the autonomy of local churches, and the merger contemplated some greater authority in regional and national bodies than had previously existed for Congregationalists. The legal controversy over the merger is discussed in Giovan H. Venable, Courts Examine Congregationalism, 41 Stan. L. Rev. 719, 727–32 (1989) (suggesting that neither of the Supreme Court’s approved approaches is particularly well-suited for determining who has the right to funds held by national bodies of congregational churches when a split occurs).
ment without grappling with the doctrines that produce them. Such instances present no trouble for civil courts identifying structures of church government.

However, some decisions about polity may require inquiry into disputed religious understandings. I was once consulted in a case involving a split among a group of Plymouth Brethren who did not believe in formal rules of organization. The church members were divided in part over their degree of loyalty to a leader in England. For one group, that loyalty was a paramount aspect of their faith; for the majority, it was not. Thus, for the first group, the church was genuinely hierarchical; for the second, congregational. A court could not reach a definitive resolution of that question without either deciding what was central to the group's understood faith at some point in time, or accepting the majority's view in conditions of disagreement and uncertainty.

Ordinarily, courts following the standard polity approach have no problem deciding whether a church is congregational or hierarchical. This ease is largely a consequence of the arbitrariness of the two categories. Any church whose central body has significant power is treated as hierarchical; thus, major denominations such as the Roman Catholic, Episcopalian, Presbyterian, and Methodist Churches are hierarchical. Baptist and Congregational churches are congregational. Nonetheless, some cases have caused difficulty, as when two merged local churches of different denominations establish contact with one of the denominations, but are not completely absorbed by it. May the semi-autonomous local church be congregational in government, though it is attached to a hierarchical denomination? Ira Mark Ellman has suggested that the governance of an autocratic minister of a storefront church may

159. Another possibility is that civil judges might need to understand some aspect of doctrine to grasp relations of church government, but the doctrines and their connection to church government would be undisputed and easily comprehensible to nonbelievers.

160. See Clough v. Wilson, 368 A.2d 231, 233-34 (Conn. 1976). Because the Plymouth Brethren opposed participation in activities of the state, the choice to litigate itself seemed regrettable and paradoxical. This case was ultimately dismissed for lack of jurisdiction, but, in dicta, the court criticized the lower court for failing to look for possible "neutral rules," with which to resolve the dispute. See id. at 234.


162. See Note, Judicial Intervention in Church Property Disputes—Some Constitutional Considerations, 74 Yale L.J. 1113, 1121-22 (1965) (discussing Master v. Second Parish of Portland, 124 F.2d 622 (1st Cir. 1941)). In another case, the Pennsylvania Supreme Court, considering a "Greek Catholic Church" that had accepted Roman Catholic priests, concluded that the local church had never rendered itself subject to the authority of the Roman Catholic Church. See Malanchuk v. Saint Mary's Greek Catholic Church, 9 A.2d 350 (Pa. 1939); see generally Robert G. Casad, The Establishment Clause and the Ecumenical Movement, 62 Mich. L. Rev. 419, 440 n.69 (1964) (discussing cases where congregational local affiliated with hierarchical denomination and later withdrew).
be hard to classify.\textsuperscript{163} A single local church hardly constitutes a hierarchy, but the church lacks the democratic form of a congregational church. Ellman notes one instance in which an association of Baptist churches was considered hierarchical.\textsuperscript{164}

In an instance when church polity is in doubt, courts must consider how they are to decide that question. In \textit{Antioch Temple, Inc. v. Parekh}, the Supreme Judicial Court of Massachusetts indicated that the determination of church structure is a fact.\textsuperscript{165} Although courts must eschew inquiry into religious doctrine and usage, they may look at ecclesiastical documents. An Ohio appellate court noted in dictum that certain Ohio cases had used a "living relationship" test; though not appropriate for the issues in the case, that test "looks beyond ordinary indicia of property ownership expressed in deeds, articles of incorporation, and like documents, and examines the rituals and practices of the churches in dispute to determine the governmental relationship or polity prevailing."\textsuperscript{166}

The two-category approach to church government is crude, but the more courts attempt to refine distinctions, asking whether hierarchical bodies have authority over particular subjects in particular circumstances, the more their classifications in individual cases may turn on disputable ecclesiastical matters. Some modern courts have suggested that a denomination may be hierarchical for matters of doctrine and practice but not hierarchical for control of local church property.\textsuperscript{167} This combination could make sense. Local churches would be affiliated with a general church and would agree to adhere to its doctrines and practices. If a dispute arose between the general and local churches, the general church could expel the local for failing to adhere to its doctrines or practices, but the local would keep its property. The Minnesota Supreme Court treated a local church of the Serbian Orthodox Church in this way, holding that the general church could not dictate how an intracongregational dispute about membership and property should be resolved.\textsuperscript{168} Under this approach, some disputes within local churches are not subject to hierarchical determination.

\begin{itemize}
\item \textsuperscript{163} See Ira Mark Ellman, Driven from the Tribunal: Judicial Resolution of Internal Church Disputes, 69 Cal. L. Rev. 1378, 1404 (1981); see also Venable, supra note 158, at 727–32, 746–49, indicating difficulties deciding who has rights in assets held by national organizations of congregational churches.
\item \textsuperscript{164} See Ellman, supra note 163, at 1384 (citing Crumbley v. Solomon, 254 S.E.2d 330 (Ga. 1979)). The hierarchical nature of this particular association was deduced by the court from a review of the minutes of its annual meeting. See \textit{Crumbley}, 254 S.E.2d at 332.
\item \textsuperscript{165} 422 N.E.2d 1337, 1343 (Mass. 1981).
\item \textsuperscript{166} Southern Ohio State Executive Offices of Church of God v. Fairborn Church of God, 573 N.E.2d 172, 182–83 (Ohio Ct. App. 1989).
\item \textsuperscript{168} See Piletich v. Deretich, 328 N.W.2d 696 (Minn. 1982).
\end{itemize}
A court inclined to find that a church is hierarchical only in some respects must consider carefully the precise lines of division. Of crucial importance is ultimate control over membership and officers in the local churches. In some churches, a regional or national organization has final say over who are members and who are the trustees (whose responsibilities include control of property)\(^6\). If the general church can expel members of the local church and replace wayward trustees, assigning local churches (final) power over property may be ineffective or unwise. It may be ineffective if the general church can designate who constitutes the local church or who are local trustees controlling the property.\(^9\)

Perhaps the local church could withdraw with its property if no local church members agreed with the national, but the national might succeed with only a small local faction.

One can imagine this combination of authority having a dismal effect on relations of local and national churches. When a local chooses to withdraw by majority vote before a national expels members or replaces trustees, it may succeed in keeping its property. Knowledge of this fact might lead members of the local to say to themselves: "We had better withdraw before the national learns of our serious disaffection. If they find out about our disagreement with their policies and expel members or replace trustees, we may forfeit our property." A national, learning of serious disaffection, may reflect: "We had better ensure that the membership and trustees are loyal or we may lose this church property." Local church members considering withdrawal may care tremendously whether they will be able to maintain their church building, and the national will hardly be indifferent, especially if a local minority agrees with it. As a consequence, the dynamics of local church control of property and central church control of membership and trustees could encourage each side to act quickly and make a preemptive strike rather than to work strenuously to settle differences. Any court that concludes that a church is hierarchical about doctrine but nonhierarchical about property should allocate responsibilities in a manner that is not potentially destructive in

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170. An illustrative example is Korean United Presbyterian Church v. Presbytery of the Pacific, 281 Cal. Rptr. 396, 406–08, 412–14 (Cal. Ct. App. 1991). The court said the identity of the "true" local church was an ecclesiastical matter, to be judged by superior tribunals in the church. Using neutral principles, the court also concluded that property was held in express trust for the national church. However, suppose it had not, determining rather that the church was congregational for matters of property or that neutral principles did not establish a trust. In that event, the general church would have had no trust, but it could have ensured that the property was used by people loyal to it by expelling members who planned to withdraw. This problem is avoided if the local church has final say over membership, as in Piletich, 328 N.W.2d at 696.
this way. Perhaps these complexities are one reason why most courts have simply assumed that churches that are hierarchical about doctrine and practice are also hierarchical about property.\textsuperscript{171}

We have seen that the standard polity approach has some manifest virtues in comparison with the departure-from-doctrine approach that it replaced. It also has grave defects. Most important among these are the extreme deference to higher church authorities, even when they have violated rules of the churches themselves, and the indefensible differentiation between congregational and hierarchical churches with respect to requirements of fair process. The polity approach should be embraced only if alternatives have even greater defects. I now turn to consider neutral principles, its main competitor.

V. Neutral Principles of Law

Under the neutral principles approach, courts employ ordinary secular principles to resolve disputes involving church government. I first point out that a neutral principles approach draws no sharp distinction between how congregational and hierarchical churches are treated. I then compare that approach with principles applicable to secular associations. Under neutral principles, courts do not afford more deference to church authorities than that given authorities of secular associations, but the restriction on religious evaluation means that courts will undertake a less complete investigation of organizational purposes and of relations between various official bodies than they would be willing to do with most nonreligious associations. (This problem, as I have noted, also exists when courts defer absolutely to higher church authorities.)\textsuperscript{172} Neutral principles, fairly applied, afford religious organizations more ability to carry out their exact intentions than the extreme deference automatically given higher authorities under the polity approach, but I show why in various ways a result under neutral principles may not match intentions. I explore the crucial questions under neutral principles of which documents courts may examine and what kinds of inquiry they should undertake. Buttressed by the subsequent treatment of Episcopalian and Presbyterian cases, this discussion reveals significant variance in judicial attitudes, and suggests how variable the results in similar cases may be under courts employing neutral principles in different ways.

\textsuperscript{171} See Ross, supra note 169, at 306; Sirico, supra note 136, at 350. According to Patty Gerstenblith, citing a limited number of cases purporting to apply neutral principles, "[a]ll [these] courts will defer to the hierarchy's determination of the 'true' religious entity. Some courts, however, refuse to grant secular authority and control to this religious entity." Patty Gerstenblith, Civil Court Resolution of Property Disputes Among Religious Organizations, 39 Am. U. L. Rev. 513, 545 (1990) (footnotes omitted). If control over the religious entity is thought to include the power to decide who are the controlling members of the local church for governance of property, the combination of power and incapacity of the national church could have the unfortunate consequences I have noted in the text.

\textsuperscript{172} See text accompanying notes 136–142.
A. Comparative Treatment of Congregational and Hierarchical Churches

An immediate advantage of this approach is that it draws no sharp distinction between congregational and hierarchical churches. Since courts need not place churches into one of two arbitrary boxes, they can be more responsive to the range of actual polities. Further, hierarchical authorities are not afforded an automatic deference denied to congregational bodies. Perhaps, at the end of the day, decisions of hierarchical bodies will be accepted as more final than votes of congregational bodies, but that will be because of powers granted within religious organizations, not because of some initial categorization by civil courts.

B. Comparison with Nonreligious Associations

Neutral principles of law may also appear to have a distinct advantage over deference in treating churches more nearly like nonreligious trusts and associations. But how well do neutral principles achieve the ideal that, as one commentator has put it, courts should use "the same legal principles that are used to resolve equivalent non-religious disputes instead of applying a special set of legal doctrines"? If neutral principles treated religious organizations like other associations, that ideal would be substantially achieved.

But the concept of neutral principles suggested by the Supreme Court and developed in more detail by other courts limits inquiries into purpose. With ordinary secular associations, courts may examine relevant documents and extrinsic evidence to discern how activities fit underlying purposes, and to gauge whether primary attachment is to a local or general organization. With churches, to the extent that courts may not delve into church documents, doctrines, and practices, they are precluded from examining significant indicia of purpose and attachment.

I have previously suggested that courts might entertain similar limits for organizations mainly engaged in ideological advocacy. The free speech principle of "no content restriction" might entail limits on judicial inquiry similar to those that apply for religious associations. But no cases establish such a limit, and none exists for most secular associations.

This creates a dilemma. Insofar as courts rely on decisional principles that avoid disputes about doctrines and church polity, the principles may be "neutral" in not requiring religious understanding, but, by effectively excluding forms of investigation analogous to those for secular associations, these same principles result in unequal treatment of religious and secular associations. Just how unequal the treatment is depends on how much neutral principles puts aside as impermissible inquiry. That

173. Gerstenblith, supra note 171, at 516.
174. I explain above why differences in historical background would result in something less than genuine equality of treatment. See supra text accompanying notes 72-75.
175. See supra text following note 148.
question in turn concerns both what documents and practices may be investigated and the tools of interpretation available to understand the documents and practices. The state cases, to which we shall turn shortly, reveal divergences on these questions much greater than one might imagine from reading Supreme Court opinions. They show that applications of neutral principles are nonuniform and unpredictable.

Apart from what they bar from consideration, neutral principles differentiate churches from secular associations in an indirect, often unrecognized way, which involves their operation against the preexisting legal background. Courts are generally hesitant to create trusts in favor of parties who do not hold property: They will find express trusts only if the language creating them is explicit, and they will find implied trusts only when the considerations favoring them are strong. When this hesitancy has been consistent over time, those who form secular associations with local and general organizations or who donate property have been aware of what they needed to do to create trusts for general organizations.

For a long time, the law for religious associations was different. In many modern cases, the crucial transactions took place years ago under a legal regime in which statutes required that property be held by local churches, and the decisional law for hierarchical churches adopted implied trusts in favor of the general church. Since the general church was the beneficiary of a trust even if no trust was expressed or might otherwise have been implied, it could understandably take the view that express trust language was unnecessary. If the background legal settings for churches and secular voluntary associations were very different in, say, 1950, it may turn out that treating identically documents from the 1950s that look about the same will not be equal treatment at all.

A possible answer to this worry is that once Jones v. Wolf was decided, churches could put their affairs in order. This answer has force when everyone agrees about what should be done and is willing to engage in the required legal formalities. Unfortunately, these conditions are not always satisfied. Many clerics and members feel that churches should

176. See, e.g., Suttles v. Vogel, 533 N.E.2d 901, 905 (Ill. 1988) (constructive trust will not be imposed absent “clear, convincing, strong and unequivocal” evidence of fraud or wrongdoing); Baker v. Leonard, 843 P.2d 1050, 1054 (Wash. 1993) (“clear, cogent, and convincing evidence” required to impose constructive trust); Restatement (Second) of Trusts §§ 23–25 (language creating express trust must be unambiguous).

177. If they were not aware, they could have been aware.

178. Initially, the implied trust could be forfeited by a departure from doctrine; after Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969), if not before, that forfeiture component was eliminated.

179. When courts assessed departures from doctrine, even the language of an express trust for the general church might have been unavailing against a claim that the general church had left its doctrinal moorings.

handle their own affairs, without a sharp eye to what the civil law would require in various contingencies. For reasons similar to those that dis-\c\cline{\engaged couples from providing in detail for property distribution in the instance of divorce, church members may feel uncomfortable trying to be very specific about the consequences of a split. On some occasions, the general church thinks that property should be held for it, but a somewhat disaffected local church disagrees, or is uncertain or divided. The general church may wish not to exacerbate existing tensions by forcing a definitive decision the local church wants to avoid. Thus, the power of churches to "set their affairs in order" does not eliminate the significance of the preexisting legal setting for long distant transactions.

Yet another aspect in which treatment of religious associations may differ from that of most secular associations is the absence of external state policies to resolve difficult disputes. For ordinary associations, a state may have policies favoring larger or smaller associations, favoring democratic modes of governance, and so on. States should not favor some forms of church government over others; their neutral principles must steer clear of external policies they might otherwise use.

C. A Contractual Approach?

Legal principles applicable to secular associations are broadly designed to carry out the understandings of those who have agreed to governing documents or who have made donations. If legal rules deter courts when doubt exists from finding trusts in entities other than property holders, people who donate money or purchase property are on notice that if they do not provide for a trust, one will probably not be found. This gives the law an edge of predictability that may aid people in ensuring that their wishes are carried out. From this perspective, a neutral principles approach for churches is superior to extreme deference, because church organizations and members can model relations as they choose, so long as their choices are clear. They need not submit to drastic differences in consequences because the organization happens to be hierarchical rather than congregational.

Judicial reliance on neutral principles, however, can frustrate the fulfillment of parties' intentions in other ways. Courts may not inquire into some matters about which the parties care a great deal, namely, doctrines and practices. The greater the exclusion, the more legal results are likely

181. If the general church claims the right to property and the local church does not respond, how are the courts to understand what has taken place when the prior law would have assigned the right to the general church?
182. One might view noninvolvement and neutrality as themselves kinds of external policies.
183. I do not think this comment applies to some preference for fair procedures, including notice and hearing, for example, over unfair procedures.
184. See Gerstenblith, supra note 171, at 543–46.
To be sure, church organizations can ensure that a shared intent is clearly embodied in the appropriate secular documents. Although churches do not know whether a state is employing neutral principles (rather than the polity-deference approach) until a state court authoritatively says so, national churches know that many local churches are in states using neutral principles, and they are well advised to structure relations to yield the desired results under that standard. Even when they do so, however, they may face unexpected contingencies for which they have failed to make explicit provision.

I have previously discussed three serious problems about reflecting intent that are relevant here. First, for some disputes, many of the crucial transactions took place before the Supreme Court imposed constitutional limits on how states dealt with church disputes. Transactions may have occurred when property was held for the general churches of hierarchical churches under implied trusts, with a possible forfeiture if a general church had departed from prior doctrine. A restricted neutral principles approach may not discern understandings behind transactions engaged in 1900 or 1935, or indeed 1966. The second and related problem is that when local churches join a national organization in a journey of faith, they may not wish to concentrate on who will control property in the event of an unanticipated disaffection. Major national organizations know that some local churches will consider withdrawal at some time—history teaches this much. They have an incentive to clarify matters in their favor, but they may not want to do that at the price of causing serious conflict, which might occur if local churches were forced, as a condition of membership, to acknowledge that property is held for the national.

The third problem mainly concerns small, relatively informal churches. For some groups, formulating precise legal relations about property is antithetical to religious faith; others may lack funds to pay lawyers to draw things up just right. Often, people may have no precise understanding of who should control property after an unforeseen bitter split, or their understandings may be divided. A court seriously trying to give effect to the parties' intentions might have to ask what they predominantly would have wanted, based on their primary loyalties, if they had been confronted with a split they did not foresee. As the examination allowed under neutral principles becomes more restrictive in terms of

185. As Louis Sirico has said, "[i]n a parallel dispute involving a secular voluntary association, a court would resolve the conflict by interpreting the relevant rules, agreements, and conduct of the parties .... Incomplete evidence and excluded arguments [in church disputes] render a court unable to ascertain the reasonable expectations of the parties." Sirico, supra note 136, at 338. Roger Bennett argues, however, that because most Protestants have congregational attitudes toward church government, the neutral principles approach overall tends to correspond to the expectations of church members. See Bennett, supra note 150, at 171–72, 186–87.

186. See supra text accompanying notes 173–175.
what courts may consider, any court's actual inquiry will diverge further from a full inquiry about intent.

D. Avoiding Ecclesiastical Questions: Which Documents and What Kind of Inquiry?

1. What Documents May Be Examined? — The neutral principles approach, like the polity approach, is designed to keep civil courts out of the business of resolving disputed ecclesiastical questions. An initial issue for a court employing neutral principles is what documents it may examine. The three rough possibilities are that a court may look at: 1) any relevant documents; 2) secular documents as well as sections of church constitutions and by-laws that are secular in their import; or 3) only secular documents. Another issue is whether the court may examine practices within the church over time that are not reflected in the relevant documents, in order to give meaning to vague or ambiguous passages in documents or to indicate that the real practices of the church do not follow the formal documents.

The most restrictive proposal of which I am aware, one defended by Louis Sirico, is that courts look only at secular documents, such as deeds and instruments of trust, including church documents only when they are incorporated by reference in the secular documents and are not too general or ambiguous.\(^{187}\) The claimed merit of this proposal is that it would make church disputes over property manageable by civil courts.\(^{188}\) The test would exclude much of relevance for original understandings, but, as people became aware that this test would be used, they could formulate their relations accordingly.

This proposal has two very serious drawbacks. First, the stringency of its restrictions could produce very unfair results when the crucial transactions had occurred prior to its adoption.\(^ {189}\) Second, because understandings may diverge or be uncertain and because many churches do not order their secular legal affairs with great care, we cannot suppose that churches, like major corporations, will always formulate their understandings precisely in secular documents.

\(^{187}\) See Sirico, supra note 136, at 357–58. The author is clear that this approach may not capture the expectations of parties, but he regards an approach that candidly is not designed for this purpose as preferable to one that purports to reflect expectations and fails to do so. See also the recommendation of Marianne Perciaccante, The Courts and Canon Law, 6 Cornell J.L. & Pub. Pol'y 171, 192 (1996), that civil courts not interpret canon law.

\(^{188}\) See Sirico, supra note 136, at 358.

\(^{189}\) This feature could be ameliorated by making operation of the rule prospective, but this is probably not an area where a prospective-only rule would be desirable. The important transactions often happened decades ago, and so courts could still be applying the “old rule,” whatever that was, to cases 50 or even 100 years from now.
How far are these various possibilities realized in judicial decisions? Few courts have adopted a stringent secular documents test, and the Supreme Court certainly has not required one. When it decided *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the Supreme Court remanded to the state courts a pending Maryland case in which two local churches had separated from the Church of God. On remand, the Maryland Court of Appeals determined that it had properly applied a neutral principles approach. After examining state statutes governing the holding of church property, the terms of the instruments deeding the property to the local churches, and provisions of the constitution of the general church and of the local church charters, the state court concluded that the majorities within the local churches could withdraw from the general church and retain their properties. The Supreme Court dismissed an appeal, a decision on the merits, in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.* Its per curiam opinion said that “the Maryland court’s resolution of the dispute involved no inquiry into religious doctrine.” Whatever may be the limits of inquiry, courts are not precluded from examining church constitutions and bylaws. The Court went further, in a sense, in *Jones v. Wolf*. On the issue of identifying the “true congregation” within the local church, the Court indicated that Georgia might have a presumption of majority rule, but that a court was required to look in the corporate charter or constitution of the general church to see if that presumption should give way.

Occasionally, courts have indicated that passages should not be considered because they are parts of essentially religious documents. For example, the Pennsylvania Supreme Court said in 1985, “[t]he . . . reliance on selected passages from the Book of Order was misplaced in that the court ignored the overall intent of that book as a means of overseeing the spiritual development of member churches.” However the court’s language is interpreted, its argument fails. The court might have believed that what was mainly a religious document was not intended to have secular legal significance. It is as if two friends exchanged promises with the

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190. For one example, see Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen, 256 N.E.2d 212, 217 (Ohio 1970).
193. See id. at 166–70.
195. Id. at 368.
197. But see Ellman, supra note 163, at 1999, for a different interpretation.
clear understanding that they would not be enforceable at law. Although churches might want provisions to be nonenforceable, most church constitutions and similar legal standards are designed to have relevance for disputes civil courts must resolve. Even if many internal church standards serve partly to carry forward religious and spiritual understandings, some are also meant for civil enforcement. A second reading of the opinion is that the religious significance of the entire document renders interpretation of apparently secular passages impossible. Again, one can imagine that ordinary sounding terms would take on special significance in a doctrinal setting, but ordinary provisions about control of property should not be so understood. The third understanding of what the Pennsylvania court said is that judges should simply not be interpreting documents the main significance of which is religious. But this position makes little sense when particular passages bear on a civil dispute and do not themselves require an inappropriate form of interpretation. Most courts, sensibly, have not construed neutral principles to restrict the kinds of documents that can be examined. Courts should be able to look at any documents, so long as they can interpret crucial passages in the appropriate way.

2. The Nature of the Inquiry — Deciding what documents may be examined is simpler than determining how they may be examined, and what else may be considered. Language in express trusts and in other documents with secular importance may be examined for its ordinary (nonreligious) implications, but may courts go beyond this? To understand the possibilities, it helps to distinguish doctrines, practices, and church government. Doctrines include, for example, the belief in the Trinity, the significance of communion, and the authority of the Bible. In contrast, practices include such matters as an all-male priesthood (or a priesthood open to women), worship on Sunday (or Saturday), and use of wine for communion. Government, in turn, concerns the procedures and structures of authority, including, crucially, relations between a denomination’s general church and its locals. As I have suggested, practices and government nearly always bear some relation to doctrine, and one court has remarked, “it is difficult if not impossible to disassociate doctrine from government or determine where the one ends and the other begins.”

The results of cases vary as much as they do partly because opinions reflect confusion over what should be taken into account and whether it matters that a doctrine, practice, or institution of government is undisputed.

199. Fairmount Presbyterian Church v. Presbytery of Holston of the Presbyterian Church of the United States, 531 S.W.2d 301, 305 (Tenn. Ct. App. 1975) (quoting Cumberland Presbyterian Church v. North Red Bank Cumberland Presbyterian Church, 430 S.W.2d 879, 882 (Tenn. Ct. App. 1968)).

200. It is always difficult, however, to tell whether judicial opinions that evidence confusion reflect actual confusion or a desire to obscure troubling points.
Courts typically go beyond express documentary language at least as far as considering undisputed matters of church government; they will look at the basic authority regional and national bodies have over local churches.\textsuperscript{201} No court takes into account disputed matters of doctrine, since Supreme Court cases definitely establish the unconstitutionality of doing so. Some courts talk as if even undisputed matters of doctrine are beyond their inquiry,\textsuperscript{202} and it is indeed doubtful that civil courts should try to draw any conclusions about relations of property from the basic religious doctrines of a group. But then, what of disputed matters of governance? Given the connections of doctrine to governance, a court employing neutral principles should try to avoid disputed questions of governance that cannot be resolved by examining documents with secular import. Some courts, however, have seemed willing to resolve disputed questions of governance as an aid to interpreting otherwise vague language.\textsuperscript{203}

In a case involving the power of the Diocese of a Bulgarian Orthodox Church over a local congregation, an Illinois appellate court suggested that “the court should weigh the conflicting testimony regarding the alleged oral subordination agreement between the local church and regional diocese and any evidence of prior construction or interpretation given by St. Sophia [the local church] to provisions regarding control in its organizational documents.”\textsuperscript{204} Accounts of oral agreements and prior interpretations may be colored by the witnesses’ understandings of doctrines and religious practices. Use of these sources seems appropriate only upon two conditions. A court should screen out whatever matters would be beyond consideration if it were considering written documents, and, contrary to what the Illinois court intimates, it should not try to resolve serious factual disputes about agreements and interpretations that

\textsuperscript{201} See, e.g., Templo Ebenezer v. Evangelical Assemblies, 752 S.W.2d 197, 198–99 (Tex. App. 1988).

\textsuperscript{202} See, e.g., Kaufmann v. Sheehan, 707 F.2d 355, 358–59 (8th Cir. 1983) (dismissing case alleging church officials failed to follow accepted “ecclesiastical due process” on the grounds that the claim involved “inherently religious issues,” without suggesting that these issues are actually in dispute in any way).

\textsuperscript{203} Although not applying it in the case, the court discusses what it calls a “living relationship” test in Southern Ohio State Executive Offices of Church of God v. Fairborn Church of God, 573 N.E.2d 172, 182–83 (Ohio Ct. App. 1989). “The living relationship test looks beyond the ordinary indicia of property ownership expressed in deeds, articles of incorporation, and like documents, and examines the rituals and practices of the churches in dispute to determine the governmental relationship or polity prevailing.” Id. at 182–83. This would include factors such as whether the “defendant attended church conventions, acted as a delegate, had expenses paid, etc.” Kendysh v. Holy Spirit Byelorussian Autocephalic Orthodox Church, 683 F. Supp. 1501, 1510 (E.D. Mich. 1987) (citing United Armenian Brethren Evangelical Church v. Kazanjian, 34 N.W.2d 510, 513 (Mich. 1948)), aff’d, 850 F.2d 692 (6th Cir. 1988).

have not been reduced to writing.\textsuperscript{205} These two conditions were met in a recent New Jersey case in which the court gave some weight to audiotaped assurances a Methodist Bishop gave about the continuing control of local church trustees over property.\textsuperscript{206}

Some practices appear substantially more straightforward than doctrines, but in few cases after \textit{Mary Elizabeth Blue Hull Memorial Presbyterian Church} have courts relied on practices (as distinct from governance) to help settle disputes about control of property. Nevertheless, there are some difficult questions about how traditional practices should bear on the interpretation of express trusts and on the authority of congregations. Specifically, should there be at least some basic practices that a religious body must maintain if it is to continue to hold property given when those practices were in effect?

Shifts to mixed seating from the traditional separate seating of men and women in Orthodox Jewish synagogues raise the relevance of an undisputed prior practice that is altered. In two cases that preceded \textit{Mary Elizabeth Blue Hull Memorial Presbyterian Church}, synagogues held their property with the understanding that use was limited to Orthodox Jewish services. A majority of each congregation voted to allow men and women to sit together. The Michigan Supreme Court sustained the argument by a minority faction that this violated traditional practices.\textsuperscript{207} The Louisiana Supreme Court, on the other hand, decided that Orthodox principles did not bar mixed seating, even though both the charter and donation inter vivos in that case had specified Orthodox services as conducted in Poland.\textsuperscript{208}

A more recent version of the problem did not involve control of property, but one can easily imagine an otherwise similar scenario that would. An Orthodox congregation merged with two already merged congregations; the new congregation affiliated in 1960 with the Union of Orthodox Jewish Congregations of America.\textsuperscript{209} From 1960 to 1983, women had limited participation in services, but, in 1983, a majority voted to grant them full participation. The congregation subsequently amended its bylaws so that members had to commit themselves to equality of women in religious services.\textsuperscript{210} In response, some members sued to

\textsuperscript{205} See Hinkle Creek Friends Church v. Western Yearly Meeting of Friends Church, 469 N.E.2d 40, 45 (Ind. Ct. App. 1984). In that case, the court gave some weight to expert testimony about the hierarchical structure of the Society of Friends and the authority at each meeting level, but it did not say how it would have regarded reliance on such testimony if there had been serious disagreement about degrees of authority.


\textsuperscript{207} See Davis v. Scher, 97 N.W.2d 137 (Mich. 1959).

\textsuperscript{208} See Katz v. Singerman, 127 So. 2d 515 (La. 1961).


\textsuperscript{210} See id. at 960.
void this membership requirement.\textsuperscript{211} According to the trial court, a New York Presbyterian Church case indicated "that if the original precepts of a church were known, uncontested and unambiguous, then those precepts could form the basis of doctrinal trust to which claimants to that church's property must be faithful."\textsuperscript{212} The trial judge concluded that an earlier court-ordered stipulation evidenced that people "devoted to Orthodox tenets" and opposed to mixed seating could continue to be members; the new bylaws interfered with their rights and were therefore invalid.\textsuperscript{213} The Appellate Division reversed, on the ground that "membership requirements are strictly an ecclesiastical matter and decisions of the church or synagogue are binding on the courts."\textsuperscript{214}

Since religious practices often evolve with religious doctrines, in general courts are no more warranted in awarding property because one group has been more faithful than another to traditional practices, than in relying on faithfulness to traditional doctrines. Does this principle leave any room for an express trust that is conditioned on traditional practices of a religion, but does not make reference to any specific practice, such as separate seating? Ira Mark Ellman remarks about property claims after a congregation has voted to have mixed seating:

What the courts needed to decide in the synagogue cases was not the essence of Judaism, an unconstitutional if not impossible task, but rather the essence of the grantor's intent. The courts ought to have determined whether the language of the trust instrument by which the grantor conditioned his gift should have been construed, under normal rules of interpretation, to bar mixed seating.\textsuperscript{215}

What Ellman suggests does not directly involve judges determining whether a departure from a prior practice is significant. But how is a court to make a judgment about "the essence of the grantor's intent," if he or she donated the property well before a sweeping change in conceptions of roles of men and women? How can a judge decide the importance of separate seating and limited participation of women in services, without being affected by how most Orthodox Jews now regard these matters, and, indeed, how the judge himself or herself regards them?\textsuperscript{216} Be-
beyond opinions on those specific practices will lie deeper assumptions about appropriate changes within religions. The prior practice is clear enough, but whether that is crucial for present use of property can hardly be disentangled from what the crucial ingredients of Orthodox Judaism are in modern times. Unless the grantor's wishes expressly cover separate seating, a judgment about that will almost inevitably be colored by an evaluation of the significance of a particular shift and the acceptability of change more generally.

Courts should not assume that a grantor intended continuation of any specific practices, unless the grant explicitly covers those practices, or the new practices, according to an overwhelmingly dominant public understanding, make the group a different kind of religious body. What I have in mind by this latter condition are such instances as a majority of an Orthodox Jewish congregation accepting Christianity or Islam, and adopting the practices of that religion. In that event, a court could reject the congregation's claim that it continued to be Orthodox Jewish.

The possible relevance of an individual's beliefs and practices became an issue in an interesting case that did not involve control of religious property. In that case, a woman attempted to disinter her father's body from an Orthodox Jewish cemetery so that he might be reburied with her mother. The cemetery association refused her request on the ground that, "under Orthodox Jewish law, disinterments are permitted only under very limited circumstances." Orthodox and Reform rabbis who testified disagreed "over how to apply Jewish law to determine the decedent's religious beliefs, [his] desires regarding burial, and whether disinterment would be permitted." Since the father had expressed no wishes regarding burial, the trial court tried to determine his religious beliefs and thereby his wishes about burial. Based primarily on his keeping a kosher home, the court determined that he was an Orthodox Jew,
although he worked on the Sabbath, dined at non-kosher restaurants, and went to synagogue only on high holidays. The court concluded that he would not wish to be disinterred, and that the disinterment would also be a desecration of hallowed ground, with a negative impact on the cemetery. The court of appeals reversed because the trial court had "impermissibly based its determination that . . . [the] father was an Orthodox Jew" and would oppose disinterment "on conflicting theological conclusions of various religious scholars." This resolution of conflicting theological principles was inconsistent with the Establishment Clause.

Does it follow that courts should never rely on individuals' religious beliefs and practices to determine their likely wishes? The Colorado court does not say what its disposition would have been had it been undisputed not only that Orthodox Jews generally wish not to be disinterred, but also that the father was an Orthodox Jew. Should a court use someone's undoubted religious beliefs and practices to conclude that he would not wish to be disinterred? It might be argued that a court should not make such determinations, because reliance on religious beliefs is inappropriate in principle, or because in a country where many individuals do not subscribe to standard doctrines and practices of their religions, one could not confidently infer a conviction about the practice of disinterment from other beliefs and practices. However, if a court were unable to draw from religious beliefs and practices in this way, it would be denying itself the most relevant evidence of what someone would have wanted. Probably the best understanding of the case is that the trial court's determination is unacceptable, precisely because it resolves matters on which religious experts disagree, not because it pays any attention at all to whether the father was an Orthodox Jew, and whether Orthodox Jews would wish to be disinterred.

We should not move too quickly from the right resolution for a case of this sort to treatment of trusts that concern the property of entire congregations. In the hypothetical disinterment case in which a person's religious adherence and the practices of that religion are undisputed, the general practices would reasonably be used as a basis to infer what the individual would have wanted. In the trust case, practices have shifted from the time the trust was granted up to the present. Unless continuation of a specific practice has been made a condition of a trust, courts have little basis from which to infer how the grantor would have regarded a change embraced by his co-religionists as social attitudes have changed.

This section may be summarized as follows. If courts adhere to neutral principles, they determine issues of church governance mainly by attending to the ordinary secular implications of documents, like church

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221. See id.
222. Id. at 1009.
223. See id.
224. The latter view was taken by a number of students in a Church-State seminar I taught in the fall of 1996.
constitutions, intended to have civil law effect. They may use undisputed principles of governance to interpret the significance of documents. They should not rely upon a prior practice (such as segregated seating) to assert that the conditions of a trust have not been kept, unless the grantor has insisted upon that particular practice. When a practice is an undisputed aspect of a religion, however, a court may infer an individual’s attitude toward the practice from his or her involvement in the religion. It is worth noting that since some of the issues in this section (for example, the treatment of express trusts) are not clearly resolved by principles of deference under the polity approach, certain conclusions reached here should be followed by courts committed to that approach, as well as by courts using neutral principles.

E. What Showing Is Needed To Establish Possessory Rights?

Courts have differed significantly over what a general church must do to establish that property possessed formally by the local membership is held on its behalf. The crucial questions are how express the trust for a general church must be, and what burden of proof it must meet. The dissent in Jones v. Wolf reads as if the majority requires an express understanding for a trust about religious property. Actually, neither the majority opinion itself nor any other Supreme Court decisions are so limiting, but some courts have made it virtually impossible for general churches to have trusts declared in their favor unless they establish the requisites of an express trust. According to standard trust law, implied trusts may be either “resulting” or “constructive.” Resulting trusts arise in limited circumstances when the settler did not intend the titleholder to take an entire interest in the property; constructive trusts are imposed as an exercise of equity jurisdiction to remedy unjust enrichment. Ordinary church property disputes do not comfortably fit either of these models, and some courts applying neutral principles have been hesitant to discern an implied trust for the general church. Others have found a controlling interest for a general church even when the circumstances are not within the ordinary law of implied trust. Given the unique historical legal background of many of the crucial transactions about church property, courts should be willing to expand on ordinary trust

225. See, e.g., Protestant Episcopal Church v. Barker, 171 Cal. Rptr. 541, 551 (Cal. Ct. App. 1981). One commentator proposes that even express language in constitutions and bylaws of the general church should be insufficient to create a trust in the face of silence by the local church; she further proposes that such provisions should be enforceable only when they are “the product of an open negotiation process between two parties of equal bargaining power.” Gerstenblith, supra note 171, at 571.

226. See Gerstenblith, supra note 171, 554–56.

227. See, e.g., Barker, 171 Cal. Rptr. at 551.

finding implied trusts in some conditions that do not meet the usual requisites of resulting and constructive trusts.

The second and related issue is the weight of the showing or burden that a general church must carry. Gerstenblith has written, "[i]n order to impose a trust on the disputed property, [some] courts require a high standard of intent and, therefore, generally conclude that the indication of a trust is insufficient." Other courts do not seem to require the general church to carry a much greater burden than the local church. In light of the complex history of state requirements for the holding of church property and shifting legal doctrines about relations between general and local churches, the latter approach is preferable.

F. Episcopalian and Presbyterian Cases

Because courts apply neutral principles in various ways, cases whose facts are similar end up being decided differently. The complexities of interpretation and the uneven pattern of results are illustrated clearly by some recent cases that involve the Episcopal and Presbyterian Churches. Cases involving both groups reveal that some judges are very hesitant to conclude that the national church holds a trust when property is formally in the name of the local church. Other cases are more "liberal" about drawing conclusions favorable to the general church based on church constitutions, bylaws, and the history of relations between national and local. The cases thus illustrate the following central point: Knowing that a court will use a neutral principles approach alone may not provide competing claimants with much of a guide as to how a case will be decided. One state judge, after surveying relevant cases, has commented, "[a]pparently, the Supreme Court's optimistic conclusions concerning neutral principles have been misplaced. What has emerged is a welter of contradictory and confusing case law largely devoid of certainty, consistency, or sustained analysis."

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229. Even if a general church fails in its effort to have a court declare that property is held on its behalf, it may nonetheless succeed indirectly if a court determines that the general church makes a final determination about who constitutes the local church. A restrictive attitude toward implied trusts would not necessarily preclude a decision that membership is within the domain of the general church.

230. Gerstenblith, supra note 171, at 544. If the documents to be interpreted were adopted after the relevant law was adequately clear, the denomination usually has a greater ability to draft and insist on language. One might conclude “that the burden of clarifying ambiguous provisions regarding property should fall primarily on the denomination.” Bennett, supra note 150, at 184.


232. John Fennelly, Property Disputes and Religious Schisms: Who Is the Church, 9 St. Thomas L. Rev. 319, 353 (1997); see also Venable, supra note 158, at 745 (“It has been suggested that the concept of neutral principles is too manipulable to be used with any consistency when resolving church property disputes . . . .”).
1. Episcopalian Cases — In Protestant Episcopal Church v. Barker, a California court was very stingy about finding a trust for the national Episcopal Church. The court considered whether four Los Angeles churches that had seceded from national and regional affiliation lost title to property held in their names. Relying on an earlier California case, the court rejected a deference approach in favor of neutral principles. It also rejected doctrines of implied trust as inapplicable: These doctrines either required an impermissible inquiry into religious doctrine, or they concerned a kind of diversion from basic charitable purposes that was not involved. According to the court, the crucial inquiry was whether an express trust had been created: "Simply put, the issue [is] ... whether the local churches expressly hold their property in trust for members of the Diocese and PECUSA [Protestant Episcopal Church in the United States of America]." The court looked to "four general sets of facts: (1) the deeds to the property, (2) the articles of incorporation of the local church, (3) the constitution, canons, and rules of the general church, and (4) relevant state statutes, if any, governing possession and disposition of such property." Applying these standards, the court concluded that a trust for the general church had been created only in one instance. In all four instances, the property was held in the name of the local church. California statutes were silent on this subject until 1939, when a law authorized incorporation of a subordinate body of a national body, with a provision for disposition of assets if the charter was surrendered. Until 1958, the constitution, canons and rules of the general church did not mention any express trust; in 1958, Canon 10.06 made property distributable to the Diocese when a parish dissolved. Holy Apostles Church was incorporated in 1963 as a subordinate body of the general church and diocese, and it was arguable that its articles of incorporation incorporated Canon 10.06. As to its property, an express trust for the general church existed. In contrast, the other churches had been incorporated before 1958, so they did not implicitly accept the principles adopted by Canon 10.06. These other three parishes had agreed upon admission to the general church that they would forever be bound by the authority of the bishop and the general church and would accede to their constitution, canons, doctrine and worship. The court, however, called these "nothing more than expressions of present intention," as with the

234. See id. at 549.
235. See id. at 549-52.
236. Id. at 553.
237. Id.
238. See id. at 555-56.
239. Two of these three churches were incorporated before the 1939 statute; the third was incorporated in 1944, but the articles did not declare that it was being incorporated as a subordinate body of a national church. See id. at 555.
marriage vow, not precluding "a change in heart." The court concluded that no express trust was impressed on the three churches.

A dissenting judge took a different view. Based on evidence about the relationship of the parishes to the diocese and general church, he said:

[t]heir relationship literally oozes the clear intention and ambition of each of the four parishes to severally achieve acceptance as a parish within the embrace of PECUSA with full knowledge that such acceptance meant the subordination of each to the Constitution and Canons of PECUSA and the transfer of the property of each to the Diocese of Los Angeles upon dissolution or other means of disaffiliation.

The right approach, in his view, was that "which comes closest to recognizing those factors which define the nature of the relationship of the parties and therefore are best calculated to indicate what was contemplated by them in arriving at and agreeing upon that relationship."

The Kentucky Supreme Court applied neutral principles much like the California court. Noting that property had been acquired exclusively by efforts of the local congregation, the court found insufficient basis to create an express trust. It relied in part on commentary to the annotated constitution of the general church that indicated that an apparently relevant restriction in the canons is of "moral value only." The Supreme Court of Colorado, in Bishop and Diocese v. Mote, took a neutral principles approach that was much less restrictive in what it allowed courts to infer from relevant documents. Faced with a dispute between a majority of the local church that wished to withdraw from the general church and a minority loyal to that church, it gave weight to the ways in which the local parish had acceded in governance to the diocese and general church, and, in particular, to precise provisions in the general church canons that gave forms of control over local church property. Indicating that a "truly neutral analysis" should begin without "any presumption," it said that "the intent to create a trust can be inferred from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular docu-

240. Id. at 554. The court's analogy is itself disconcerting. Legal permission of divorce should be viewed as allowing people to withdraw from promises, not as an indication that marriage vows are merely "statements of present intention." "It is my present intention—I don't promise" is language better suited to parents planning to take children to the movies on the weekend.

241. Id. at 557.

242. Id.

243. See Bjorkman v. Protestant Episcopal Church, 759 S.W.2d 583, 586 (Ky. 1988).

244. Id. at 586.

245. 716 P.2d 85 (Colo. 1986).

246. See id. at 105–07.

247. Id. at 99.
ments or language employed, and the conduct of the parties." 248 No particular language was required to create what could amount to "an express trust created by implication in fact." 249 A court need not shy away from "documents, or provisions in documents, that intertwine religious concepts with matters otherwise relevant to the issue of who controls the property." 250. Treating the provision in the local church's corporate by-laws that accepted the constitution and canons of the general church as much more significant than the Barker majority did, the court said that various canons that specify forms of control over local property by the general church "demonstrate the irrevocable nature of the dedication of property by the local church corporation for the purpose of advancing the work of PECUSA." 251 These were sufficient to establish that a trust had been imposed for use of the general church. 252

2. Presbyterian Cases. — An examination of cases involving Presbyterian churches reveals a similar variation of approaches among courts applying neutral principles. The highest courts in New York and Pennsylvania decided cases in favor of local Presbyterian churches. In 1984, the New York Court of Appeals held that a local church that had voted 334 to 4 to depart from the United Presbyterian Church in the United States of America could retain its property. 253 In a somewhat puzzling passage, the court said it was improper to rely on provisions of the Book of Order, even ones that mention control of property, because they are located outside the property section of the Book of Order. They deal with church government and relate only indirectly to the control of property. They set forth the mechanism of church government in the event of a church dispute and any inquiry into their meaning by a court is constitutionally foreclosed because it would require the court to choose between the insurgent Session and the commission or "replacement session." 254

248. Id. at 100.
249. Id. at 103 n.14; see id. at 100–01.
250. Id. at 101.
251. Id. at 107.
252. See also Bennison v. Sharp, 329 N.W.2d 466, 475 (Mich. Ct. App. 1982) (indicating that the general church would win under either the deference or neutral principles approach); Protestant Episcopal Church v. Graves, 417 A.2d 19, 24 (N.J. 1980) (similar); see generally Ross, supra note 169, 305–16 (arguing that a neutral principle approach is constitutionally preferable to the polity approach but needs to be more uniform in application); Robert J. Bohner, Jr., Note, Religious Property Disputes and Intrinsically Religious Evidence: Towards a Narrow Application of the Neutral Principles Approach, 35 Vill. L. Rev. 949, 981 (1990) (arguing that a narrow neutral principles approach "properly places intrinsically religious evidence . . . outside the purview of the court's inquiry").
254. Id. at 462.
Apparently, a court was not to rely on provisions about church government, *even if they were clear*, because doing so would mean taking sides between disputing factions, and even provisions specifically dealing in part with property were not to be considered if the provisions dealt mainly with church government. This is an extremely restrictive and indefensible view of permissible inquiries under neutral principles. Courts should be able to rely on provisions that deal clearly with legal relations over property in whatever context they may be found.

The opinion of the Supreme Court of Pennsylvania upholding the claim of a local church said that the trial judge's "reliance on selected passages from the Book of Order was misplaced in that the court ignored the overall intent of that book as a means of overseeing the spiritual development of member churches." Further, the passages "are far from constituting the clear unequivocal evidence necessary to support a conclusion that a trust existed.

The Virginia Supreme Court, without rendering a final decision about who should win a conflict between a local church and the Norfolk Presbytery, elaborated a principle of decision favorable to local churches. It said that the Presbytery had the burden of proving that trustees of the local church "have violated either the express language of the deeds or a contractual obligation to the general church."

On the other hand, ten years after *Barker*, the California Episcopalian case, a branch of California's intermediate appellate court took a more generous approach to finding a trust in resolving a conflict between a local majority disaffected with the national church and a minority loyal to it. The court said that the Presbytery had acquired the initial properties for the local church and had worked with the church for 80 years. The Book of Order of the Presbyterian Church in the United States of America provides that property is held in trust for it, and the local church's articles of incorporation expressed adherence to the


256. *Presbytery of Beaver-Butler*, 489 A.2d at 1325.


258. Id. at 758; see also Trinity Presbyterian Church of Montgomery v. Tankersley, 374 So. 2d 861, 867 ( Ala. 1979) (holding that a minority faction faithful to the national church was estopped because the Presbytery had afforded local churches permission to withdraw and the national church had waited nearly three years before declaring that the action of the Presbytery was unconstitutional).


260. See id. at 398.
doctrines and discipline of the general church. The court concluded that property was held in express trust for the national church, relying in part on a post-\textit{Barker} statute that provides that a trust is presumed in religious assets "to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide." The court was untroubled by the idea that a statute enacted after \textit{Barker} might alter the approach of \textit{Barker} for transactions that took place prior to the statute. Either the court viewed \textit{Barker} as too restrictive (and therefore wrongly decided) or assumed that refusal to defer to provisions in general church law was not required constitutionally, and that the rule of the case could be altered by the statute, even for events preceding its passage. The court placed substantial emphasis on a provision in the Book of Order, adopted in 1981, that provided an express trust in property for the national church.

The court further said that the identity of the "true" local church was an ecclesiastical matter, to be judged by superior tribunals for a hierarchical church. On this basis, the court concluded that the judgment of the Presbytery decided that question, in accord with the Book of Order. The court indicated that it would have reached a similar result on that issue by a proper application of neutral principles, given the local church's incorporation of adherence to the governance of the general church.

Commencing with a deference approach but concluding that it would reach the same result under neutral principles, the Supreme Court of Iowa upheld a claim by the United Presbyterian Church in the United States of America that property of a local church that had disaffiliated by a vote of 192 to 96 was held in trust for it. Rejecting the claim that the local church had "actually functioned as an ecumenical church" despite its being formally a local Presbyterian church, the court said that it would require "an impermissible inquiry into doctrine for us to determine whether this function was consistent with Presbyterian teachings." Since the local church was a subordinate part of a hierarchical church, the presbytery's decision regarding the property dispute was conclusive under the compulsory deference approach; neutral principles would yield the same outcome because the local church had agreed to follow

\begin{itemize}
  \item \textit{261.} See id. at 400–01.
  \item \textit{262.} Id. at 412 (emphasis omitted) (internal citation omitted).
  \item \textit{263.} See id. at 414.
  \item \textit{264.} See id. at 408.
  \item \textit{265.} See id.
  \item \textit{266.} See id. at 408–11.
  \item \textit{267.} See Fonken v. Community Church of Kamrar, 339 N.W.2d 810, 816–19 (Iowa 1983). The local church affiliated itself in 1964 with the United Presbyterian Church in the United States.
  \item \textit{268.} Id. at 816.
  \item \textit{269.} See id. at 816–17.
\end{itemize}
the decisions and procedures of the general church tribunals. The change in the 1981 constitution of the general church did not show that a different principle prevailed before that time; the addition was meant to clarify uncertainty created by Jones v. Wolf.

Three dissenting judges applying neutral principles would have decided for the local church, since no language created an express trust and the conditions for implied trusts were not met. As to which local faction controlled, the dissenters adopted a presumption of majority rule, which they did not find overcome by relevant provisions of the general church constitution or local church charter.

VI. POLITY V. NEUTRAL PRINCIPLES: PREFERABLE APPROACHES AND CONSTITUTIONAL REQUIREMENTS

Our examination has shown three serious defects in the standard polity approach. First, the extreme deference to the highest adjudicatories in all hierarchical churches is out of line with treatment of nonreligious associations and fails to reflect the expectations of many church members. Second, the stark variation in treatment of hierarchical and congregational churches is unwarranted. Third, drawing the line between hierarchical and congregational churches can sometimes be troublesome. To some extent, these problems can be met by regarding church organizations as hierarchical in some respects though congregational in others, but that approach introduces other difficulties that I have addressed. In any event, if the courts begin to engage in more subtle differentiations of this sort, it is hard to see how they will make those determinations without employing a version of neutral principles. In sum, the polity approach in its pure form is seriously flawed, despite its endorsement by the Supreme Court in Serbian Eastern Orthodox Diocese.

The flaws of the polity approach are great enough to make some type of neutral principles approach preferable. Of course, one possible result of neutral principles analysis is that a church is organized to give absolute authority to its highest bodies. And, for issues that are so inextricably religious that secular neutral principles cannot help in resolving them, a court may reasonably adopt a deference approach for hierarchi-

270. See id. at 817–18.
271. 443 U.S. 595 (1979); see also Adickes v. Adkins, 215 S.E.2d 442, 444–45 (S.C. 1975) (apparently applying a deference approach to decide who is the controlling local faction); Fairmount Presbyterian Church, Inc. v. Presbytery of Holston, 531 S.W.2d 301, 305–06 (Tenn. Ct. App. 1985) (deciding that an implied trust existed in favor of general church; saying that result conformed with neutral principles, but not identifying a difference between that approach and deference); Schismatic and Purported Casa Linda Presbyterian Church v. Grace Union Presbytery, Inc., 710 S.W.2d 700, 705–07 (Tex. App. 1986) (applying deference approach).
272. See Fonken, 339 N.W.2d at 819–26 (Schultz, J., dissenting).
273. See id. at 827.
274. See text accompanying notes 167–171.
The difficult question is how neutral principles should be applied. In addressing this question, appellate courts face a general jurisprudential problem that bears on the best resolution of the concrete alternatives. Perhaps what would be the best standard for sensitive, fair-minded, able, intelligent judges will not be the best standard for most actual judges. (The same observation applies to juror standards, insofar as relevant issues may be decided by juries.) The best standard for the best judges may permit evaluations of nuances that other judges will make poorly or in an abusive way to favor parties that they like. If one believes that cases involving religious organizations will often trigger unwarranted prejudices or be beyond the range of judicial competence, one might favor sharper, more rigid rules than one would want for the best judges.

A sound doctrinal standard must take the competence and prejudice of judges into account, but it should not preclude judges from examining factors that are obviously relevant to how a church is organized and to the expectations of church members. For example, disregarding provisions regarding property because they are in a church constitution that covers matters of faith is quite unwarranted. Demanding explicit trust language for transactions that occurred at a time when general churches would expect to succeed without such language is also unwarranted. Courts should not resolve whether altered doctrines or practices are central or how genuine and substantial disagreements over church government and practices should be resolved, but they should be able to interpret church documents in a manner that does not require such judgments, and to pay attention to clear, established practices and understandings about organizational authority.

It might be argued that giving the courts this degree of latitude will produce uncertainty about results. But one needs to compare this worry with the present situation, in which many courts sound more restrictive about what they may consider. Subject to a possible qualification I shall briefly examine, the present law is highly unpredictable for religious groups that are neither as rigorously hierarchical as the Roman Catholic Church, nor as straightforwardly congregational as the old Congregationalist Churches. As a result, the law’s application is highly unpredictable for a vast range of religious organizations in the country.

The possible qualification is that looking at cases in many states does not tell us how predictable results are in any one state. States with rather different approaches might each have settled law within their own borders. A much more detailed, fine-grained analysis than this Article pro-

276. For a description of the development of the law of New Jersey, see generally Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church, 98 F.3d 78, 90–94 (3d Cir. 1996) (examining the trend towards a neutral principles approach in resolving intrachurch property disputes, but emphasizing that a court might choose a deference approach depending on whether the dispute implicates questions of religious doctrine or polity).
vides would be needed to show widespread unpredictability. Nevertheless, in some states, notably California, we have results from appellate courts that diverge considerably; in other states, the language of authoritative opinions is too vague or confused to provide much confidence about what might happen. In still other states, higher courts have yet to give authoritative guidance, so litigants must regard the patchwork of decisions outside their own states. Uncertainty about how courts will deal with actual disputes between general and local churches exists within many individual states.277

The uncertainties of decision under neutral principles may make unquestioned deference to hierarchical bodies more attractive than it has thus far been portrayed in this Article. Here is a possible defense of deference: However a higher court formulates standards under neutral principles, judges of trial courts will bend the principles to yield outcomes that strike them as fair in the circumstances. They will, for example, be very hesitant to take a church building away from a local membership that overwhelmingly wants to secede from the national. Local memberships rarely decide to leave on their own; they follow ministers or priests that have fallen out with the national. Neutral principles makes it difficult for national churches to maintain the degree of discipline called for by their fundamental principles. Most major national churches in the United States have well developed internal judicial systems. Under a polity-deference approach, the highest church courts typically constitute the highest judicatories to which the civil courts defer. In disputes between local churches and regional or national bodies, these courts take due account of the claims of locals and can be much better trusted to deal with competing claims fairly than can civil courts, especially since the church courts need not wear blinders about religious understandings.278 Therefore, deference is preferable to civil courts struggling with neutral principles.279

This argument has some force, and it shows that a defense of absolute deference need not rest on confusion or outdated conceptions of the attitudes of typical church members. Nonetheless, I believe its most powerful aspects should be incorporated within a framework based on neutral principles. National churches should specify the range of authority of their highest courts in documents clearly designed for recognition

277. What of the possibility that courts really rely on factors not specified in opinions, such as the degree of unanimity of a withdrawing local church or the fairness with which the national has dealt with the local? It is extremely unlikely that much certainty can be derived from factors unspecified in opinions, and one could hardly recommend that basis for predicting outcomes as a reason for supporting the present situation, unless one were prepared to defend the legal relevance of the unspecified factors.

278. A countervailing worry may be that a national judiciary will be likely to favor the claims of the national church over local churches, and that, for this reason, the highest judicatories in ecclesiastic systems may be less fair in such disputes than civil courts.

279. Something like this argument was made to me by a close friend who long served as the chief executive of a regional church organization.
under civil law. If that authority is inclusive, civil courts should treat disputants as having agreed to a decision by that (religious) court system. Barring extreme delay, civil courts should await the determinations of those religious courts and then accept their determinations, unless those determinations are undercut by some gross failure of the religious courts to comply with their own rules.

Instability among governing bodies is a concern that could arise even when legal principles are relatively stable. When courts employ neutral principles, they should seek to find an overall distribution of authority for churches that does not itself introduce instability in church government. As I have indicated, a conclusion that a local has absolute control over its property, but that a national has control over the membership and governing boards of the local, is just such an unstable combination.

What I have said thus far does not settle whether or to what extent the preferable approaches should be constitutionally required. I shall concentrate on the Supreme Court, although state courts may well decide that state constitutional limits reach further than what the federal Supreme Court has said or implied about the national Constitution. The rigid deference component of the polity approach should be declared unconstitutional as insensitive to the diversity of American religions. Rigid deference is constitutionally acceptable only if a denomination is organized so that the highest church authorities are legally unconstrained; it is not acceptable for denominations that have a balance of local and general authority, or that provide significant restrictions on the decisions of higher authorities.

The Supreme Court should require some form of neutral principles approach, one that allows courts to consider a broad range of documents and also settled principles and practices of church authority that bear clearly on matters of governance and control of property. The Supreme Court should also make plain that when church documents intended for civil enforcement grant wide authority to church courts to resolve disputes, civil courts applying neutral principles must give effect to the determinations of church courts that are rendered according to the authority conferred.

**Conclusion**

One might fairly regard the church property cases as a kind of constitutional backwater. They receive few, if any, pages in constitutional law casebooks, are rarely discussed in constitutional law classes, and have received scholarly attention that is slight in comparison with that given to standard free exercise and establishment cases. In those cases, some activity or restriction of the government is directly involved; in the church property cases, the government's involvement is to provide a rule of law to resolve private disputes. One might be tempted to think issues about constitutionally permissible rules of law for the resolution of disputes among private parties have less general interest than do more straightfor-
ward state involvements, but the free-speech law regarding defamation falls into this category, and it attracts very considerable attention. If our study demonstrates nothing else, it shows that church property disputes raise very difficult constitutional issues, and that because of various competing values, no resolution of the role of civil courts is fully satisfactory. Perhaps the most fundamental dilemma is that courts cannot both avoid resolving religious questions and give effect to all the expectations of those deeply involved in religious organizations.

If one looks only to Supreme Court cases, this branch of law seems remarkably stable, but one is reminded of the struggles beneath tranquil surface waters. Church bodies fight for polity-deference or neutral principles, and they also fight over the precise version of either approach to be adopted.

I have suggested that the exact approach of Watson v. Jones should be rejected, but it has shown remarkable staying power. The polity-deference approach was put in place by the Supreme Court (as a matter of general common law) more than a half century before any part of the First Amendment was held applicable to the states. The Court's underlying wisdom that civil courts should not be resolving disputed issues of religious doctrine and practice remains firmly entrenched, and it would be carried forward even were the Supreme Court to decide that courts must use some version of neutral principles.

Like the courts, I have treated this subject mainly on its own footing, drawing infrequent connections to other areas of constitutional law. A few concluding observations about how the constitutional law of church property disputes relates to major directions in establishment and free exercise law may be illuminating. I offer these in the spirit of seeing the issues in all these areas more deeply and of providing some further starting points for analysis, not as a means to predict subsequent decisions. Prediction is not promising here, both because this subject matter has been treated so independently and because it may well be another twenty years before the Supreme Court ventures again into this terrain.

For a substantial time, the Supreme Court employed the threefold Lemon test as its overarching standard for establishment cases. The two relevant prongs of that standard are that the government may not have the effect of advancing or inhibiting religion, and that the government may not become excessively entangled with religion. The Supreme Court sometimes has relied on a complementary principle that the government may not discriminate among religions. The Lemon test, as a complete whole, appears to have a very short shelf life. The Supreme Court has not abandoned its major elements, though recent cases have emphasized the acceptability of treating religious and nonreligious groups similarly. The entanglement worry fits very well with a strong "hands-off" ap-

281. See Greenawalt, supra note 4, at 324-28.
proach; courts should not become the adjudicators of religious matters. The nonadvancement prong of *Lemon* and the "neutrality" approach of allowing similar treatment may point mildly against the strong deference for hierarchy in the polity approach. Within a religious denomination, that approach seems to "advance" higher bodies whose behavior is challenged, and it affords those higher bodies a degree of deference that analogous bodies in nonreligious associations would not receive. The neutral principles approach does not match perfectly the treatment of nonreligious associations either, because it withdraws so much from consideration, but its emphasis on formalities and on language in church documents that is understandable by those outside the faith does not, on its face, favor one level of church authority over another.

The dominant recent trend in free-exercise law has been to withdraw special constitutional protection for religious claimants in favor of a view that people with religious reasons to violate laws should be treated like all other violators unless a legislature grants them an exemption. If one reads *Employment Division v. Smith* with any care, one notices that a, or, I would say, the, major basis for the decision is that courts should not have to assess religious understandings and the strength of religious feeling in order to decide if the religious claim is strong enough to warrant an exemption. We may note that the inquiry the Court is unwilling to make is, despite its difficulty, not nearly as difficult as the inquiry the modern church property cases say courts cannot make. Why is the one inquiry more difficult than the other?

In religious exemption cases, courts must figure out what an individual claimant believes and feels to see whether an exemption is warranted. If the claim involves group behavior, the court must discern what some or most members of a group believe and feel. A court does not have to decide which of the competing assertions from within the group is right or more true to a tradition. If a court is unwilling to countenance judicial assessment when no relevant conflict exists, a fortiori it should reject assessment when conflict is present. Whatever else it may be, *Smith* evidences a strong attachment to the underlying premises of *Watson* and all subsequent church property cases. Either polity-deference or neutral principles avoids for the most part judicial assessment of religious matters, but the neutral principles approach fits somewhat better with the Court's proclivities towards not having special constitutional rights for religious claimants.

This brief look at the most directly related areas of constitutional law hardly yields a decisive judgment about the bases upon which church property cases should be resolved, but I believe it provides modest support for my view that the Supreme Court should move to requiring a

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neutral principles approach, one that includes significant (though not absolute) deference to what church judicial bodies have concluded and that allows sensitive consideration of virtually all documents designed (even partly) for civil enforcement, including whatever natural inferences an outsider might draw without getting into debatable matters of doctrine, practice, and polity.