2010

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Recommended Citation

Calvin R. Massey, *Church Schisms, Church Property, and Civil Authority*, 84 *St. John's Law Review* 23 (2010).

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ARTICLES

CHURCH SCHISMS, CHURCH PROPERTY, AND CIVIL AUTHORITY

CALVIN MASSEY[†]

When human relationships fail, litigation often ensues. When those relationships are religious and doctrinal strife produces factional division, courts are limited to secular criteria to decide church property disputes. This sounds simple, but it is not. While courts must use secular criteria to decide church property disputes, there remains considerable uncertainty about the permissible latitude of those secular principles. The uncertainty stems from the Supreme Court's attempt to honor three principles that are in tension with one another: (1) autonomous church governance, which the Court sees as an aspect of the free exercise of religion; (2) the need to prevent civil courts from deciding issues of religious doctrine, an aspect of the ban on governmental establishments of religion; and (3) preservation of state autonomy to decide how best to accommodate these twin goals, an aspect of federalism. There are three principal problems with this tripartite objective. First, sometimes they conflict with each other. Second, and worse, this framework fails to take into account adequately the interest of individuals—united in local congregations of religious believers—to exercise freely their religious beliefs. Finally, embedded in this framework is a generally unrecognized potential violation of the Establishment Clause. This Article seeks to expose these problems, identify the unrecognized Establishment Clause violation, and present an approach that better protects the interest in religious freedom of local congregants while still preserving autonomy of church governance and limiting civil courts to adjudication of secular issues.

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The generally unrecognized Establishment Clause violation is the provision by states of special advantages to hierarchical churches that allow them unilaterally to impose trusts for their benefit upon property held by local congregations. The approach advocated in this Article is that when hierarchical churches divide into factions, the principles of religious freedom embedded in the religion clauses compel civil courts to recognize the religious beliefs of a majority of the local congregation in deciding which faction of the divided church is entitled to the use of the local congregational property, absent some clear and wholly secular indication that the local congregation has given control of its property to the general church. The cost of this approach is a slight reduction in the discretion of states to specify decision rules for church property disputes, and a somewhat more controversial reduction in the degree of deference that civil courts should pay to internal church governance rules when churches divide into factions as a result of religious schism.

The general issue is poised for judicial reexamination in light of the incipient fracture of the Episcopal Church in the United States, as litigation between the general church and its secessionist elements has broken out in California and Virginia—and threatens to occur in Pennsylvania, Texas, and Illinois.¹ The

¹ This results from the steady division of the Episcopal Church into separate elements. On December 4, 2008, various disparate elements of the Anglican Communion, including four dioceses that have seceded from the Episcopal Church, USA ("ECUSA" or "Episcopal" Church)—Pittsburgh, Fort Worth, San Joaquin (California), and Quincy (Illinois)—formed the Anglican Church in North America. See Laurie Goodstein, *Episcopal Split as Conservatives Form New Group*, N.Y. TIMES, Dec. 4, 2008, at A1; Taylor Gandossy, *Conservatives Form New Anglican Church*, CNN, Dec. 4, 2008, <http://www.cnn.com/2008/US/12/04/episcopal.split/index.html>; Anglican Church in North America, *Our Genesis*, http://anglicanchurch.net/media/acna_our_genesis_june_2009.pdf (last visited Apr. 1, 2010). For more on the Anglican Church in North America, see Anglican Church in North America, <http://www.anglicanchurch.net> (last visited Apr. 1, 2010). The schismatic Anglican Church includes at least eight Episcopal parishes in Virginia that previously disaffiliated from the ECUSA, and a Colorado parish that disaffiliated in 2007. See Jean Torkelson, *Parish Votes To Secede: Episcopal Church Joins Breakaway Anglican Network*, ROCKY MTN. NEWS, Mar. 27, 2007, at 20; Bill Turque & Michelle Boorstein, *7 Va. Episcopal Parishes Vote To Sever Ties; Same-Sex Unions, Choice of Gay Bishop Spark Conservatives' Break from Church*, WASH. POST, Dec. 18, 2006, at A01. Three other parishes in California that left the ECUSA to affiliate with the Anglican Church in Uganda also joined the new Anglican Church in North America. See Larry B. Stammer, *North Hollywood Parish Is Third To Leave the Episcopal Church; Conservative Members Join a Growing Group of Dissidents Who've Left the Denomination*, L.A. TIMES, Aug. 25, 2004, at B1. In addition, the dioceses of San Joaquin (California), Pittsburgh (Pennsylvania), Fort Worth (Texas),

academic literature on the subject has focused on the need to avoid civil involvement in religious doctrine, but has reflected the Court's indeterminate doctrine by its lack of agreement concerning either the use of neutral principles or deference to internal church governance.² There has been scant attention paid to either the Establishment Clause problems that can occur by such deference,³ or to the religious freedom interest of individuals and local congregations when a church of which they are a part has splintered into schismatic factions.⁴ Each of those issues is presented in the context of the schism within the Episcopal Church and is considered in detail in this Article.

and Quincy (Illinois) have joined the ACNA. Web sites of these dioceses may be accessed at Anglican Diocese of Pittsburgh, <http://www.pitanglican.org> (last visited Apr. 1, 2010), Anglican Diocese of San Joaquin, <http://www.dioceseofsanjoaquin.net> (last visited Apr. 1, 2010), Diocese of Quincy, <http://dioceseofquincy.org/index.html> (last visited Apr. 1, 2010), and Episcopal Diocese of Fort Worth, <http://www.fwepiscopal.org/index1.php> (last visited Apr. 1, 2010).

The Diocese of South Carolina has an uneasy relationship with the ECUSA, because the ECUSA refused to consent to the election of the Reverend Mark Lawrence as its bishop. See Alan Cooperman, *Episcopal Church Rejects S.C. Bishop; Failed Election Raises Conservatives' Ire*, WASH. POST, Mar. 17, 2007, at A03. Later, the ECUSA relented and Bishop Lawrence has been installed as Bishop. See Dave Munday, *Episcopal Diocese's Bishop Approved; After 2 Elections, Lawrence To Be Consecrated in Jan.*, POST & COURIER (Charleston, S.C.), Oct. 30, 2007, at B1.

² See generally 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 (1980); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633; Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378 (1981); Kent Greenawalt, *Hands off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 858-68 (1984); William G. Ross, *The Need for an Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L.J. 263 (1987); Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335 (1986); Louis J. Sirico, Jr., *The Constitutional Dimensions of Church Property Disputes*, 59 WASH. U. L.Q. 1 (1981); Robert J. Bohnert, Jr., Note, *Religious Property Disputes and Intrinsically Religious Evidence: Towards a Narrow Application of the Neutral Principles Approach*, 35 VILL. L. REV. 949 (1990); Michael William Galligan, Note, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007 (1983). But see H. Oaks, *Trust Doctrines in Church Controversies*, 1981 BYU L. REV. 805.

³ But see Greenawalt, *supra* note 2; Galligan, *supra* note 2.

⁴ Greenawalt considers these interests as factors in balancing deference to internal church rules and application of neutral principles, but does not conceive of them as constituting an independent aspect of the religious liberty protected by either or both of the religion clauses. See Greenawalt, *supra* note 2, at 1902-04.

Part I describes the varied nature of church organizations and the development of the constitutional doctrine that limits civil court involvement in the resolution of church property disputes. Part II explores the religious freedom interests of individuals and local congregations under conditions of religious division, using a Virginia statute that deals with this issue as the lens by which to examine the question. Part III assesses the circumstances under which reliance on internal church governance rules as the criterion for deciding church property may constitute a violation of either of the religion clauses. Part IV states the constitutional principles that should be applied to church property disputes when churches divide into discrete factions as a result of doctrinal disagreement.

I. CHURCH ORGANIZATIONS AND THE DEVELOPMENT OF THE CONSTITUTIONAL DOCTRINE

An understanding of church organizations is critical to understanding the constitutional doctrine pertaining to church property disputes and this Article's analysis of that doctrine. Churches may be organized in either hierarchical or congregational forms. A hierarchical church is composed of local congregations, each of which "is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control . . . over the whole membership of that general organization."⁵ A congregational church is one in which the local

⁵ *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722–23 (1871). The Supreme Court has also defined a hierarchical church as one "organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 110 (1952). Hierarchical churches can be further divided into episcopal and presbyterian forms. An episcopal church has a ruling prelate, subordinate bishops, and local churches under the control of these higher church authorities. See *The Episcopal Church, Church Governance*, http://www.episcopalchurch.org/67608_ENG_HTM.htm?menupage=59957 (last visited Apr. 1, 2010). Churches using this form of organization include the Roman Catholic Church ("Catholic"), the Episcopal Church, the Methodist Church ("Methodist"), and various Eastern Orthodox churches. See, e.g., *Economic Expert, Episcopalian Church Governance*, <http://www.economicexpert.com/a/Episcopalian:church:governance.htm> (last visited Apr. 1, 2010); *The People of the United Methodist Church, Structure & Organization: Governance*, <http://www.umc.org> (follow Our Church hyperlink, then follow Structure & Organization hyperlink, then follow Governance hyperlink) (last visited Apr. 1, 2010). For example, the ECUSA has a Presiding Bishop as its head, a number of bishops who preside over geographic subdivisions

congregation “is strictly independent of other ecclesiastical associations.”⁶

The significance of these differing forms of church organization to constitutional law was first highlighted in *Watson v. Jones*,⁷ a case decided by the Supreme Court in 1871 under federal common law.⁸ During the Civil War, the

called dioceses, and local churches within each diocese. See The Episcopal Church, Church Governance, http://www.episcopalchurch.org/67608_ENG_HTML.htm?menupage=59957 (last visited Apr. 1, 2010). The ECUSA is governed by a constitution and canons that are the product of the General Convention, an assembly of Episcopal bishops and delegates from the dioceses of the ECUSA. See Gregory Straub, The Episcopal Church, *Introduction to the General Convention*, <http://generalconvention.org/gc/introduction> (last visited Apr. 1, 2010). The ECUSA is part of the worldwide Anglican Communion, which recognizes the Archbishop of Canterbury as the spiritual head of the church, but does not acknowledge that he has any other governing authority. See HARTFORD INST. FOR RELIGION RESEARCH, HARTFORD SEMINARY, *Episcopal Church*, in *ENCYCLOPEDIA OF RELIGION AND SOCIETY* (William H. Swatos, Jr. ed., 1998), available at <http://hrr.hartsem.edu/ency/Episcopal.htm>; Archbishop of Canterbury, Roles & Responsibilities Overview, <http://www.archbishopofcanterbury.org/105> (last visited Apr. 1, 2010). Presbyterian churches place authority in an ascending order of bodies, each of which is composed by representatives of the laity and the clergy. Churches using this form of organization include the several branches of the Presbyterian Church in the United States and the Assemblies of God. See General Council of the Assemblies of God, *Our Form of Government*, <http://www.ag.org/top/About/structure.cfm> (last visited Apr. 1, 2010); Presbyterian Church in America, *A Brief History: Presbyterian Church in America*, <http://www.pcanet.org/general/history.htm> (last visited Apr. 1, 2010). For example, the Presbyterian Church is governed at the congregational level by a session, consisting of the clergy and an elected group of lay elders, which in turn is governed by a presbytery, consisting of the clergy and lay elders within a geographic area. See Economic Expert, Presbyterian Church Governance, <http://www.economicexpert.com/a/Presbyterian:church:governance.htm> (last visited Apr. 1, 2010). The presbyteries are joined in a synod and governed by a national assembly of clergy and laity. See Presbyterian Church in America, *supra*. In general, the distinction between episcopal and presbyterian hierarchical churches is not of importance to this Article.

⁶ *Watson*, 80 U.S. (13 Wall.) at 722. Congregational churches can and do affiliate with other religious organizations, but they recognize no superior authority over the affairs of the local congregation. Examples of this form of organization include the various Baptist churches, Jewish synagogues, Quakers, the Church of Christ, and the variety of Protestant evangelical, Pentecostal, or fundamentalist churches.

⁷ 80 U.S. (13 Wall.) 679.

⁸ Because *Watson* was decided well before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Court applied federal common law in accord with the principle of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842), overruled by *Erie Railroad Co.*, 304 U.S. at 79. Because neither of the religion clauses had then been made applicable to the states via the Fourteenth Amendment’s Due Process Clause, the decision of the Court in *Watson* has no constitutional precedential value. The Free Exercise Clause was first applied to the states in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), and the Establishment Clause was first so applied in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

Presbyterian Church fractured over the issue of slavery and preservation of the Union. The national church announced its fealty to the Union and emancipation by declaring support of slavery and secession to be heretical sin, but a majority of the ruling elders of Louisville, Kentucky's Walnut Street Presbyterian Church took the opposing view and claimed ownership of the local property. The Supreme Court ruled that, with respect to hierarchical churches such as the Presbyterian Church,

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, and as binding on them, in their application to the case before them.⁹

Though the Court adverted to "the full and free right to entertain any religious belief" and noted that "[t]he law . . . is committed to the support of no dogma, the establishment of no sect,"¹⁰ it founded its decision on principles of implied contract:

The right to organize voluntary religious associations . . . and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.¹¹

While the Court in *Watson* rejected the United Kingdom rule—which requires civil courts to determine which of two contending religious factions holds to "the true standard of faith in the church organization"¹²—it did not do so as a matter of constitutional law. Thus, as recently as 1968, the Georgia Supreme Court decided a church property dispute by ruling that a local congregation of a hierarchical church held its property in an implied trust for the benefit of the hierarchical church only so

⁹ *Watson*, 80 U.S. (13 Wall.) at 727.

¹⁰ *Id.* at 728.

¹¹ *Id.* at 728–29.

¹² *Id.* at 727; see, e.g., *Attorney General v. Pearson*, 36 Eng. Rep. 135, 148–49 (Ch. 1817); *Craigdallie v. Aikman*, 3 Eng. Rep. 601, 607 (H.L. 1813) (appeal taken from Scot.).

long as the higher church continued to adhere “to its tenets of faith and practice existing when the local church affiliated with it.”¹³ Any “departure from . . . such tenets is a diversion from the trust, which the civil courts will prevent.”¹⁴ But this approach was rejected by the United States Supreme Court in *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.¹⁵ The Court concluded that the First Amendment “commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.”¹⁶ On remand, the Georgia Supreme Court concluded that it could no longer use implied trust theory to decide church property disputes,¹⁷ and relied instead upon deeds vesting title in the local congregation to decide the issue.¹⁸

Ten years later, in *Jones v. Wolf*,¹⁹ the Supreme Court embraced this “neutral principles” doctrine, which holds that courts may use secular criteria such as deeds, statutes dealing with express and implied trusts, and internal church governance rules to dispose of church property disputes.²⁰ The Court characterized the approach as one that “relies exclusively on objective, well-established concepts of trust and property law,”²¹ but acknowledged that it might require “a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church.”²² When doing so, the Court cautioned that “a civil court must take special care to scrutinize the document in purely secular terms,”²³ and when “interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by

¹³ *Presbyterian Church in the U.S. v. E. Heights Presbyterian Church*, 159 S.E.2d 690, 695 (Ga. 1968), *rev'd sub nom. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969).

¹⁴ *Id.*

¹⁵ 393 U.S. 440.

¹⁶ *Id.* at 449.

¹⁷ *Presbyterian Church in the U.S. v. E. Heights Presbyterian Church*, 167 S.E.2d 658, 659 (Ga. 1969).

¹⁸ *Id.* at 659–60.

¹⁹ 443 U.S. 595 (1979).

²⁰ *Id.* at 600, 602 (internal quotations omitted).

²¹ *Id.* at 603.

²² *Id.* at 604.

²³ *Id.*

the authoritative ecclesiastical body."²⁴ Of equal importance, however, was the Court's observation that states could adopt *any one* of three approaches to church property disputes without running afoul of the Establishment Clause. The Court cited with approval a concurrence by Justice Brennan in *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*,²⁵ in which Justice Brennan summarized the three approaches.

The first is the *Watson* method of deference to internal church governance principles. As applied to congregational churches, property issues "must be determined by the ordinary principles which govern voluntary associations."²⁶ The local congregation decides the issue, by either majority rule or by vesting control of its property in a local governing body, a point acknowledged by the court in *Watson*²⁷ and Justice Brennan in *Eldership*.²⁸ In the case of hierarchical churches, however,

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, and as binding on them, in their application to the case before them.²⁹

But the Court in *Jones v. Wolf* expressly rejected the notion "that the First Amendment *requires* the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved."³⁰

The second approach is the "neutral principles" method, which relies upon formal evidence of title, as embodied in deeds, trusts, wills, and "general principles of property law," providing

²⁴ *Id.* (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976)).

²⁵ 396 U.S. 367 (1970) (Brennan, J., concurring).

²⁶ *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725 (1871).

²⁷ *Id.* The Court stated: "If the principle . . . is that the majority rules, then the numerical majority of members must control the right to the use of the property." *Id.* But if there are "within the congregation officers in whom are vested the powers of such control, then those who adhere to the . . . organism by which the body is governed are entitled to the use of the property." *Id.*

²⁸ 396 U.S. at 368 (Brennan, J., concurring) (noting that courts may "enforce the property decisions made within a church of congregational polity 'by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government'" (quoting *Watson*, 80 U.S. (13 Wall.) at 724)).

²⁹ *Watson*, 80 U.S. (13 Wall.) at 727.

³⁰ *Jones v. Wolf*, 443 U.S. 595, 605 (1979) (emphasis added).

that the application of those principles does not require secular courts to decide issues of religious doctrine.³¹ Under this theory, civil courts may look only at the formal title arrangements to determine the owner of church property. If title to a church building is vested in the local congregation, it does not matter that the hierarchical church of which it is a part has declared in its governing instruments that all local church property is held in trust for the benefit of the hierarchical church, unless the local congregation has expressly or impliedly created such a trust.³²

The third “approach is the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine. Such statutes must . . . leave control of ecclesiastical policy, as well as doctrine, to church governing bodies.”³³ The term “ecclesiastical polity” is not self-defining. It may mean that church governing bodies are entitled to determine who is a member of the church, or which local congregations are members of a hierarchical church. Such a reading does not vest any authority in states to enact laws that empower a hierarchical church to assert control unilaterally over local congregational property. While that is the most straightforward meaning of “ecclesiastical polity,” the term could be stretched to include the power of a hierarchical church unilaterally to determine who owns the property of local congregations that are part of it. However, if that more expansive meaning is given to “ecclesiastical polity,” a question arises of whether state laws vesting hierarchical churches with that power violate the Establishment or Free Exercise Clauses.³⁴

For the sake of clarity, this Article uses the term “secular principles” to describe the general requirement that a civil court may not decide issues of religious doctrine to adjudicate entitlement to church property. Secular principles require that

³¹ *Eldership*, 396 U.S. at 370 (Brennan, J., concurring) (citing *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969)).

³² Canon I.7.4 of the Episcopal Church USA so provides: “All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located.” THE EPISCOPAL CHURCH, CONSTITUTIONS AND CANONS tit. I, canon 7, sec. 4 (The Archives of the Episcopal Church ed., Church Publishing Inc. 2006) (1789), available at http://www.episcopalarchives.org/e-archives/canons/CandC_FINAL_11.29.2006.pdf.

³³ *Eldership*, 396 U.S. at 370 (Brennan, J., concurring).

³⁴ See *infra* Part III.

any one of the three approaches sanctioned by *Jones v. Wolf* eschew any inquiry into, or reliance upon, church doctrine as a basis for decision of the property issues.

Even though *Jones v. Wolf* represented a commitment to secular principles to decide church property issues, the case left many questions unanswered. Under what circumstances may a state mandate deference to religious authority? To what extent may a state ignore or displace the internal rules of a hierarchical church? Other than adherence to secular criteria for decision, what limits, if any, do the religion clauses place on statutes that a state may adopt to decide church property disputes?

As may be expected, courts are divided on their answers to these questions. Some courts have applied a principle of compulsory deference to the internal rules of a hierarchical church.³⁵ Others have applied neutral principles in a fashion that takes account the internal governance of a hierarchical church, producing outcomes no different from those reached by courts that have mandated deference to internal church rules.³⁶ Some courts have applied an amalgam of neutral principles and deference to internal governance rules.³⁷ Some courts have applied neutral principles without any deference to the internal governance of hierarchical churches.³⁸ Other courts have held

³⁵ See, e.g., *Episcopal Church Cases*, 61 Cal. Rptr. 3d 845, 894–95 (Cal. Ct. App. 2007), *aff'd on different grounds*, 198 P.3d 66, 84 (Cal. 2009); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 918–19 (Mass. App. Ct. 2003); *Bennison v. Sharp*, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980); *Presbytery of Seattle, Inc. v. Rohrbaugh*, 485 P.2d 615, 619 (Wash. 1971) (en banc). Under California Rules of Court 8.1105(e), the California Supreme Court ordered the Court of Appeal's opinion in *Episcopal Church Cases* "de-published"—an Orwellian practice that prevents attorneys from citing the opinion in their briefs or arguments. See CAL. R. CT. 8.1105(e).

³⁶ See, e.g., *Episcopal Church Cases*, 198 P.3d 66, 79–81 (Cal. 2009); *In re Church of St. James the Less*, 888 A.2d 795, 807–10 (Pa. 2005); *Guardian Angel Polish Nat'l Catholic Church of L.A., Inc. v. Grotnik*, 13 Cal. Rptr. 3d 552, 560 (Cal. Ct. App. 2004); *Korean United Presbyterian Church of L.A. v. Presbytery of the Pac.*, 281 Cal. Rptr. 396, 405–10 (Cal. Ct. App. 1991); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 99–100 (Colo. 1986).

³⁷ See, e.g., *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1284–85 (Conn. 1993).

³⁸ See, e.g., *Cal.-Nev. Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church*, 17 Cal. Rptr. 3d 442, 449 (Cal. Ct. App. 2004); *Protestant Episcopal Church in the Diocese of L.A. v. Barker*, 171 Cal. Rptr. 541, 549 (Cal. Ct. App. 1981); *Presbytery of Riverside v. Cmty. Church of Palm Springs*, 152 Cal. Rptr. 854, 859–60 (Cal. Ct. App. 1979).

that deference to internal governance should occur only with respect to doctrinal or ecclesiastical matters, but not to property disputes.³⁹ Finally, a few courts have concluded that a hierarchical church can be hierarchical as to ecclesiastical and doctrinal matters, but congregational as to church property.⁴⁰ This welter of doctrines has come sharply into focus in recent years as the Episcopal Church of the United States fractures, and various parishes and dioceses secede from the American branch of the worldwide Anglican Communion⁴¹ and associate with more doctrinally congenial units of the Anglican Communion. The Episcopal Church has been aggressive in its resort to litigation to retain control of the church buildings and related property of the parishes and dioceses that prefer new connections within the Anglican Communion. Litigation in Virginia and California may well provide the United States Supreme Court with an opportunity to clarify the constitutional law applicable to this issue. This Article uses the present litigation in Virginia and California as a lens to clarify the scope of the secular principles doctrine.

³⁹ See, e.g., *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583, 585–86 (Ky. 1988); cf. *Dixon v. Edwards*, 290 F.3d 699, 711–12 (4th Cir. 2002) (deferring to internal governance on the question of whether an Episcopal rector was duly qualified so to act).

⁴⁰ See, e.g., *Fire Baptized Holiness Church of the Americas, Inc. v. McSwain*, 518 S.E.2d 558, 560 (N.C. Ct. App. 1999); *Looney v. Cmty. Bible Holiness Church*, 405 S.E.2d 811, 813–14 (N.C. Ct. App. 1991). Furthermore, in Justice Schreiber's dissent in *Graves*, he advocated examination of church governance documents to decide where the "locus of control" should reside in the event of religious schism. *Graves*, 417 A.2d at 27–29 (Schreiber, J., dissenting). To that extent, Justice Schreiber reverted to a rule of deference to internal governance. See *id.*

⁴¹ The Anglican Communion is an association of separate churches, each having historical and liturgical roots in the Church of England. The Archbishop of Canterbury, head of the Church of England, exercises no governance authority over the individual churches composing the Anglican Communion, but is regarded as the spiritual leader of the Anglican Communion. See Anglican Communion Office, The Anglican Communion Official Website, <http://www.anglicancommunion.org/communion/index.cfm> (last visited Apr. 1, 2010).

II. VIRGINIA: A STATUTORY PREFERENCE FOR CONGREGATIONAL CHOICE

Virginia has adopted a statute directing courts how to decide church property disputes when churches divide into contending factions. As applied to hierarchical churches,⁴² the law provides that,

[i]f a division has . . . occurred or shall . . . occur in a church . . . to which any . . . congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church . . . such congregation shall thereafter belong. Such determination . . . shall be conclusive as to the title to and control of any property held in trust for such congregation⁴³

This provision is intended to give local congregations the power to choose the branch of a divided hierarchical church with which it wishes to affiliate. The first issue that the statute presents to the civil courts is to decide whether there has been a division within the hierarchical church. The resolution of that issue does not turn on endorsement or examination of any religious doctrinal principles. Rather, it can be decided by review of empirical evidence of the existence of factions within the hierarchical church. That is precisely what the Virginia trial court did in ruling in 2008 that the Episcopal Church had divided into two factions.⁴⁴ Faced with evidence of secession of a growing number of Episcopal parishes from the ECUSA,⁴⁵ the wholesale secession of one entire diocese,⁴⁶ and the pending secession of at

⁴² *Baber v. Caldwell*, 152 S.E.2d 23, 26 (Va. Ct. App. 1967) (holding that the quoted provision applies to hierarchical churches).

⁴³ VA. CODE ANN. § 57-9(A) (2009).

⁴⁴ *In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 785, 868–72 (Cir. Ct. 2008).

⁴⁵ At the time of the Virginia trial court ruling, at least eight Episcopal parishes in Virginia have disaffiliated from the ECUSA. *See* Turque & Boorstein, *supra* note 1. At least one Colorado parish had also disaffiliated from its local diocese and the ECUSA. *See* Torkelson, *supra* note 1. Three parishes in California had also left the ECUSA to affiliate with the Anglican Church in Uganda. *See* Stammer, *supra* note 1.

⁴⁶ At the time of the Virginia trial court ruling, the Diocese of San Joaquin (California) had voted to affiliate with the Anglican Province of the Southern Cone (Latin America). *See* Neela Banerjee, *Episcopal Diocese Votes To Secede from Church*, N.Y. TIMES, Dec. 9, 2007, § 1, at 34. The web site of the disaffiliated, San Joaquin diocese is at <http://www.dioceseofsanjoaquin.net/>.

least three more dioceses,⁴⁷ the fact of division was strong. Moreover, because the ECUSA asserts that it is spiritually governed—if not otherwise—by the Archbishop of Canterbury, the ruling prelate of the worldwide Anglican Communion, the division within that Communion is even more palpable. Disagreement over doctrine between the African and South American Episcopal Churches, on the one hand, and the North American and British Episcopal Churches, on the other hand, has created a global rift within the Anglican Communion.⁴⁸ The North American disaffiliations did not occur in a vacuum, for each of the seceding units of the ECUSA did not leave the worldwide Anglican Communion, but initially affiliated with either the African or South American branches of the Anglican Communion. Of course, after the creation of the Anglican Church of North America, these dioceses and congregations have united in a new branch of worldwide Anglicanism. Inquiry by the Virginia civil courts into these matters involved no inquiry into doctrine, but only into the observable, wholly secular, question of whether the Anglican Communion and the ECUSA had divided into factions.

The reasons for the division⁴⁹ were legally irrelevant because the neutral principles approach commands courts to be

⁴⁷ At the time of the Virginia trial court ruling, the Episcopal Dioceses of Pittsburgh, Fort Worth (Texas), and Quincy (Illinois) were all poised to disaffiliate from the ECUSA. See *Episcopal Diocese of Pittsburgh Changes Constitution, Joins Anglican Province*, TRINITY, Oct. 4, 2008, at 4; Sean D. Hamill, *Episcopalians in Pittsburgh Vote To Leave U.S. Church*, N.Y. TIMES, Oct. 5, 2008, at A23. Since then, these dioceses and other disaffiliated units of the ECUSA have formed a new Anglican unit: the Anglican Church in North America. See *supra* note 1.

⁴⁸ See, e.g., John F. Burns, *Anglicans To Seek Pact To Prevent a Schism*, N.Y. TIMES, Aug. 4, 2008, at A6; Laurie Goodstein, *Conservative Anglicans Plan Rival Conference as Split over Homosexuality Grows*, N.Y. TIMES, June 20, 2008, at A6. Of course, the schism discussed in these articles has become a tangible reality in North America. See *supra* note 1.

⁴⁹ Though portrayed in the media as a split over homosexual clergy and the blessing of same-sex unions, the division has been occasioned by complex differences of religious doctrine. In brief, the Episcopal Church maintains that Christ's message must be interpreted in light of contemporary experience, and asserts that belief in Christ's work is not the exclusive path to salvation. These doctrines have the practical effect of, among other things, permitting ordination of women, consecration of homosexual clergy and bishops, and the blessing of same-sex marriages. Almost all Episcopal churches in the Anglican Communion outside of North America and Europe reject these notions as inconsistent with their view of Christian faith. A useful summation of the doctrinal divisions is contained in a statement by the Bishop of the Episcopal Diocese of Fort Worth, Texas: "[W]e are contending for the faith." Bishop Jack Iker, Episcopal Diocese of Fort Worth, Tx., Address to the

indifferent to disputed church doctrine. Yet, civil courts cannot remain indifferent to the fact of disputed claims of ownership, and the Virginia statute displaces hierarchical church decisions about ownership in favor of local congregational choice. The Virginia statute thus raises the question of whether it impermissibly interferes with the Episcopal Church's ecclesiastical polity. The leading Supreme Court cases dealing with state interference with ecclesiastical polity suggest that Virginia has not offended the religious freedom of the Episcopal Church by directing its courts to award local church property to the majority faction of each local congregation when the hierarchical church of which each congregation is a part has divided into discrete and separate elements.

In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*,⁵⁰ the Supreme Court ruled that the Free Exercise Clause was violated by a New York statute, enacted after the Bolshevik Revolution, which expressly transferred control of Russian Orthodox churches in New York from the mother church in Russia to the governing ecclesiastical authorities of the Russian Orthodox Church in the United States.⁵¹ The issue was the right to use the cathedral; the Court acknowledged that title was indisputably in the name of the American church. The Court reasoned as follows:

Legislation that regulates church administration, the operation of the churches, the appointment of clergy, by *requiring* conformity to [specified] church statutes . . . prohibits the free exercise of religion. Although this statute requires the New York churches to "in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)," their conformity is by legislative fiat and subject to legislative will. Should the state assert power to change the statute requiring conformity to ancient faith and doctrine to one establishing a different doctrine, the invalidity would be unmistakable.⁵²

Diocese of Ft. Worth (Nov. 15, 2008), <http://www.virtueonline.org/portal/modules/news/article.php?storyid=9355>.

⁵⁰ 344 U.S. 94 (1952).

⁵¹ *Id.* at 106–07.

⁵² *Id.* at 107–08 (emphasis added). While *Kedroff* dealt only with legislative action of New York, eight years later the Supreme Court applied the same principles to judicial action. In *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 190–91 (1960), the Court reversed a New York judgment that stripped the Moscow-based

Although the Court in *Kedroff* proclaimed that “[f]reedom to select the clergy . . . [has] federal constitutional protection as a part of the free exercise of religion,”⁵³ the case was mostly about New York’s mandated transfer of control of a specified hierarchical church from one governing body to a different one—as well as the state’s command that the statutorily preferred governing body conform to specified church rules. The principle for which *Kedroff* properly stands is that states may not command churches to alter their hierarchical arrangements, conform to specified religious doctrines, or to accept as clergy those persons stipulated by the state.

The Virginia division statute, however, does not command transfer of control of a specified hierarchical church from one governing body to a different one. Nor does it require a church, or a congregational unit of a church, to conform to any specified church statutes. Rather, the Virginia law operates only when a hierarchical church has itself become internally divided and, even then, the law does not order transfer of control, but establishes a process allowing the church members to decide which branch better serves their religious needs. Unlike the New York law at issue in *Kedroff*, in no sense does the Virginia law stipulate any religious doctrine to which the divided church is compelled to adhere.

Although it might be argued that the Virginia statute “regulates church administration, the operation of the churches, [and] the appointment of clergy,”⁵⁴ this objection fails for two reasons. First, the manner in which such interference occurs, if at all, is produced by the intervening independent decision of parishioners, and then only after the church has lapsed into factional division. Unlike *Kedroff*, where the state directly regulated church administration, church operation, and clergy appointment, these effects are produced under the Virginia law by religious adherents, not by the state. Of course, it is true that parishioners might not be able to produce these effects without the presence of the Virginia law, but that fact merely brings into focus the second reason.

head of the Russian Orthodox Church of control of the Cathedral and vested control in the United States-based governing authorities of the Russian Orthodox Church.

⁵³ *Kedroff*, 344 U.S. at 116.

⁵⁴ *Id.* at 107.

The core values of free exercise of religion are absolute protection of religious belief and a presumption of invalidity of state action that singles out religious conduct for disadvantageous treatment. In *Kedroff*, the Court viewed New York's mandate as interfering with the free exercise of religion. But with whose freedom did New York interfere? New York did not interfere with the free exercise of religious belief or conduct of the members of the Russian Orthodox Church in America. New York interfered with the internal governance autonomy of the hierarchical church. The Court in *Kedroff* could just as easily have grounded its decision on the Establishment Clause, because by directing the transfer of control of the Russian Orthodox Church in New York, the state was literally establishing a new hierarchical church in lieu of the prior one. While that establishment was not the creation of a state religion to which all citizens were forced to adhere to, it was a state establishment of an American Russian Orthodox Church. Yet, the *Kedroff* Court chose to rest its rationale on free exercise. In doing so, however, it did acknowledge that there was "no schism over faith or doctrine between the Russian Church in America and the Russian Orthodox Church."⁵⁵ This is a critical difference.

When religious schism is present, free exercise values have two dimensions, which are in tension with one another. Hierarchical churches are entitled to freedom from state interference in their internal governance, but individuals and local congregations are equally entitled to choose the branch of their faith to which they wish to adhere. The Virginia statute seeks to accommodate each of those goals by leaving a divided hierarchical church free to create its own doctrinal and governance rules, so long as those rules do not impede the equally valid freedom of local congregations to honor their branch of the faith. The free exercise of religion is overwhelmingly an individual freedom; it becomes an institutional freedom only when the state takes command of a church, as in *Kedroff*, or when the state engages in "religious gerrymandering"⁵⁶ by a law that is designed "to burden or favor selected religious denominations."⁵⁷ To allow the internal governance rules of a

⁵⁵ *Id.* at 120.

⁵⁶ *Larson v. Valente*, 456 U.S. 228, 255 (1982) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

⁵⁷ *Id.*

divided hierarchical church to deprive a local congregation of its religious home—should it choose the branch of the faith disfavored by the original hierarchical church—is utterly to ignore the practical reality of free exercise of religion by that community of individuals.

Of course, the local congregants who disagree with the general church are always free to leave that church and create a new religious congregation. But this ignores several salient realities. First, from the perspective of the local congregants, their religious community is primarily that which gathers in the local church. This is not merely a social bond; religious belief almost always entails some form of communal worship. Second, and perhaps even more relevant to church property issues, is the fact that in many hierarchical churches, the local congregations are financed entirely through the voluntary contributions of the local members, and those voluntary contributions are taxed by the hierarchical church for its benefit.⁵⁸ Moreover, the buildings in which local communities worship have often been acquired through local contributions and, in virtually every case, the buildings are maintained through the voluntary largesse of the local members. When schism occurs, reflexive delivery of these properties to the hierarchical church flatly ignores the profound interest in religious freedom of the local assembly. Without the buildings and grounds which they have either purchased or

⁵⁸ In *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583 (Ky. 1988), the Kentucky Supreme Court attached weight to the fact that St. John's, the seceding parish of the national Episcopal Church,

acquired the property with no assistance from [the Episcopal Church]; . . . the property was managed and maintained exclusively by St. John's; . . . St. John's improved and added to its property; and that [the Episcopal Church] deliberately avoided acquisition of title or entanglement with the property to ensure that it would not be subject to civil liability.

Id. at 587. Moreover, in the ECUSA, some portion of the contributions made by local parishioners are taxed by the general church for its support, so local members provide all the financial support for their local community, as well as provide a subsidy to the general church. See EPISCOPAL DIOCESE OF WASH., CONSTITUTION AND CANONS 24 (2006) (stipulating that assessments are to be imposed upon each diocese for the support of the national church). Similarly, each diocese imposes upon local congregations the obligation to provide financial support to the diocese. See, e.g., THE CONSTITUTION & CANONS OF THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF WASH., ET AL., CONSTITUTION AND CANONS, pt. V, at 41 (Supp. 2007), available at <http://www.edow.org/diocese/governance/constandcanons2007.pdf> (outlining the Operating Budget of the Diocese in Canon 30, and the Support of the Diocesan Operating Budget by Congregations in Canon 31).

maintained at their own expense, these communities may well wither and die. A local congregation's freedom to choose which branch of a divided church to which it will adhere is hollow without access to its church property.

The Virginia statute protects this interest without interfering with the internal church governance of a hierarchical church. First, the Virginia statute only applies when a hierarchical church has divided into two factions. To defer to internal governance rules of a hierarchical church that would keep control of local church property in the general church is to favor one branch of a divided church at the expense of the other, and to ignore completely the religious views of local congregations that have chosen to ally themselves with the other branch of the sundered church. Deference under these circumstances amounts to a governmental sectarian preference of the sort condemned by the Supreme Court in *Larson v. Valente*.⁵⁹

Second, deference to internal church governance as a criterion for resolution of church property disputes was originally justified in *Watson* as founded on implied contract.⁶⁰ As the Court put it in *Gonzalez v. Roman Catholic Archbishop of Manila*,⁶¹ local congregants have chosen "by contract or otherwise"⁶² to surrender ecclesiastical control of their congregations to the general church. This may be an adequate explanation of the state of affairs when a hierarchical church chooses to close a local church or replace a much-loved priest or minister with a new and unwelcome one, but it will not serve when the general church has fractured into separate elements. Under schismatic circumstances, permitting the original hierarchical church to drive its members out of their halls of worship is to deny to those individuals an essential element of their exercise of religion. Their implied contract was with one hierarchical church. When that singular church divides, amoeba-like, there is no longer any contractual or other obligation that can trump individual and congregational decisions of religious conscience. Virginia recognizes this by permitting members of the hierarchical church to choose individually which branch of

⁵⁹ 456 U.S. 228 (1982).

⁶⁰ *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871) ("All who unite themselves to [a hierarchical church] do so with an implied consent to this government, and are bound to submit to it.").

⁶¹ 280 U.S. 1 (1929).

⁶² *Id.* at 16.

the doctrine they believe, and as a local community of faith, to choose which branch will be honored in their building. Someone must lose when churches divide, and church property is not susceptible to division in kind. Virginia's solution does not require courts to delve into doctrine or interfere with church governance or polity, but it does act to preserve the individual element of religious belief in the most relevant context in which that individual faith is manifested by communal worship.

Nor does *Serbian Eastern Orthodox Diocese v. Milivojevic*⁶³ lend support to the idea that the Virginia division statute might impermissibly interfere with ecclesiastical polity. After the highest governing body of the Serbian Orthodox Church, a hierarchical church, suspended Milivojevic as bishop of its North American diocese and split the diocese into three parts, Milivojevic sued the church, contending that the suspension and diocesan reorganization violated internal church rules.⁶⁴ The Illinois Supreme Court held the church's actions to be invalid because the removal was arbitrary and the reorganization did not conform to the church's internal governance rules.⁶⁵ The United States Supreme Court reversed.⁶⁶ The question of removal of a bishop was a canonical act, and an earlier case, *Gonzalez*,⁶⁷ held that "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."⁶⁸ Though the Illinois court concluded that the bishop's removal was arbitrary because it violated the church's laws, the Supreme Court reasoned that judicial analysis of

whether the ecclesiastical actions of a church judicatory are . . . "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law . . . requires the church judicatory to follow, or else in to the substantive criteria

⁶³ 426 U.S. 696 (1976).

⁶⁴ See *id.* at 697–98.

⁶⁵ See *id.* at 698.

⁶⁶ See *id.*

⁶⁷ 280 U.S. at 1.

⁶⁸ *Id.* at 16.

by which they are . . . to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits . . .⁶⁹

The Illinois court's conclusion that the mother church's reorganization of the diocese into three subdivisions was *ultra vires* was also reversed. The Illinois court had impermissibly "substituted its interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation" since "the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs."⁷⁰ Quoting *Kedroff*, the Court reiterated "that religious freedom encompasses the 'power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'⁷¹

The critical difference between *Gonzalez*, *Kedroff*, and *Serbian Orthodox*, on one hand, and the Virginia division statute, on the other, is that each of these cases rejected civil judicial interference in the internal ecclesiastical affairs of a hierarchical church, but did not deal with the quite different issue of the status of church property following a doctrinal schism within such a church. The Virginia statute does not dictate how clergy are to be appointed or removed, what the composition of dioceses or other internal units of the church should be, or which faction is entitled to claim the mantle of the church. Rather, the Virginia statute responds to the inherent duality of religious freedom in the context of a religious schism. Religious belief is both individual⁷² and collective.⁷³ The collective aspect of

⁶⁹ *Milivojevich*, 426 U.S. at 713.

⁷⁰ *Id.* at 721.

⁷¹ *Id.* at 721–22 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952)).

⁷² Justice William O. Douglas once noted that "[r]eligion is an individual experience." *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting). A staple of Protestant theology is the idea that individuals have a personal relationship with God. An example of this belief is this explanation from the Central Presbyterian Church of Towson, Maryland, on how to become a Christian: One must accept "a personal relationship to God through Jesus Christ." See Central Presbyterian Church, *Becoming a Christian*, http://www.centralpc.org/new_to_central/becoming_a_christian (last visited Apr. 1, 2010). Yet, alongside that principle lies the notion that believers are united in one body. As the Nicene Creed, a statement of faith used in the Episcopal liturgy, puts it: "[I] believe in

religious faith requires that religious organizations be free of state interference in matters of doctrine and arrangement of the ecclesiastical polity. The individual aspect of religious faith requires that individuals be free to choose the communities with which they worship. The Virginia statute is aimed precisely at the line between these two principles. A hierarchical church is free to pronounce doctrine, select clergy, organize, and govern itself free of state interference. But when a hierarchical church divides into doctrinal factions, Virginia announces a democratic principle of majority vote of the individuals who compose each worship unit to determine which faction will have possession and use of the church property. So long as a hierarchical church remains a single organization, the Virginia statute ignores it, but once it chooses to divide, Virginia applies a neutral principle to resolve the property dispute that is implicit in church schism. Virginia's rule is unconcerned with the doctrinal reasons for the rift. Moreover, by using majority vote at the congregational level to decide the property dispute, Virginia protects the freedom of religious choice of a majority of the individuals composing each unit of property that is in dispute.

one . . . catholic and apostolic Church." NICHOLAS AYO, *THE CREED AS SYMBOL* 174 (1989).

⁷³ Professor Douglas Laycock has written: "Religion includes important communal elements for most believers." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981). Because "[t]hey exercise their religion through religious organizations, . . . these organizations must be protected" by the guarantee of free exercise of religion. *Id.* In a similar vein, Justice William Brennan has asserted that "[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community [which] represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). Roman Catholic theology asserts that *extra ecclesiam, nulla salus* (outside the Church, no salvation), a doctrine that is founded on the belief that Christ and his church are indivisible—though Catholic doctrine holds that literal membership in the Roman Catholic Church is not essential to salvation. See generally THE HARPER COLLINS ENCYCLOPEDIA OF CATHOLICISM 1158–60 (Richard P. McBrien et al. eds., 1995). A recent statement of the doctrine by the Vatican's Congregation for the Doctrine of the Faith is found in *Dominus Iesus*. See CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION "DOMINUS IESUS" ON THE UNICITY AND SALVIFIC UNIVERSALITY OF JESUS CHRIST AND THE CHURCH (Aug. 6, 2000), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20000806_dominus-iesus_en.html; see also Fr. Ray Ryland, *No Salvation Outside the Church*, THIS ROCK, Dec. 2005, available at <http://www.catholic.com/thisrock/2005/0512fea3.asp>.

A different subsection of the Virginia division statute applies to congregational churches,⁷⁴ and the validity of that subsection is largely beyond cavil.⁷⁵ When a congregation has splintered into factions, Virginia has chosen the third option that the Court in *Jones v. Wolf* offered to states to resolve church property disputes. The statute does not interfere with ecclesiastical affairs, but merely announces the eminently democratic principle of majority rule to resolve property disputes that arise from doctrinal schism. Of course, there can be problems in the application of the statute to a congregational denomination. For example, when division occurs within a congregation with no written instrument that defines who is a member, and thus entitled to vote, civil courts would be required to determine membership by reference to actual practice of the congregation, so long as that can be decided without delving into religious doctrine. These problems, however, are administrative only, and do not raise large questions of religious freedom under the Constitution.

III. CALIFORNIA: WHEN MANDATORY DEFERENCE TO RELIGIOUS GOVERNANCE VIOLATES RELIGIOUS FREEDOM

California's approach to church property disputes includes a statute, Corporations Code Section 9142, that specifies the conditions under which a charitable trust for religious purposes will be found. In relevant part, the statute provides:

(c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies:

(1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by

⁷⁴ VA. CODE ANN. § 57-9(B) (2009) provides, in relevant part:

If a division has occurred . . . or shall . . . occur in a congregation whose property is held by trustees which, in its organization and government, is a church or society entirely independent of any other church or general society, a majority of the members of such congregation, entitled to vote by its constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom, may decide the right, title, and control of all property held in trust for such congregation.

Id.

⁷⁵ For further discussion of the problems that exist with respect to the application of statutes such as the Virginia division statute to congregational churches, see *supra* text accompanying notes 49–58.

resolution of its board of directors to so hold those assets in trust.

(2) Unless, and only 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.

(3) Unless, and only to the extent that, the donor expressly imposed a trust, in writing, at the time of the gift or donation.

(d) Trusts created by paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or governing instruments creating the trusts.⁷⁶

This provision combines neutral principles with the special statute approach suggested by the Court in *Jones v. Wolf*, but it contains a serious defect that causes it, in some applications, to constitute a forbidden establishment of religion. Because any *one* of three methods specified by the statute can create a trust of a local church's property in favor of the hierarchical church with which it is affiliated, it is important to examine each of the methods. The first is not constitutionally problematic, so long as the directors resolve to hold the assets in trust for the hierarchical church. Similarly, the third method is beyond reproach, so long as the donor's express trust makes clear that the trust is in favor of the hierarchical church. Even if there were ambiguity in either of these cases, the neutral principles approach would require a civil court to examine the terms of the trust or its acceptance—so long as doctrinal inquiry is unnecessary—to decide whether the trust is in favor of the hierarchical church or the local congregation. The second method, however, is fraught with constitutional difficulties.

Under subsection (c)(2) of the California statute, a trust of local church property in favor of a hierarchical church can be created simply by an express declaration of that trust in the "governing instruments of a superior religious body or general church" of which a local church is a part. Subsection (d) provides that such trusts may be amended or dissolved by mere alteration of those governing instruments. Ordinary principles of trust law do not contemplate creation of a trust by the unilateral declaration of trust by the putative beneficiary. Thus, this provision grants a unique benefit to hierarchical churches.

⁷⁶ CAL. CORP. CODE § 9142 (2006).

Government aid to religion violates the Establishment Clause when it lacks a secular purpose or has as its primary effect the advancement of religion.⁷⁷ Phrased more positively, when government aid “is entirely neutral with respect to religion . . . [and] provides benefits directly to a wide spectrum of individuals”⁷⁸ to accomplish secular goals, it does not violate the Establishment Clause.⁷⁹ By these provisions, California has granted to hierarchical churches a benefit that is not made available to other putative charitable trust beneficiaries. Only hierarchical churches may impose a trust in its favor upon property of a local affiliate. The Veterans of Foreign Wars, the Rotary Club, or the Fraternal Order of Elks are not given this power. On their faces, California Corporations Code sections 9142(c)(2) and 9142(d) are not neutral with respect to religion.

Yet, in the *Episcopal Church Cases*,⁸⁰ the California Supreme Court failed to discern the religious preference of Corporations Code section 9142. First, that court fastened upon dicta in *Jones v. Wolf* that “the constitution of the general church can be made to recite an express trust in favor of the denominational church . . . [a]nd the civil courts will be bound to give effect to *the result indicated by the parties*.”⁸¹ The California court reflexively relied on this passage to conclude that a hierarchical church can unilaterally impress a trust in its favor of local congregational property.⁸² It wholly ignored the important qualification in the *Jones v. Wolf* dicta that the obligation of civil courts is to honor “the result indicated by the parties.”⁸³ In simpler language, civil

⁷⁷ Despite repeated reports of the death of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), its analytical approach remains as a template through which government aid to religion is assessed for compliance with the Establishment Clause. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 669 (2002).

⁷⁸ *Zelman*, 536 U.S. at 662.

⁷⁹ See also *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion) (citation omitted) (“[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.”).

⁸⁰ 198 P.3d 66 (Cal. 2009), cert. denied sub nom. Rector, Wardens & Vestrymen of Saint James Parish in Newport Beach, Cal. v. Protestant Episcopal Church in the Diocese of L.A., 130 S. Ct. 179 (2009).

⁸¹ *Id.* at 80 (emphasis removed) (quoting *Jones v. Wolf*, 443 U.S. 595, 606 (1979) (emphasis added)).

⁸² See *id.* at 83.

⁸³ *Id.* at 80 (emphasis removed) (quoting *Wolf*, 443 U.S. at 606).

courts must give effect to bilateral agreements, and a unilateral declaration of trust *by the putative beneficiary* is not a bilateral agreement.

The California Supreme Court accepted uncritically the argument of the hierarchical church that was benefitted by section 9142 that the secular goal of the statute is to avoid conflict with the free exercise guarantee by providing a method for resolving church property disputes that does not depend on doctrinal inquiry and recognizes internal autonomy as an aspect of the free exercise right of churches.⁸⁴ This justification fails because California's method prefers hierarchical churches to congregational churches, in violation of the Establishment Clause. *Larson v. Valente*⁸⁵ held that statutes that "burden or favor selected religious denominations" constitute "religious gerrymandering" and are forbidden by the Establishment Clause.⁸⁶ The clear effect and evident purpose of subsections (c)(2) and (d) are to favor hierarchical churches. They enable hierarchical churches, and no other churches, charitable organizations, or non-charitable entities, to create trusts for their benefit of property they do not own by mere declaration of the trust.

Moreover, because California has created alternative ways to accomplish its putative objective, there is even less reason to view subsections (c)(2) and (d) as furthering any secular purpose or having any neutral effect with respect to religion generally or between denominations. Were subsections (c)(2) and (d) modified to remove this benefit to hierarchical churches, such churches would remain free to acquire beneficial title in local congregational property. Of course, either of the other two methods California provides for creation of trusts of local church property for the benefit of the hierarchical church would require consent of the donor or local congregations. This requirement, however, is a general rule of conduct applicable to all citizens. Ecclesiastical autonomy, which is the concern of *Gonzalez*,

⁸⁴ *Id.* at 83 ("[T]he section . . . promotes the free exercise rights of persons to form and join a religious association that is constructed and governed as they choose.").

⁸⁵ 456 U.S. 228 (1982).

⁸⁶ *Id.* at 254.

Serbian Orthodox, and *Kedroff*, is not compromised by imposing on hierarchical churches a rule which all persons must observe in their quest to acquire property interests.

To similar effect is *Board of Education of Kiryas Joel Village School District v. Grumet*,⁸⁷ in which the Court concluded that New York legislation designed to permit an insular religious community to operate a public school system that would consist entirely of members of the religious community was "tantamount to an allocation of political power on a religious criterion," and thus violated the Establishment Clause.⁸⁸ California's decision to grant hierarchical churches a unique authority to impress a trust upon property they do not own merely by declaring that the church is the trust beneficiary of that property is an even more startling cession of governmental power to a religious organization. This is not a mere veto over the ability of others to obtain governmental benefits—as in *Larkin v. Grendel's Den, Inc.*⁸⁹—but the far more extraordinary power to seize property by divesting others of their beneficial interests in the property.⁹⁰

The California provisions also fail the scrutiny that Justice Kennedy proposed in his *Kiryas Joel* concurrence. For a governmental accommodation of religion to be valid, the state must seek "to alleviate a specific and identifiable burden"⁹¹ on religion, the accommodation must "not impose or increase any burden" on those who are not adherents to the accommodated religion,⁹² and the state must not have denied other religions the same benefit "under analogous circumstances."⁹³ First, there is no "specific and identifiable burden" on hierarchical churches

⁸⁷ 512 U.S. 687 (1994).

⁸⁸ *Id.* at 690.

⁸⁹ 459 U.S. 116, 125 (1982).

⁹⁰ Although sections (c)(2) and (d) work no immediate dispossession of the local congregation, and thus provide no solid basis for asserting that they constitute a regulatory taking, once conflict erupts between the local congregation and the general church over possession of the local church property, a civil court decision granting possession to the general church based on sections (c)(2) or (d) would constitute a permanent dispossession and, thus, a taking. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a cable television company's permanent occupation of a landlord's property constitutes a taking, even though the relevant New York statute required landlords to permit cable installation).

⁹¹ *Kiryas Joel*, 512 U.S. at 724 (Kennedy, J., concurring).

⁹² *Id.*

⁹³ *Id.* at 726.

that subsections (c)(2) and (d) alleviate. Hierarchical churches are free to utilize the more conventional, and less preferential, methods of subsections (c)(1) and (c)(3) to place local church property in trust for the benefit of the general church. Second, the California provision imposes a burden on those who are not adherents to the accommodated religion. Donors of property to local churches are not necessarily members of the hierarchical church. Such donors have no assurance that their intent to transfer property in trust for the exclusive benefit of the local church, and not the hierarchical church, will be honored. All the general church would need to do is alter its own internal governing instruments to nullify the explicit intentions of donors. This is a unique and specific burden that would not exist but for the California provisions.

Justice Kennard, concurring in the judgment, defended the California provisions on the grounds that they incorporate the *Watson* principle that civil courts should defer to a hierarchical church's governance structure to adjudicate property disputes within such a church.⁹⁴ But this *Watson* principle holds that governments may not inquire into, or interfere with, such governance structures, not that governments may endow hierarchical churches with unique powers that a church could not create or obtain in the absence of government action. The New York legislation voided in *Kedroff*, for example, was an attempt to privilege a governance structure created by a schismatic faction of the Russian Orthodox Church. Such insulation from the pre-existing governance structure of the mother church could not have been created without New York's intervention. Rather than declaring a principle of neutrality with respect to the governance of hierarchical churches, California's provisions intervene in that governance by enabling hierarchical churches to impose trusts in their favor without the consent of the property owner.

Hierarchical churches contend that the California provision does no more than recognize a common governance principle of hierarchical churches, and in the *Episcopal Church Cases* the California Supreme Court agreed.⁹⁵ A condition of local affiliation with the hierarchical church is that the local

⁹⁴ See *Episcopal Church Cases*, 198 P.3d 66, 85–86 (Cal. 2009) (Kennard, J., concurring).

⁹⁵ See *id.* at 81–82.

congregation's property will be held in trust for the benefit of the hierarchical church. For example, the ECUSA's Canon I.7.4 provides that "[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located."⁹⁶ This may well constitute a prerequisite for local affiliation with the higher church,⁹⁷ but without secular action of the owners of that property to place it in trust for the benefit of the higher church, the canon is hortatory. To be sure, the existence of the canon might support the creation of an implied trust in favor of the ECUSA, but this cannot be true with respect to local churches that hold their property explicitly in trust for the benefit of the local congregation. Something more than the higher church's unilateral ukase is needed to convert an explicit trust for the benefit of a local congregation into a trust for the benefit of the hierarchical church with which the local body is affiliated. That is where the California provision comes in. It purports to vest in the hierarchical church the unilateral power to convert property held for local congregational benefit into property held in trust for its own benefit. As discussed, this is both a form of denominational preference and a cession to a church of secular authority, each of which is forbidden by recent Supreme Court precedent. What is remarkable is that the courts are so indifferent to these principles.⁹⁸

IV. RELIGIOUS FREEDOM, NEUTRAL PRINCIPLES, AND STATE AUTONOMY

There is confusion concerning the proper standard for civil resolution of church property disputes because in *Jones v. Wolf*, the Supreme Court left three options for civil courts to choose from to dispose of church property disputes. One solution is to

⁹⁶ THE EPISCOPAL CHURCH, *supra* note 32 (Organization and Administration of Business Methods in Church Affairs: Property Held in Trust). This provision was adopted by the ECUSA in 1979. See *Episcopal Church Cases*, 198 P.3d at 72. Enactment of the canon was probably a reaction to the apparent invitation of *Jones v. Wolf*.

⁹⁷ For example, Canon II.6.1 of the ECUSA, provides that no church "shall be consecrated until the Bishop shall have been sufficiently satisfied that the building and the ground on which it is erected are secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons." THE EPISCOPAL CHURCH, *supra* note 32, at tit. II, canon 6, sec. 1 (Worship of Dedicated and Consecrated Churches: Evidence of Affiliation).

⁹⁸ See cases cited *supra* notes 35-37.

settle upon a single standard,⁹⁹ but this approach pays insufficient attention to the disparate nature of church organizations, the variety of property arrangements that are possible, and the delicate task of accommodating the religious freedom of both church organizations and their constituent elements, whether individuals or local assemblies of believers. This multiplicity of factors suggests that flexibility is needed, but clearer boundaries upon the exercise of flexibility are also necessary. Each of the three options for resolution of church property disputes that the Supreme Court identified in *Jones v. Wolf* requires courts to use only secular criteria when reaching a decision. However, the options fail to account adequately for either religious freedom or the need to avoid forbidden establishments of religion. Uncritical reliance upon internal church governance rules to resolve property disputes is the principal problem. This issue has two facets.

First, while courts should defer to internal governance rules in ecclesiastical matters—issues of religious doctrine or clerical authority—the use of these rules to decide property disputes may provide a constitutionally forbidden preference to hierarchical churches. When hierarchical churches adopt internal rules that permit them to acquire property without the consent of the property owner, and those rules are enforced by civil courts, they have obtained a governmental benefit not available to secular charities or non-hierarchical churches. Second, under conditions of religious schism, reliance upon internal church governance rules places civil courts in the position of favoring one side of a religious dispute. This is particularly true in the case of hierarchical churches because the internal governance rules of the original church will almost always favor that wing of the schismatic church. Even more important is the fact that this method of decision utterly fails to recognize the significant interest in individual and collective choice of religious belief that is manifested by the decision of a local congregation of a schismatic hierarchical church to align with the wing of the divided church that is disfavored by the original church. When schism occurs, the religion clauses unite to require that local congregational property goes with the choice of affiliation made

⁹⁹ See, e.g., William G. Ross, *The Need for an Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L.J. 263, 316 (1987).

by a majority of the local congregation. These principles will be discussed in connection with each of the three options preserved for civil courts by *Jones v. Wolf*.

A. Deference to Internal Principles of Church Governance

Under this approach, problems of differing magnitude occur with respect to congregational churches and hierarchical churches. Constitutional difficulties are present in either case, but they are greater with respect to hierarchical churches.

1. Congregational Churches

When congregational churches fracture, the property issues that result are generally capable of resolution without significant danger of civil intrusion into religious freedom. If such churches have a written constitution—whether articles of incorporation or some other written expression of a fundamental governance structure—that document may be used to resolve the issue unless, of course, control of the property under the constitutive document turns on a resolution of religious doctrine. In such cases, resort to neutral principles such as formal title is necessary. Some congregational churches, especially those that are unincorporated associations, do not have written constitutive documents. In such cases, the state law concerning unincorporated associations must be used to decide the property issues. If majority rule is the state's rule, the customs of the congregation should be used to decide who constitutes the voting polity of the congregation; but conflict with religious doctrine can occur when relying on congregational customs to determine who constitutes the church polity.

As an example, imagine a congregational church that has fractured over the issue of whether women should be permitted to participate equally with men in the liturgical and governance work of the church. The prior understanding of the congregation, based on religious texts, has been that women should be silent and passive participants in the church's liturgy and governance. The church is an unincorporated association located in one of the states that permits such associations to hold title to realty, and either lacks any written constitutive document or operates under a charter that fails to specify who may vote on governance matters. Resort to congregational custom will cause the civil court to side with one side in the doctrinal controversy.

Of course, the relevant state law could stipulate that all persons age eighteen or older who are members of the association may vote. But this statutory provision would merely shift the problem to the question of whether the statutory rule would constitute an impermissible interference with ecclesiastical polity. Application of the principle that civil courts must respect equally the church's religious freedom and the individual religious freedom manifested through a community of adherents leads to the conclusion that the state's voting rule should prevail. Absent contrary evidence, the state's rule should be presumed to be crafted without either the intent or probable effect of favoring one side in a doctrinal controversy. This would surely be the case if the rule applied to all unincorporated associations, whether religious or secular. This neutrality should insulate the state's rule from attack as an impermissible interference with the religious freedom of the congregation. The state's rule might favor one side of the doctrinal split, but it would do so unintentionally, as part of a rule generally applicable to unincorporated associations. Moreover, it would preserve the individual and communal religious freedom that is particularly critical when congregations divide on points of religious belief. In this example, a congregational church's religious freedom, as distinguished from that of a hierarchical church, is subsumed into the doctrinal preferences of its members.

2. Hierarchical Churches

Hierarchical churches generally hold as a matter of religious doctrine that the tenets of the faith are unitary and unvarying across all elements of the church. The highest authority in such a church generally articulates that doctrine. Thus, for example, the Roman Catholic Church regards the Pope as the apostolic successor to St. Peter, whom Jesus declared to be the "rock [upon which] I will build my church."¹⁰⁰ Roman Catholic doctrine relies upon the same Biblical passage to hold that Peter and his papal successors have divinely sanctioned authority on Earth.¹⁰¹ The

¹⁰⁰ *Matthew* 16:18 (New International).

¹⁰¹ *Id.* 16:19 ("I will give you the keys of the kingdom of heaven; whatever you bind on earth will be bound in heaven, and whatever you loose on earth will be loosed in heaven."); see also George Joyce, *The Pope*, in *THE CATHOLIC ENCYCLOPEDIA* 260, 260–61 (Charles G. Herbermann et al. eds., 1911), available at <http://www.newadvent.org/cathen/12260a.htm>.

governance structure of the Roman Catholic Church is thus intimately connected to its religious doctrine. Other hierarchical churches may involve less fusion of governance and doctrine. The ECUSA, for example, vests governance in a General Convention consisting of bishops and elected deputies, and charges the Presiding Bishop to speak "for the Church as to the policies, strategies and programs authorized by the General Convention,"¹⁰² and also to "[s]peak God's words . . . as the representative of this Church and its episcopate in its corporate capacity."¹⁰³ Because hierarchical churches consist of a multitude of local congregations officiated by clergy who are ordained and designated by and through the general church, conflict can and does arise when doctrinal disagreements occur between the general church and its constituent elements. Civil courts have no authority to adjudicate doctrine, of course, but must adjudicate the property issues that inevitably follow. There are several situations in which these property issues can arise.

First, there may be congruence between the internal rules of church governance and the manner in which title to the local congregational property is held. For example, assume the internal church rules declare that all local congregational property is held in trust for the benefit of the general church, and the secular title documents state the same thing. Civil court deference to internal church governance rules poses no constitutional difficulty because the same result would obtain if the court were to apply the neutral principles approach.

A second scenario is conflict between deference to internal rules of hierarchical churches that declare that local congregational property is held in trust for the general church, even though legal and beneficial title is held in favor of the local congregation. When a majority of a local congregation decides that its religious beliefs and the doctrine of the general church are no longer compatible, and thus decides to separate from the general church, a serious constitutional issue is presented. On one hand, deference to internal church governance rules recognizes the freedom of a hierarchical church to preserve itself as an entity. But that perspective is myopic, as it wholly ignores

¹⁰² THE EPISCOPAL CHURCH, *supra* note 32, at tit. I, canon 2, sec. 4(a)(1) (Policy and Strategy of the Chief Pastor and Primate).

¹⁰³ *Id.* at sec. 4(a)(2) (Chief Pastor and Primate as Representative of Church and Episcopate).

the conflicting freedom of individuals gathered together in a local worship community to preserve their own community of religious belief. Assuming that the state has not acted to mandate deference to hierarchical church governance, as California has done by enacting California Corporations Code sections 9142(c)(2) and 9142(d), the constitutional problem presented is whether judicial discretion to defer to hierarchical church governance violates the Establishment Clause as fully as does a statutory mandate.¹⁰⁴

There are several problems with judicial resort to internal church governance rules as the standard of decision. First, although internal governance rules appear to offer the promise of avoiding inquiry into religious doctrine, this is sometimes an illusory promise. Second, reliance on internal governance rules favors the religious freedom of institutional churches at the expense of the religious freedom of their constituent elements.

To illustrate the point that deference to internal church governance rules sometimes may require civil courts to inquire into religious doctrine, consider the following scenario. It is familiar history that Henry VIII deposed the Roman Catholic Church and substituted the Church of England in its stead. The Church of England came with colonists to America, mostly in the southern colonies, where it was the officially established church in Virginia and southwards. With the success of the American Revolution, Anglicans in America created the ECUSA, though continued to retain ties with the Archbishop of Canterbury as the spiritual head of the worldwide Anglican Communion. Suppose that units of the ECUSA were to leave that church and affiliate with the Roman Catholic Church because they have concluded that the historic split between Rome and Canterbury, and the subsequent secession of the ECUSA from the Church of England in the wake of the American Revolution, were each errors of doctrine.¹⁰⁵ These hypothetical secessionist units of the ECUSA would acknowledge that the true Christian church is the Roman Catholic Church, as that church has always contended. To whose internal hierarchical governance rules should a civil

¹⁰⁴ See *supra* note 52 and accompanying text.

¹⁰⁵ See, e.g., David Van Biema & Jeff Israely, *Could the Pope Aid an Anglican Split?*, TIME, July 9, 2008, available at <http://www.time.com/time/world/article/0,8599,1821374,00.html?imw=Y> (discussing a possible schism within the Anglican Church resulting in units of the Anglican Church rejoining the Roman Catholic Church).

court look to decide the resulting property dispute—the ECUSA's or the Roman Catholic Church's? To add to the problem, suppose that the internal governance rules of each church provide that the property of local units is held in trust for the benefit of the general church.

A glib answer is that the internal governance rules of the ECUSA should control, but the reason for the dispute is that the local units proclaim that the true church of which they are a part is not the ECUSA, but the Roman Catholic Church. The local units placed title in trust for the benefit of the ECUSA because they believed it to be the "true" singular hierarchical church established by Jesus Christ, but they say they now realize that the true church is the Roman Catholic Church. The local units note that the general church of which they are a part has always been "one catholic and apostolic church," as the Nicene Creed of the ECUSA and the Roman Catholic Church each proclaim; thus, the entity to which they belong can only be determined by resolving a disputed issue of religious doctrine. "Nonsense," says the ECUSA, "the dispute can be resolved by simply examining the internal governance rules of the ECUSA, which state that the property of its local units is held in trust for the benefit of the ECUSA." Literal adherence to internal governance rules would effectively resolve the doctrinal question in favor of the ECUSA. But such literal adherence places the civil courts in the position of answering the doctrinal question in favor of the Episcopal Church and against the Roman Catholic Church. Of course, for a civil court to look behind the internal rules would require the court to answer directly the doctrinal question, an answer that it cannot provide. In neither case is neutrality served. In the latter case, civil courts are unequivocally deciding issues of religious doctrine, but in the former case they are doing so under the thin coverlet of examining a church's internal governance rules.

Even resort to neutral principles of formal title is not much help. Henry VIII seized the Roman Catholic Church's property and vested it in the Church of England. Post-revolutionary American Anglicans seized the Church of England's property and vested it in the ECUSA. If a local Episcopal congregation that holds its property in trust for the ECUSA should decide that the true church of which it is a part is the Roman Catholic Church, though called the Episcopal Church in the title documents,

reliance on formal title produces an outcome that effectively resolves the doctrinal question. It is pretense to think that either internal governance rules or neutral principles truly free the civil courts from deciding doctrinal issues.

To be sure, there are likely to be instances in which use of internal governance rules do not require an implicit judicial decision about doctrine. Such was the case in *Gonzalez, Serbian Orthodox Church*, and *Kedroff*. Matters of internal ecclesiastical governance are surely the exclusive province of the church, but when churches splinter into religious factions the dynamic changes markedly, and the constitutional considerations for adjudication of property disputes should reflect those changes.¹⁰⁶

The basic problem with schisms within a hierarchical church is that three entities have valid claims of religious freedom. The institutional church claims that it has the freedom to specify and perpetuate its dogma by retaining control of the property that constitutes the local venues for perpetuation of its mission. Individual members of the institutional church claim the freedom to reject the church's dogma and think for themselves. If this were the only conflict, resolution would be simple: The church's freedom is protected by delivering possession of local church property to the institutional church and individuals remain free to walk out of the building and form a new church. But there is a third element, which knocks this easy resolution into the gutter. Individuals band together into local communities of worship. As noted earlier,¹⁰⁷ religious belief usually entails communal worship and practice, and these local congregations are often self-financed. To strip the property acquired by local contributions from the local body that financed and maintained that property is to deny completely the communal aspect of religious belief and place civil courts in a partisan role as defenders of institutional religious orthodoxy. When schism occurs, reflexive delivery of these properties to the hierarchical church flatly ignores the profound interest in religious freedom of the local assembly. Without the buildings and grounds that they have either purchased or maintained at their own expense, these

¹⁰⁶ An illustration of this principle may be found in *Dixon v. Edwards*, 290 F.3d 699, 718 (4th Cir. 2002) (deferring to a ruling by the diocesan bishop, under the internal rules of the Episcopal Church, that a local rector was not eligible for the post).

¹⁰⁷ See *supra* text accompanying note 58.

communities will wither and die. Of course, within each local congregation, the schism that is the root of the problem will likely be present as well. Under such conditions, something like the Virginia division statute is the only way to recognize the equally compelling interests of the hierarchical church and the local congregations.

It is axiomatic that civil courts cannot use "departure from doctrine" as a test, but under conditions of schism it is intellectually dishonest to use a nominally neutral test—whether internal governance or neutral principles—when the test effectively privileges one side of a doctrinal division. When schism occurs, courts are truly neutral as to religious doctrine when they use a rule that allows local congregations to make independent judgments on doctrine, rather than automatically permitting the general church to impose disputed doctrine on unwilling local communities. Hierarchical churches may object that this amounts to a civil rejection of a central doctrinal tenet, but this is not so if the principle is limited to cases where the hierarchical church has itself divided. When schism has occurred, the hierarchical church has lost the rationale for awarding local property to it by reason of deference to internal governance rules or application of neutral principles of title. Neither branch of a divided church is entitled to preference from the civil courts.

Moreover, under *Employment Division v. Smith*,¹⁰⁸ a law that is not a generally applicable rule of conduct, but which in either purpose or effect singles out religious conduct for unfavorable treatment, violates the free exercise guarantee. Judicial deference to the internal governance rules of a hierarchical church that has divided into competing factions is not a generally applicable principle. The principle applies only to churches, in practice applies almost entirely to hierarchical churches, and is unique in its effects when invoked in the context of a church schism. Its application in that context singles out the religious conduct of dissident congregations for unfavorable treatment. While it may seem that rival claims to church property do not involve religious conduct, that view is mistaken. The claim of a congregation to keep the property it has acquired

¹⁰⁸ 494 U.S. 872, 877–78 (1990), *superseded by* Religious Freedom Restoration Act ("RFRA") of 1993, 42 U.S.C. § 2000bb-1 (2006).

and maintained by expenditure of its own funds to preserve its community of religious fellowship is at the heart of the religious conduct of the community.

B. Special Statutes

State autonomy to craft special statutes to deal with church property disputes is more apparent than real. Such statutes cannot require judicial resolution of doctrinal matters, afford special benefits to churches that are not offered equally to secular charities to attain some secular objective, or privilege some churches at the expense of others. Moreover, statutory approaches must respect the free exercise freedoms of individuals gathered in local worship communities. These principles reduce considerably the choices open to legislatures in crafting such statutes. California's statutory grant of special privileges to hierarchical churches is a good example of a statute that fails these principles.¹⁰⁹ So, too, is Pennsylvania's version of this approach, which mandates that civil courts defer to internal governance rules of a church in adjudicating property disputes, and which also stipulates that all property acquired by units of a hierarchical church shall be under the control of the ruling officers and authorities of the institutional church.¹¹⁰ To be sure, application of such statutes to local units of a hierarchical church that have voluntarily agreed to hold their property in trust for the general church are not constitutionally problematic.¹¹¹ But when such statutes enable hierarchical churches to impress a trust upon local congregational property without explicit agreement to the trust on the part of the local congregation, the Establishment Clause is violated.

In addition, regardless of the form of ownership of local congregational property, when a hierarchical church fractures over issues of doctrine, there is no longer any rationale for exclusive reliance upon internal governance rules, and statutes that compel such reliance under conditions of schism become vulnerable to claims that their application deprives local congregations of their religious freedom and that they constitute a forbidden establishment of religion. Under such circumstances, any special statutory approach must recognize the free exercise

¹⁰⁹ See *supra* Part III.

¹¹⁰ See 10 PA. CONS. STAT. § 81 (1999).

¹¹¹ See, e.g., *In re Church of St. James the Less*, 888 A.2d 795, 807–08 (Pa. 2005).

claims of local congregations as well as the interest in religious autonomy asserted by a hierarchical church.¹¹² The Virginia division statute is an excellent example of a special statute that validly addresses the particular problem of churches in the throes of doctrinal schism.¹¹³

C. Neutral Principles

While the neutral principles approach is generally a reliable method of dealing with property issues amid church schisms, problems can exist in its application. Religious issues can be embedded in titles. Thus, for example, if property is transferred in trust to "the Episcopal Bishop of Pittsburgh," neutral principles cannot possibly resolve the matter. Because there are now two Episcopal Bishops of Pittsburgh—one the leader of the existing Episcopal Diocese that has voted to affiliate with the Anglican Church of North America, and the other the cleric installed by the ECUSA to assume the role of Bishop of Pittsburgh—a civil court applying neutral principles must determine which of these entities is the "Episcopal Bishop of Pittsburgh." Alternatively, a civil court could inquire into the intent of the transferor. That inquiry would involve determination of the donor's preferences in the schism, but would not require a resolution of the ecclesiastical dispute concerning which cleric is the Episcopal Bishop of Pittsburgh. Rather, a civil court might simply determine which Episcopal Bishop the donor intended to benefit, unless the answer to that question required a resolution of doctrinal differences.

An additional problem in the case of hierarchical churches is that neutral principles become intertwined with deference to internal church governance. The most common situation is presented when a hierarchical church includes in its governing instruments a declaration that local congregational property is held for the benefit of the general church. Even without any action on the part of a local congregation to create such a trust, courts frequently find an implied trust in favor of the general church based on local congregational acceptance of clergy provided through the general church, the use of the hierarchical

¹¹² Of course, once a hierarchical church has divided, its interest in religious autonomy no longer extends to imposing its will upon all elements of a divided church.

¹¹³ See *supra* Part II.

church's name, or other evidence suggestive of local acquiescence to the rules of the hierarchical church.¹¹⁴ To the extent that these factors are applied with equal vigor to secular charitable entities, this may be a pure application of neutral principles. However, if a hierarchical church's declaration that local congregations hold property in trust for the general church is the critical element in a finding of implied trust, and secular entities are not permitted to impose trusts in their favor by such unilateral action, an Establishment Clause violation is the result.

CONCLUSION

When the Supreme Court decided *Watson* and adopted deference to internal church governance as a standard for resolution of church property disputes, the religion clauses did not apply to the states. While the Court couched its reliance upon internal governance as an implication flowing from the ideals of religious freedom, it did not have to examine that premise critically. Deference to internal governance rules of hierarchical churches promotes religious freedom sometimes, but not always. Civil judicial interference with a hierarchical church's control of its clergy is the paradigmatic case of impermissible interference with the free exercise of religion. By contrast, permitting a hierarchical church unilaterally to impose trusts in its favor upon property held for the benefit of local congregations either creates an Establishment Clause violation—if secular charitable entities are denied this state-created benefit or if there is no plausible secular purpose for this benefit—or cuts deeply into the practical reality of how individual believers gathered in local communities manifest their religious conduct. This problem is exacerbated when a hierarchical church divides amid doctrinal disagreement. At that point, courts should apply a rule of local option, permitting each congregation to decide for itself which branch of the divided church will have its fealty and its property. Only by applying such a rule can a proper balance be struck between the splintered autonomy interest of a hierarchical church and the interest in religious associational freedom of local congregations and their individual members. The reflexive reliance of courts upon internal governance rules to

¹¹⁴ See, e.g., *Church of St. James*, 888 A.2d at 809.

decide property issues amid schism has obscured the interests in religious freedom that are at stake.

Adoption of the local option principle leaves hierarchical churches with many avenues to secure local property for the benefit of the general church. First, they can avoid rupture by finding sufficient common ground in their religious doctrine to accommodate their bodies of believers. Second, they can insist that local congregations explicitly place their properties in trust for the benefit of the general church as the price of continued affiliation with the general church. What they cannot do is create such trusts by the *ipse dixit* of the hierarchical church.