ARTICLES

PROTECTING CHURCH AUTONOMY IN THE TWENTY-FIRST CENTURY: A DEFENSE OF THE COMPULSORY DEFERENCE APPROACH FOR CHURCH PROPERTY LITIGATION

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ABSTRACT

The First Amendment's Establishment Clause, in prohibiting Congress from making any law "respecting an establishment of religion," sets forth the separation of church and state so recognizable in American society. The First Amendment's Free Exercise Clause prevents Congress from "prohibiting the free exercise" of religion. When disputes arise within religious communities, such as when competing factions both claiming to be the "true church" seek to secure church property rights, the interplay between the First Amendment's two religion clauses becomes particularly nuanced: the opposing parties seek an impartial tribunal (i.e., a secular court of law) to settle the dispute, but the tribunal must avoid interfering in the religious community's internal affairs.

In response to this conundrum, American courts have oscillated between two judicial postures that the United States Supreme Court has found to be constitutionally permissible: (1) the "compulsory deference" method preferred in the 1871 case Watson v. Jones, providing that for a hierarchical church (i.e., a church organized where local branches are situated within a larger structural tier), the secular tribunal should defer to the decision of the church's hierarchical authority; and (2) the "neutral principles" method endorsed in the 1979 case Jones v. Wolf, whereby courts are permitted to review secular documents (e.g., property deeds, church constitutions, etc.) to determine for themselves which faction should triumph—even if, in the case of hierarchical churches, the church's higher structural level has already decided. The "neutral principles" judicial posture allows a secular court to rule for one party while the church hierarchy has supported the opposing party, thus creating a conflict between secular and religious interests that the "compulsory deference" method avoids.

This Article argues that in cases involving the Roman Catholic Church, secular courts should use the compulsory deference method to resolve those property disputes. This position is warranted not only because the Catholic Church is hierarchically arranged but also because of the particular ways that the Catholic Church vests property ownership. This Article concludes that the compulsory deference approach is the only constitutionally permissible method that ensures that secular courts do not infringe upon the Catholic Church's free exercise rights.

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INTRODUCTION

When Americans reflect on the qualities that make their patria extraordinary, many identify the freedoms enshrined in the Constitution and the Bill of Rights as significant contributors to a distinct American ethos.[1] The First Amendment protection of freedom of religion is one of these enshrinements on which millions of Americans rely daily. In particular, the separation of church and state so woven into the fabric of American society that it is often taken for granted.[2] William G. Ross thus observes that "[f]ew legal principles are more widely known and universally accepted by Americans than are the doctrines of freedom of religion and separation of church and state. Thomas Jefferson's metaphorical 'wall of separation' between the government and religious [communities] has become an axiom of legal thought."[3] This tradition did not originate in the United States *ex nihilo* but rather was the product of centuries

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1. *See, e.g.*, THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY (Pew Rsch. Center, 2018). The Pew Research Center found that many Americans recognize the value of the principles on which our nation was founded and yet see the need for reform and purification: "At a time of growing stress on democracy around the world, Americans generally agree on democratic ideals and values that are important for the United States. But for the most part, they see the country falling well short in living up to these ideals . . . ." *Id.* at 1. This current zeitgeist makes it more tempting to accept increased government intervention as a solution for society's structural problems, but this top-down approach has its drawbacks in infringing upon society's middle institutions like religious communities.

2. For the pertinent text of the First Amendment's religion clauses, see *infra* text accompanying note 16.

3. 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, 263 (1987) (footnote omitted). Ross advocates for the judicial posture of neutral principles championed in the landmark case of the United States Supreme Court, *Jones v. Wolf*, 443 U.S. 595 (1979). For an examination of *Jones v. Wolf*, see *infra* Section I.B.ii. As will become clear, however, this Article argues that an alternative judicial method deemed constitutionally permissible, the compulsory deference approach, should be preferred in the context of litigation involving the Roman Catholic Church.

of development. Steven K. Green thus describes this particularly robust thread of Western thought enduring for almost a millennium:

> [A] distinction between temporal and ecclesiastical authority, with each operating in independent realms, can be traced to the eleventh century Catholic Church. As a means of freeing the Church from the control of emperors and kings, Pope Gregory VII promoted the "two swords" theorem in which clergy wielded the spiritual sword and civil magistrates possessed the temporal sword.[4]

Closer to the American founding, Ross comments on how Europeans came to the New World to flee religious persecution and yet also inherited a tradition of church-state connectedness:

> The earliest American settlers brought from Europe a heritage of close ties between church and state. The doctrine of *curius regio, eius religio* still prevailed in most parts of Europe during the Seventeenth and Eighteenth Centuries. In England, the civil rights of Protestant dissenters and Roman Catholics were not fully recognized until the Nineteenth Century.[5]

Growing out of this multifaceted tradition, scholars, judges, and the general public emphasize different historical aspects to create drastically different outcomes downstream.[6] Angela C. Carmella writes that "[t]hose who

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4. Steven K. Green, *The "Irrelevance" of Church-State Separation in the Twenty-First Century*, 69 SYRACUSE L. REV. 27, 33 (2019) (first citing HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 92–93 (1983); and then citing John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH & STATE 15, 20 (2006)); *see also* Richard W. Garnett, *The Freedom of the Church: (Toward) An Exposition, Translation, and Defense*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 39, 40 (Micah Schwartzman et al. eds., 2016) ("[A] powerful 'slogan' of the revolutionaries was *libertas ecclesiae*, 'the freedom of the church,' a '"Great Idea," whose entrance into history marked the beginning of a new civilizational era.'") (first quoting BERMAN, *supra*, at 87; and then quoting JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN EXPERIENCE 202 (1960)).

5. Ross, *supra* note 3, at 265 (citing DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485 429–32 (9th ed. 1969)). *But see* Don R. Sampen, *Civil Courts, Church Property, and Neutral Principles: A Dissenting View*, 1975 U. ILL. L.F. 543, 545 (1975) (footnotes omitted) ("The principle of complete church independence in settling matters of a religious nature has been recognized and condoned throughout history by state and church tribunals alike."); Garnett, *supra* note 4, at 42 ("[Pope Emeritus Benedict XVI] has also proposed and elaborated on the suggestion that Christianity 'brought the idea of the separation of Church and state into the world' and thereby 'deprived the state of its sacral nature.'") (first quoting JOSEPH RATZINGER, THE SALT OF THE EARTH 239 (1997); and then quoting *id*. at 240).

6. For example, Ross writes that "American legal thought remains rife with controversy over the proper means of effectuating the commands of the first amendment's religio[n] clauses. Such disagreement is inevitable since neither the state nor religion exists in a vacuum." Ross, *supra* note 3, at 263. Richard Garnett writes in a different article that "the content of religious doctrine and the trajectory of its development might instead be matters to which even a liberal, secular, and democratic state reasonably could, and perhaps should, attend." Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1649 (2004).

defend robust religious freedom argue that religious rights form the foundation on which limited constitutional government is built, and that governmental attempts to limit religious exercise to the inside of heads, homes, and houses of worship is proof of the state's tendency to overreach."[7] But opponents of this outlook, especially those of a more secular worldview, tend to view government intervention in a more optimistic light if such involvement accomplishes preferable policy objectives.[8]

The drama of this debate over the proper relationship between church and state unfolds in a particularly acute and often controversial way in church property litigation.[9] Louis J. Sirico, Jr. describes the dual concerns present in legal disputes involving church property:

> Church property disputes furnish a case study on the intersection of public law and private law. The private association makes internal allocations of property interests, and principles of private law normally decide any disputes that may arise. Public concerns, here the concern for religious autonomy, may require modifying the private law.[10]

But not all church property disputes proceed in the same way. This substantive and procedural diversity originates not only in theological or doctrinal multiplicity but also in how the legal titles themselves are established. McConnell and Goodrich comment on the variety of ways that churches may choose to organize title to their properties:

> Sometimes the deed to the property states that it is held for the benefit of the denomination, as is common in the United Methodist

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7. Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 2 (2017); *see also* Robert J. Bohner, Jr., Note, *Religious Property Disputes and Intrinsically Religious Evidence: Towards a Narrow Application of the Neutral Principles Approach*, 35 VILL. L. REV. 949, 950 (footnotes omitted) ("[T]he first amendment severely restricts the scope of the inquiry that civil courts may undertake in resolving disputes over religious property.").

8. Akin to the debate between retributivism and consequentialism in the criminal law context, the dispute between more or less government intervention to achieve policy outcomes reaches to the core of political philosophy and its practical applications on how best to accomplish the optimal balance between freedom and externally imposed order. Relatedly, separation of powers questions arise about *which branch of the government* should be tasked with acting towards these ends. *See, e.g.*, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 265 (1990) ("The judicial power is neither a Platonic essence nor a pre-existing empirical classification. It is a purposive institutional concept, whose content is a product of history and custom distilled in the light of experience and expediency.").

9. "Church property disputes addressed by the courts often arise out of a schism in a local congregation, diocese, or subdivision of a hierarchical church." Robert A. Recio, Jones v. Wolf: *Church Property Disputes and Judicial Intrusion into Church Governance*, 33 RUTGERS L. REV. 538, 554 (1981).

10. Louis J. Sirico, Jr., *The Constitutional Dimensions of Church Property Disputes*, 59 WASH. U. L.Q. 1, 2 (1981) (footnote omitted). The intersection of which Sirico writes occasionally creates tensions when public and private interests are seen as conflicting. This difficulty is in part why many commentators are less sanguine about the role of religion in the public sphere, preferring religious practice to remain merely in the private sphere.

> Church; other times, the property is subject to an express trust agreement in favor of the denomination; still other times, title to the property is vested in a denominational officer such as a bishop, as is common in the Roman Catholic Church and the Church of Jesus Christ of Latter-day Saints. In these cases, there is little doubt that the denomination owns the property . . . .[11]

As for *why* church property disputes develop, John A. Spark contends that contentions "often arise because a particular denomination and the individual churches affiliated with that denomination find themselves differing over particular doctrinal matters."[12] Calvin Massey similarly notes that "[w]hen 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."[13] Religious communities thus do not exist disconnected from the outside world but rather operate within society's frameworks and institutions, even if the *content* of their doctrines extends beyond the imminent, tangible, and physically observable.[14] Accordingly, church property disputes represent crises within religious communities that must come to peaceful resolution. Judicial adjudication provides a constructive forum for this resolution to take place. At the same time, judicial involvement must respect the First Amendment's religion clauses, no matter the inconveniences or difficulties.[15]

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11. Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 308–09 (2016).

12. John A. Sparks, *Whose Church Is This?: Church Property Disputes and the Civil Courts*, 1 GROVE CITY COLL. J.L. & PUB. POL'Y 19, 19 (2010). It is not surprising that disputes of this nature arise, though it may initially seem counterintuitive because religions often speak of, and promote, peace and interior tranquility. When opposing church factions believe with equal fervor that their doctrinal position is the authentic one, however, people will naturally stand up for what they believe, often vehemently. M.H. Ogilvie thus writes that "[s]ince the aims and purposes of churches are sustained by the voluntary contributions of their members, it is unremarkable that those members will want to secure future control over the property purchased with their contributions . . . ." M.H. Ogilvie, *Church Property Disputes: Some Organizing Principles*, 42 U. TORONTO L.J. 377, 377 (1992).

13. Calvin Massey, *Church Schisms, Church Property, and Civil Authority*, 84 ST. JOHN'S L. REV. 23, 23 (2010). Massey recognizes the need for impartial adjudicatory bodies to provide a venue by which disputes can be resolved peacefully. Such a view acknowledges honestly the weaknesses of human nature and yet remains optimistic that the better angels will triumph over the darker demons of our nature. *See* Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) ("The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, *by the better angels of our nature*.") (emphasis added).

14. For a penetrating and insightful commentary on religious communities operating in an increasingly secular world, see CHARLES TAYLOR, A SECULAR AGE (2007).

15. In other words, there is a line that should not be crossed. On the one hand, the litigants go before the court to have the dispute resolved peacefully, which is preferable to the parties resorting to self-help. On the other hand, the Establishment Clause and Free Exercise Clause do not cease being relevant simply because there is a difficult situation at hand. Since this Article argues that the compulsory deference approach is preferable—in general or abstractly, but also in the

This Article explores which judicial posture is proper for property litigation involving the Roman Catholic Church. Part I begins by assessing the constitutional foundations of this issue, examining the text of the First Amendment and its incorporation against the several states by the Fourteenth Amendment. Building on that textual foundation, this first part then evaluates what freedom from government interference means on a practical level. This section analyzes the United States Supreme Court cases of *Watson v. Jones* and *Jones v. Wolf* to elucidate the similarities and differences between *Watson*'s compulsory deference approach versus *Wolf*'s neutral principles approach. Therefore, Part I remains descriptive in nature, providing the necessary foundation on which to make prescriptive claims later.

Part II discusses the compulsory deference and neutral principles approaches in greater depth. Considering that the Supreme Court has found both approaches to be constitutionally permissible, it is apt to evaluate their strengths and weaknesses *for specific applications*. Although the neutral principles method may be permissible for congregational churches that lack a defined hierarchical structure outside of the local community itself, applying the neutral principles approach to *hierarchical* churches creates tensions between the court and the religious community's factions litigating the case. Given the nature of hierarchical churches, especially the Roman Catholic Church with its clearly defined and consistent hierarchy, allowing courts to use the neutral principles approach to determine which litigant-faction is the "true church" remains too intrusive to be preferred in hierarchical church litigation. As a result, Part II concludes that the compulsory deference model should be favored in litigation involving hierarchical churches in both the federal and state systems.

Part III considers the analysis of Parts I and II in the context of the Roman Catholic Church. This part examines the specific characteristics of how the Roman Catholic Church tends to structure title to its property, often placing title in the name of the diocesan bishop. Applying the conclusions of Parts I and II to this application, it becomes clear that the compulsory deference approach is the preferred approach for litigation involving the Roman Catholic Church. Later in the section, more radical methods of resolving jurisdictional inconsistencies are discussed, such as statutory intervention. Differing philosophies regarding separation of powers draw ideological lines about which method of resolving these inconsistencies may be permissible versus which of them may be merely expedient or the "quick fix." Part III closes by opposing any federal legislative intervention against the current state law regimes.

In conclusion, judges should use the compulsory deference approach to resolve property disputes involving the Roman Catholic Church. Such a method persists as the best guarantee that the First Amendment religion protections remain robust rather than mere sentiments that possess no realistic applicability

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context of litigation involving the Catholic Church—it is also better, in principle, to have the least governmental intrusion as possible. If judicial resolution of the dispute intervenes to the extent of pernicious government involvement, a difficult legal dispute may be resolved in the short-term, but such a decision has worse, long-lasting consequences in the long-term for the relationship between church and state.

in the contemporary American legal system. Ultimately, it is not the role of the judge—or indeed any governmental official—to determine independently how a hierarchical religious community should operate or engage with society. Rather, the judge should defer to what the church's hierarchy has determined the right resolution should be. Even if the government authorities perceive positive ends could be achieved by secular intrusion into the dispute, the ends do not justify the means: the alleged cure of judicial intervention is actually worse than the apparent disease of the factions' doctrinal disagreements.

I. BACKGROUND

A. Constitutional Foundations

Before one can properly juxtapose the compulsory deference and neutral principles approaches that courts may choose to use, one must first grasp the constitutional framework from which these approaches arise. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[16] The Fourteenth Amendment to the United States Constitution has been interpreted to incorporate most of the protections of the Bill of Rights against the states[17] by means of the Due Process

16. U.S. CONST. amend. I. The first clause of the First Amendment's religion protections is known as the Establishment Clause, and the second clause is called the Free Exercise Clause. Though colloquially it is common to say that the First Amendment protects the freedom of religion generally, it is important to remember that these clauses concern different facets of religious freedom. The common denominator, however, is the guarantee that the government will respect religion's place in society, providing space for religion to flourish without fear of state interference.

17. In *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the United States Supreme Court held that the Bill of Rights applied only to the federal government, not the state governments. "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." *Id.* at 250. This case set the precedent until the Fourteenth Amendment to the United States Constitution was ratified in 1868.

Clause,[18] including the religion clauses.[19] These constitutional provisions demonstrate how American constitutional law has committed to maintaining freedom of religion. Religious freedom is thus a fundamental right that extends beyond "mere" freedom of worship to also encompass citizens' liberty to live out their religion and act on it *in the public sphere*, free from the fear of government interference.[20] Individuals opposing religious liberty may advocate for their positions in the public sphere, too, as their views are also protected by

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18. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The Supreme Court closed the possibility of incorporation by means of the Privileges or Immunities Clause in the *Slaughter-House Cases*, 83 U.S. 36 (1873), in which the Court held that the privileges and immunities of citizens of the United States are those pertaining to the national government:

> We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.

Id. at 76. Accordingly, the Court interpreted the Privileges or Immunities Clause to only protect those privileges and immunities guaranteed by the *federal* government, not state governments. Gradually, however, the Supreme Court arrived at the Due Process Clause as the means of incorporating the protections of the Bill of Rights against the states. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that freedom of speech and of the press, as fundamental rights and liberties, are protected against state abridgment by the Fourteenth Amendment Due Process Clause).

19. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court held that the Fourteenth Amendment Due Process Clause incorporated the Free Exercise Clause of the First Amendment against the states. "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Id.* at 303. Seven years later, in *Everson v. Board of Education*, 330 U.S. 1 (1947), the Supreme Court held the First Amendment Establishment Clause incorporated against the states as well. The Court in *Everson* elaborated on what the Establishment Clause means:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.

Id. at 15.

20. *See* Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 849 (2009) (arguing for courts to use a hands-off approach when dealing with religion in the public sphere, Garnett argues that "[t]his sensible reticence is not only required by the Constitution's Religion Clauses; it also protects and promotes the religious freedom commitments those Clauses embody.").

First Amendment freedom of speech.[21] In other words, such opposition remains within the appropriate exchanges in the marketplace of ideas from which citizens can arrive at their own conclusions about the veracity or falsity of a certain claim or proposition.[22] But if opposition to religious freedom takes the form of *government* activity, that action is of a different character entirely, one that the First Amendment will not tolerate. Indeed, this type of government intervention contradicts the original intention of both the Free Exercise and Establishment Clauses guarantees that religious communities retain control of their affairs free from government interference.[23]

B. What Freedom from Government Interference Means in Practice

The First Amendment religion clauses guarantee that the government will not unduly intrude into the affairs of religion. Angela Carmella writes that "[t]he interpretation of the Religion Clauses (and the complement of related statutes) as 'articles of peace' resides in a 'middle ground' somewhere between the polarized arguments of the litigators."[24] Richard Garnett likewise notes that "it would be both mulish and idle to deny that, in our political community, government arms and actors (including courts) steer well clear of theological disputes; they avoid (perhaps to a fault) excessive entanglement with the governance and doctrines of religious communities, institutions, and

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21. The First Amendment also protects freedom of speech: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. It is a difficult problem to resolve when competing constitutional rights appear to conflict with one another. For insightful analysis of how the First Amendment guarantees of freedom of religion and freedom of speech interact with each other, see, for example, Joscelyn A. Gorsline, *Reconciling First Amendment Freedom of Speech with Freedom of Religion & Peaceful Assembly*, 14 T.M. COOLEY J. PRAC. & CLINICAL L. 1, 3 (2011) (footnote omitted) ("In cases where First Amendment rights are pitted against each other, the court should not automatically dismiss the case based on freedom of speech protection. Instead, the rights of the individuals involved should be balanced carefully.") *See also* Snyder v. Phelps, 562 U.S. 443 (2011). For a comparative context on how to balance competing fundamental rights claims in Europe, compare Erica Howard, *Freedom of Speech* Versus *Freedom of Religion? The Case of Dutch Politician Geert Wilders*, 17 HUM. RTS. L. REV. 313 (2017) with Ben Clarke, *Freedom of Speech and Criticism of Religion: What are the Limits?*, 14 MURDOCH U. ELECTRONIC J.L. 94 (2007).

22. *See, e.g.*, G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2158 (2020) ("The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas.") (quoting Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981)).

23. *See* Scott J. Ward, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 YALE L.J. 1739, 1742 (1989) ("In 1789, the framers of the First Amendment were concerned primarily with limiting the power of the new Federal government with regard to religion in the states." (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 309–10 (1963) (Stewart, J., dissenting) ("As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.")).

24. Carmella, *supra* note 7, at 8.

traditions."[25] Finding a minimally invasive method to resolve church property disputes is equally acute, as courts seek to adjudicate disputes fairly without intruding perniciously into the church's internal affairs. The Supreme Court needed to determine what exactly constitutes inappropriate interference into religious affairs while simultaneously avoiding the opposite extreme of asserting that courts have *nothing* to do in these cases. In *Watson v. Jones*, the Court addressed how courts should deal with litigation involving church property disputes, respecting the enshrined First Amendment guarantees.

But before one can fully understand *Watson*'s analysis regarding government deference, it is beneficial first to describe the different configurations of church property disputes which often vary and are fact-specific. As Louis J. Sirico, Jr. explains, "When a church breaks into factions or a local church withdraws from a denomination, the disputants also frequently divide over who should retain the church property."[26]

Watson recognized that some churches are "congregational," meaning that the church stands alone as an autonomous community of worship instead of being part of a larger organizational structure with different hierarchical levels.[27] There are other churches which have a "hierarchical" structure, where a local parish church is subject to the larger organizational structure of the diocese, congregation, or synod, the nomenclature of which depends on the denomination.[28] This structural difference directly implicates church property disputes. If the church is organized congregationally, then the secular court can only address the arguments raised by the majority and minority factions litigating the case. This is because the litigating factions of the *congregational* church do not have recourse to a higher ecclesial body before filing suit. But in churches that are organized *hierarchically*, the majority and minority factions will have already petitioned the larger ecclesial body before filing suit in the secular court.[29]

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25. Garnett, *supra* note 20, at 842 (citing Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 86 (1997)). William Ross likewise comments that the judiciary "often found the task of divining doctrinal intentions 'difficult and painful.'" Ross, *supra* note 3, at 270 (quoting Bowden v. M'Leod, 1 Edw. Ch. 588, 592 (N.Y. Ch. 1833)).

26. Sirico, *supra* note 10, at 1 (footnote omitted).

27. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 724 (1871) ("The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself . . . .").

28. Indeed, churches generally are organized in either congregational or hierarchical forms. *See* Massey, *supra* note 13, at 26–28. The Roman Catholic Church is not the only religion in the United States that has a hierarchical structure, but it does remain the paradigmatic example of an entity that possesses a clear, consistent hierarchy from (a) the local level of parishes led by priests, to (b) the regional level of dioceses headed by bishops, and furthermore to (c) the universal level of the Catholic Church as a whole shepherded by Pope Francis. For another example of a church with a hierarchical formulation, see *Watson*, 80 U.S. at 727 ("There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the General Assembly over all.").

29. *See* Sampen, *supra* note 5, at 546 n.29 ("The two basic types of internal church structure are congregational and hierarchical. Under the congregational structure the local church is self-

Having examined these structural differences between religious communities, it is now appropriate to examine *Watson v. Jones* and *Jones v. Wolf* as proposing two competing methods of resolving such disputes.[30] Since the focus of this Article is to advocate for the compulsory deference method when adjudicating disputes involving the Roman Catholic Church, it is not this Article's purpose to provide an exhaustive history of United States Supreme Court precedents, even though recently there have been many significant developments in the Court's jurisprudence in this regard.[31] Rather, the key objective is to explain how the two competing jurisprudential methods play out in actual cases, what reasons are given as justifications for such methods, and why judges and commentators argue that one method is superior to the other. Only then can one fully appreciate the prescriptive arguments in favor of the compulsory deference method.

i. Watson v. Jones (1871)

In *Watson*, disagreements developed within the congregation of Louisville, Kentucky's Third or Walnut Street Presbyterian Church, which "was organized about 1842, under the authority and as a part of the Presbyterian Church in the United States," and "was received into connection with and under

governing and ruled by simple majority vote. The hierarchical polity is a system of government in which each local church is subject to the control of a higher ecclesiastical authority.").

30. It is important to remember that the Supreme Court has ruled that both the neutral principles approach and the compulsory deference approach are constitutional judicial postures. The question emerges, then, which method is better suited to respect free exercise and establishment clause principles.

31. The United States Supreme Court after *Watson* developed its free exercise clause jurisprudence that helps to explain and clarify *Watson* before the Court changed course in *Wolf*. For example, in *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), the Supreme Court held that "the determination of which party had the right to appoint the Archbishop and thereby to prescribe use of the Cathedral was 'strictly a matter of ecclesiastical government.'" Alan R. Friedman, Note, *Church Property Dispute Resolution: An Expanded Role for Courts After* Jones v. Wolf*?*, 68 GEO. L.J. 1141, 1149 (1980) (quoting *Kedroff*, 344 U.S. at 115). Later, in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church (Hull Church)*, 393 U.S. 440 (1969), the Court further developed a posture rooted in deference to the religious community: "Relying upon and interpreting *Watson v. Jones*, the Supreme Court stated that in resolving church property disputes the civil courts have *no* role in deciding ecclesiastical questions." Recio, *supra* note 9, at 542 (citing *Hull Church*, 393 U.S. at 447). For a more in-depth analysis of the *Hull Church* case, see Garnett, *supra* note 6, at 1646 ("Thirty-five years ago, in the *Hull Church* case, the U.S. Supreme Court held that the First Amendment does not permit civil courts to resolve church-property disputes involving 'controversies over religious doctrine and practice.'" (quoting *Hull Church*, 393 U.S. at 449)). *See also* Robert C. Casad, *Church Property Litigation: A Comment on the* Hull Church *Case*, 27 WASH. & LEE L. REV. 44 (1970). Finally, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Court maintains its commitment to a deference-inspired posture: "The First and Fourteenth Amendments, Brennan concluded, permit hierarchical religious organizations to create their own disciplinary rules and tribunals to adjudicate disputes within them." John E. Fennelly, *Property Disputes and Religious Schisms: Who Is the Church?*, 9 ST. THOMAS L. REV. 319, 330 (1997) (citing *Milivojevich*, 426 U.S. at 721).

the jurisdiction of the Presbytery of Louisville and the Synod of Kentucky."[32] Shortly after the church's establishment, it "purchased a lot of ground in Louisville" in 1853, and "a conveyance was made to the church's trustees to have and to hold to them, and to their successors, to be chosen by the congregation."[33] But the state of the church's internal affairs changed with the Civil War, specifically "upon the subject of slavery."[34] Majority and minority factions developed concerning whether to keep the present pastor as the leader of the church community, and some members appealed to the Synod of Kentucky who "appointed a committee to visit the congregation"[35] that could decide the pastor election as well as elder disputes. One of the elders filed suit in the local trial court, which ultimately recognized him and his associates as legitimate elders. But the Court of Appeals of Kentucky reversed the trial court

32. *Watson*, 80 U.S. at 683. The Court expounds on the different hierarchical levels of the Presbyterian church. At the local level of each particular church community, the trustees act as administrative leaders:

> Connected with each local church, and apparently without any functions in essence ecclesiastical, are what are called the "Trustees;" three persons usually, in whom is vested for form's sake, the legal title to the church edifice and other property; the equitable power of management of the property being with the Session. These Trustees are usually elected biennially; they are subject to the Session, and may be removed by the congregation.

Id. at 681. At the next level of organization is the Presbytery:

> The Presbytery, consisting of all the ministers and one ruling elder from each congregation within a certain district, has various powers, among them the power to visit particular churches for the purpose of inquiring into their state, and redressing the evils which may have arisen in them; to ordain, and install, remove, and judge ministers; and, in general, power to order whatever pertains to the spiritual welfare of the churches under their care.

Id. at 681–82. At a larger level than the Presbytery is the Synod:

> The Synod, consisting of all the ministers and one ruling elder from each congregation in a larger district, has various powers, among them the power to receive and issue all appeals from Presbyteries; to decide on all references made to them; to redress whatever has been done by Presbyteries contrary to order; and generally to take such order with respect to the Presbyteries, Sessions, and people under their care as may be in conformity with the word of God and the established rules, and which tend to promote the edification of the church.

Id. at 682. Finally, the largest level of the Presbyterian Church is the General Assembly: "The General Assembly, consisting of ministers and elders commissioned from each Presbytery under its care, is the highest judicatory of the Presbyterian Church, representing in one body all the particular churches of the denomination." *Id.*

33. *Id.* at 683.

34. *Id.* at 684.

35. *Id.*

order,[36] and on remand[37] the trial court distinguished between elders and trustees of the original church order.

The United States Supreme Court granted certiorari. The Court first noted that "in the earliest stages of this controversy it was found that a majority of the members of the Walnut Street Church concurred with the action of the General Assembly" concerning the assignment of elders and trustees.[38] The General Assembly, universally considered the highest level of the Presbyterian Church, had already determined how the dispute should be resolved. Accordingly, the Supreme Court addressed whether it—as a secular tribunal—should defer to the determination of the General Assembly.

In discussing how *Watson* sought to answer this question, John Fennelly writes that "Justice Miller sought to fashion a solution that was consistent with the 'right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine.'"[39] To arrive at this conclusion, Justice Miller first observed that religious communities "come before [the Court] in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."[40] Justice Miller then stated that this litigation "*is* a case of a division or schism in the church. It *is* a question as to which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church."[41] The resolution of this dispute, according to the *Watson* Court, rested in large part on which category of ecclesial structure the Court viewed the Presbyterian Church.[42]

Recio elaborates on these three different structural categories that *Watson* identified and what ramifications those categories have for adjudication:

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36. *Id.* at 687 ("The language of the order of reversal was thus: 'And the judgment of the chancellor, *which commits the management and control of said church property* to said [trustees], in conjunction with [certain other trustees], is therefore deemed erroneous.'" (quoting Watson v. Avery, 65 Ky. (2 Bush) 332, 363 (1867))).

37. *Id.* ("Wherefore the judgment is reversed, and the cause remanded for proper corrective proceedings respecting the possession, control, and use of the church property, and for final judgment in conformity to this opinion." (quoting Watson v. Avery, 65 Ky. at 363).

38. *Id.* at 693.

39. Fennelly, *supra* note 31, at 319 (quoting *Watson*, 80 U.S. at 728). Indeed, Justice Miller begins his majority opinion by noting that "[t]his case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the State for the maintenance of rights which the church has refused to acknowledge, or found itself unable to protect." *Watson*, 80 U.S. at 713.

40. *Id.* at 714. This observation reiterates that religious communities do not exist outside of society in an isolated or insular manner but rather operate within the framework of society, subject to society's legal rules.

41. *Id.* at 717.

42. "The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads . . . ." *Id.* at 722.

> In the first [scenario], property is committed by will or deed for the propagation of a specific form of religious practice and belief. If the users of the property deviate from this practice or belief, the property reverts to some party designated by the original grantor. Disputes over church property may also occur between the members of a congregation that is independent of other religious associations and subordinate to no central ecclesiastical governing body. In these cases, the *Watson* Court stated, the rights to the use and control of church property are determined by the ordinary principles of voluntary associations. The third context is that in which the property is held by a congregation that is a subordinate member of a general church organization, governed by ecclesiastical tribunals under the ultimate control of "some supreme [church] judicatory." In this case, the Court noted, if a religious schism develops in the congregation, the church hierarchy itself has jurisdiction to decide which faction prevails, and civil courts may not review these decisions even though rights to use and control of property follow.[43]

Ultimately, *Watson* placed the Presbyterian Church in the third category of church property disputes.[44] Accordingly, *Watson* held that a deferential judicial posture towards the hierarchical church was appropriate:

> In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept

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43. Recio, *supra* note 9, at 539 (quoting *Watson*, 80 U.S. at 722–23). The Court in *Watson* proceeds through the three categories of property arrangements:

> The first of these [categories] is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

Watson, 80 U.S. at 722. "The second [category] is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority." *Id.*

> The third [category] is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.

Id. at 722–23.

44. *Id.* at 727 ("There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the General Assembly over all.").

> such decisions as final, and as binding on them, in their application to the case before them.[45]

As for the ramifications of such a ruling, Fennelly contends that "*Watson*, which would prove to have a profound impact on subsequent decisions, should be viewed as a synthesis of First Amendment concepts, common law contract principles, and judicial philosophy."[46] In the same vein, Sirico, Jr. observes that "[i]n *Watson v. Jones* the Supreme Court championed the autonomy of the religious organization, but emphasized the institution rather than the individual member."[47] Carmella likewise comments that *Watson* "prohibited civil courts from intervening in any church's internal adjudication as to 'discipline, or of faith, or ecclesiastical rule, custom, or law.'"[48] The compulsory deference approach that *Watson* endorses for hierarchical churches allows these churches to determine *for themselves* their future orientation and governance. The presiding judge may not agree with how the church's higher levels of governance had decided the issue at hand, but under the compulsory deference approach, the presiding judge's viewpoint is inapposite. As *Watson* stated plainly, once the church's hierarchy made its decision, "the legal tribunals must accept such decisions as final."[49]

ii. Jones v. Wolf (1979)

The Supreme Court changed course in *Jones v. Wolf*,[50] however, as the Court's majority warmed to the neutral principles method. In *Wolf*, the Blackmun majority[51] endorsed the neutral principles method, while the Powell dissent[52] continued to favor *Watson*'s compulsory deference method to resolve church property disputes in the least invasive manner. It is important to note that *Wolf* did not reject the compulsory deference method as unconstitutional. Nevertheless, *Wolf* appears to constitute a shift in the Court's preference towards the neutral principles method.[53] This neutral principles method has advantages in certain situations, but in cases involving the Roman Catholic

45. *Id.*

46. Fennelly, *supra* note 31, at 321.

47. Sirico, *supra* note 10, at 10. Richard Garnett writes similarly of the importance of the *Watson* decision: "Although *Watson* did not directly involve the interpretation and application of the First Amendment, . . . the Justices observed that '[t]he law knows no heresy, and is committed to the support of no dogma.'" Garnett, *supra* note 6, at 1655 (quoting Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 446 (1969)).

48. Carmella, *supra* note 7, at 29 (quoting *Watson*, 80 U.S. at 727).

49. *Watson*, 80 U.S. at 727.

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

51. For Justice Harry Blackmun's majority opinion, see *Wolf*, 443 U.S. at 597–610.

52. For Justice Lewis Powell's dissenting opinion, see *Wolf*, 443 U.S. at 610–21 (Powell, J., dissenting).

53. The Court states the question to be resolved in *Wolf*: "The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they *must* defer to the resolution of an authoritative tribunal of the hierarchical church." *Wolf*, 443 U.S. at 597 (emphasis added).

Church, the neutral principles method produces problems that the compulsory deference method avoids.

In *Wolf*, the Vineville Presbyterian Church was a member of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS).[54] This ecclesial formulation makes *Wolf*'s facts quite similar to *Watson*'s facts in that both local churches were a part of the larger presbyterian church that *Watson* categorized as a hierarchical church.[55] *Wolf* likewise explained the particular hierarchical structure at stake: "Under the polity of the PCUS, the government of the local church is committed to its Session in the first instance, but the actions of this assembly or 'court' are subject to the review and control of the higher church courts, the Presbytery, Synod, and General Assembly, respectively."[56]

Justice Blackmun delivered the Court's majority opinion that the "only question presented by this case is which faction of the formerly united Vineville congregation is entitled to possess and enjoy the property located at 2193 Vineville Avenue in Macon, Ga."[57] Blackmun acknowledged that "the first Amendment severely circumscribes the role that civil courts may play in resolving church property disputes."[58] *Nevertheless*, and in spite of this recognition, as Fennelly recognizes, "[t]he Court nonetheless acknowledged that, within this limited role, the state has a legitimate interest in resolving property disputes."[59] Blackmun quoted Supreme Court precedent saying that "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether

54. *Id.* Justice Blackmun explains that "[i]n response to the schism within the Vineville congregation, the Augusta-Macon Presbytery appointed a commission to investigate the dispute and, if possible, to resolve it. The commission eventually issued a written ruling declaring that the minority faction constituted 'the true congregation of Vineville Presbyterian Church' . . . ." *Id.* at 598. The minority faction sued to have this determination enforced, and if the state trial court had used the compulsory deference approach, the court would have deferred to the commission's decision that the minority faction was the true church. The trial court did not use the compulsory deference approach, however: "The trial court, purporting to apply Georgia's 'neutral principles of law' approach to church property disputes, granted judgment for the majority." *Id.* at 599. Later, on appeal, the "Supreme Court of Georgia, holding that the trial court had *correctly stated and applied Georgia law*, and rejecting the minority's challenge based on the First and Fourteenth Amendments, affirmed." *Id.* (emphasis added).

55. *See* Watson v. Jones, 80 U.S. 679, 722 (1871) ("The third [category] is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals . . . .").

56. *Wolf*, 443 U.S. at 598.

57. *Id.* at 602.

58. *Id.* (quoting Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)); *see also* Fennelly, *supra* note 31, at 331 ("To Justice Blackmun, the issue was whether the *Watson* polity approach precludes use of neutral principles of law in resolving intra-church disputes." (citing *Wolf*, 443 U.S. at 597)). Advocates of the compulsory deference approach tend to look at Justice Blackmun's characterization of the facts in *Wolf* with some suspicion.

59. Fennelly, *supra* note 31, at 331 (citing *Wolf*, 443 U.S. at 602).

the ritual and liturgy of worship or the tenets of faith."[60] But this statement did not recognize that the original disagreement sparking the schism came from theological dispute.[61] Nonetheless, Justice Blackmun believed that the neutral principles approach withstood any difficulties in potential application: "On balance . . . the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application."[62]

Ultimately, the Blackmun majority vacated the Georgia Supreme Court's judgment and remanded for further proceedings.[63] But in so ruling, the Court endorsed the neutral principles approach to resolving church property disputes involving hierarchical churches, indicating a departure from *Watson*.[64] *Wolf*'s practical effect is that lower courts, in cases involving hierarchical churches, are now allowed to examine secular documents to determine for themselves which litigating faction is the "true church" entitled to the property at issue. This independent, secular judgment might agree with the determination of the

60. *Wolf*, 443 U.S. at 602 (quoting Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

61. Justice Blackmun himself described the initial fissure: "On May 27, 1973, at a congregational meeting of the Vineville church attended by a quorum of its duly enrolled members, 164 of them, including the pastor, voted to separate from the PCUS. Ninety-four members opposed the resolution." Wolf, 443 U.S. at 598. Justice Blackmun, later in his majority opinion, seemed to address this concern of a secular tribunal meddling in theological doctrine:

> This is not to say that the application of the neutral-principles approach is wholly free of difficulty. The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust.

Id. at 604. Justice Blackmun remained more sanguine than Justice Powell about the competency of courts to achieve this impartial, secular analysis by means of the neutral principles approach. Justice Powell in dissent chose to adhere to the compulsory deference approach endorsed in *Watson*. Justice Powell dissenting in *Wolf* wrote that "[t]he schism in the Vineville church, for example, resulted from disagreements among the church members over questions of doctrine and practice." *Id.* at 613 (Powell, J., dissenting). One might contend that Justice Blackmun adequately addressed the concerns over the neutral principles approach in the above-quoted paragraph. Others who are less confident would respond saying that Justice Blackmun presented a compelling critique of the neutral principles approach but then simply glossed over the objection without giving the argument its due.

62. *Id.* at 604.

63. *Id.* at 609–10 (stating that the Court "does not declare what the law of Georgia is. Since the grounds for the decision that respondents represent the Vineville church remain unarticulated, the judgment of the Supreme Court of Georgia is vacated, and the case is remanded for further proceedings not inconsistent with this opinion."). Accordingly, McConnell & Goodrich explain that "the Supreme Court upheld the constitutionality of the neutral principles approach in theory, but remanded for clarification of how it had been applied in practice." McConnell & Goodrich, *supra* note 11, at 318.

64. Bohner, Jr. explains that the "*Jones* majority approved of the Georgia court's decision to apply a neutral principles of law approach and in so doing endorsed the neutral principles approach as constitutionally permissible." Bohner, *supra* note 7, at 960 (footnotes omitted).

church's hierarchy, in which case there would be no conflict between the secular and religious pronouncements. But it is also possible that the court could utilize the neutral principles method to rule for one litigating party while the church's hierarchy supported the opposing litigating party. This scenario presents a conflict between the secular and religious determinations, one that the compulsory deference approach avoids entirely—under the compulsory deference approach, the court would defer to the church hierarchy's determination, i.e., the court would rule for the litigating party that the church hierarchy endorsed. In this scenario, there would be no conflict between the secular and religious resolutions.

Justice Powell's *Wolf* dissent[65] critiqued the majority's endorsement of the neutral principles methodology and argued instead for the compulsory deference approach endorsed in *Watson*. Powell worried that the *Wolf* majority endorsing the neutral principles approach was "more likely to invite intrusion into church polity forbidden by the First Amendment."[66] Powell recognized that "the Court indicates that Georgia, consistently with the First Amendment, *may* adopt the *Watson v. Jones* rule,"[67] but he also stated that "instead of *requiring* the state courts to take this approach, the Court approves as well an alternative rule of state law."[68] Although it might initially appear that the Blackmun majority properly disposed a court to remain purely secular in its examinations of church documents, Alan Friedman writes that "Justice Powell predicted that a court's failure to consider *all* evidence relevant to ownership or control of local church property would in some cases violate the [F]irst [A]mendment by imposing both a form of church government and a doctrinal resolution contrary to that reached by the general church."[69] Powell's concerns have gained some traction in lower courts in recent decades, with some states choosing to require compulsory deference instead of opting for the neutral principles approach.[70]

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65. *Wolf*, 443 U.S. at 610–21 (Powell, J., dissenting).

66. *Id.* at 610.

67. *Id.* at 615 (emphasis added).

68. *Id.* (emphasis added). The alternative rule of state law, Powell contends, is that "the Georgia courts are said to be free to 'adop[t] a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means.'" *Id*.

69. Friedman, *supra* note 31, at 1160–61 (citing Wolf, 443 U.S. at 613, 613 n.2).

70. For an example of a state applying the compulsory deference method, consider the Kentucky Supreme Court in *Cumberland*, *infra* note 78. For an example of a state applying the neutral principles method, on the other hand, despite prior reasoning in the court's opinion that might lead one to expect a contrary conclusion, consider the Texas Supreme Court's rationale in both *Masterson*, *infra* note 86 and *Episcopal Diocese of Fort Worth*, *infra* note 91.

II. AN ANALYSIS AND CRITIQUE OF CONSTITUTIONALLY PERMISSIBLE METHODS OF ADJUDICATING CHURCH PROPERTY DISPUTES

A. The Compulsory Deference Method

Sirico, Jr. explains that the compulsory deference method, also known as complete deference, "calls for a court to defer to the judgment of the highest authority in a hierarchical church and to the majority, or other designated decisionmaker, in a congregational church."[71] In other words, the compulsory deference rule "requires judicial acceptance of a hierarchical church's resolution of religious questions as final and binding."[72] Fennelly recognizes that "the *Watson* Court employed what might be called a functional analysis to distinguish a congregational policy from a hierarchical church. It recognized that the congregational church was, it might be said, a small case, free-standing body. Hierarchical churches, in contrast, possessed both vertical and horizontal aspects."[73] The compulsory deference approach respects the vertical aspect of hierarchical churches more than the neutral principles approach because the compulsory deference approach leaves the determination to the church itself whereas the neutral principles approach risks ruling contrary to the ecclesial decision.[74]

The compulsory deference approach is not without its weaknesses, however. Nathan Belzer notes a drawback of the compulsory deference approach that might seem counterintuitive but nonetheless potentially problematic: "Deference to church authorities entails the adoption by the courts of the decisions of either congregational majorities or the highest governing body in a hierarchical church. By adopting these decisions, however, the courts are placing the force of governmental authority behind a particular religious group or organization."[75] Such a critique leads to the question whether society should tolerate prioritizing hierarchical churches over congregational ones, or

71. Sirico, *supra* note 10, at 4.

72. Friedman, *supra* note 31, at 1143.

73. Fennelly, *supra* note 31, at 321.

74. A court using the neutral principles method to rule contrary to the hierarchical church's determination might seem insignificant at the level of a single lawsuit. However, in addition to the objection out of principle, several problems arise when considering the *aggregate effects* of a neutral principles regime. First, the one lawsuit adhering to the neutral principles approach creates a precedent that lower courts can employ in the future, thus exponentially increasing the intrusiveness of the secular tribunal's effects on religious communities. Second, the neutral principles approach enables judges to analyze the pertinent materials in a manner that encourages judicial discretion, so judges from a certain court or region may decide a case differently compared to another court or region. In the case of the Roman Catholic Church, an international entity, this regional variance would cause disparities in the way the government treats different dioceses, thus prejudicing some local churches while sparing others. This judicially created differentiation is repugnant to both the Establishment Clause and the Free Exercise Clause of the First Amendment.

75. Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 122 (1998) (citing Michael William Galligan, Note, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007, 2020 (1983)).

indeed, hierarchical churches over less organized religious communities in general. But this critique can also cut in favor of the compulsory deference approach: strictly interpreting both the First Amendment Establishment Clause and Free Exercise Clause leads to the conclusion that no religion should be prioritized over another. Accordingly, all religions should benefit from the courts deferring to their own determinations.

Ogilvie also asserts, in favor of the neutral principles approach, that the "effect of this [compulsory] deference in the interests of the free exercise of religion has been to create a quasi-sovereign or virtually autonomous sphere for churches," which does not have equivalent treatment in other spheres of society.[76] This observation stimulates conversation about whether society should place religions in a special position compared to other groups of similarly established philosophical commitments.[77] Although this debate gathers honest individuals on both sides of the issue, it cannot be denied that the Constitution itself treats religion specially by mentioning it specifically in the First Amendment. The fact that the Framers included religion in this special setting indicates that they valued religion's place in society in a distinct way compared even to prestigious social groups that did not possess an exclusively religious character.

Not all states have followed *Wolf* and its endorsement of the neutral principles approach. On the contrary, some states have preferred the compulsory deference approach for hierarchical churches in the jurisprudential line of *Watson* instead. The Kentucky Supreme Court resolved a case involving a hierarchical church by referencing compulsory deference, viewing this case as harmonious with other cases involving congregational churches in which the Court used the neutral principles method:

> Application of the "compulsory deference rule" to the facts of the dispute before us leads to the inescapable conclusion that the minority faction of the Wisdom Church, which "adheres to" and "is sanctioned by" the central body, the Cumberland Presbytery of the Synod of the Mid-West of the Cumberland Presbyterian Church, must prevail.[78]

Accordingly, *Cumberland*'s minority church faction, despite being the minority in number of members, was affirmed by the larger hierarchical structure. As a result, the Kentucky Supreme Court held that that determination should be left intact and settled.

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76. Ogilvie, *supra* note 12, at 393.

77. The Supreme Court has repeatedly refused to determine a religious claim's plausibility. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014) (quoting Emp. Div. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.")); *see also* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989). But the Court maintaining this buffer for religion is not seen in other contexts, not even for competing philosophical claims that do not explicitly reference God or the transcendent. The question emerges, then, whether society should treat these seemingly similar groups differently, or whether there actually is a significant difference between these groups.

78. Cumberland Presbytery of the Synod of the Mid-West of the Cumberland Presbyterian Church v. Branstetter, 824 S.W.2d 417, 420 (Ky. 1992).

B. The Neutral Principles Method

The neutral principles method, on the other hand, permits a court to engage in a more active role when assessing the church property dispute. Therefore, the court does not simply defer to the church's decision on the matter.[79] Alan Friedman explains that "[w]hen the church's resolution of the religious disagreement unavoidably determines the disposition of church property, judicial intervention may be necessary to assure peaceful possession of the church property. Even though church property is at stake, the state remains interested in providing a mechanism to resolve conflicting claims conclusively."[80] Cameron Ellis likewise observes that "states are free to adopt any ordinary secular principles in order to resolve disputes between religiously affiliated participants."[81]

Sirico Jr. argues that there are two versions of the neutral principles method:

> Under the "formal title" version, a court may look to statutes, deeds, and other secular documents—that is, articles of incorporation and the like, as opposed to internal church documents, such as constitutions and books of discipline—to determine property ownership. Under the broader version of neutral principles, courts may also consider provisions in church documents.[82]

As for why *Wolf* held the neutral principles method to be a constitutionally permissible adjudicatory approach, Fennelly provides a rationale:

> Neutral principles, the Court held, was a constitutionally acceptable method of resolving church property disputes because it (1) was completely secular in operation; (2) was flexible enough to accommodate all forms of religious organization and polity; (3) relies on objective concepts of trust and property law; and (4) frees civil courts from entanglements in religious questions of doctrine, polity, and practice. This would ensure that, in the event of schism,

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79. Justice Blackmun in *Wolf* describes the advantages of the neutral principles approach:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties.

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

80. Friedman, *supra* note 31, at 1142.

81. Cameron W. Ellis, *Church Factionalism and Judicial Resolution: A Reconsideration of the Neutral-Principles Approach*, 60 ALA. L. REV. 1001, 1005 (2009) (citing Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1881 (1998)).

82. Sirico, *supra* note 10, at 4 (footnotes omitted).

> property ownership will be decided in accordance with the desires of the members.[83]

It is perplexing, however, that although the court takes a more active role in the neutral principles method when examining church founding documents, the Supreme Court nevertheless claims that it remains committed to respecting the freedom that religions possess over doctrine.[84] But one may worry that despite this verbal commitment—almost an exhortation for future generations—the neutral principles method will not suffice to provide religious communities enough protections from government interference. Even if courts "only" examine church property disputes from a purely secular, neutral principles approach, *even this method* would enter too far into the religion's internal affairs. As a result, this intrusion would violate the guarantees afforded to the religion to exist and operate free from government interference, *however slight that interference may initially seem*. Fennelly thus critiques the rationale that *Wolf* provided in endorsing the neutral principles approach:

> From an analytical standpoint, the decision is troublesome. The logic employed by the majority is tortured and, at times, almost circular. The Court's major premise seems to be that *Watson* involved too deep of an examination into church polity. Therefore, mere neutral principles should be used—that is, unless the neutral documents involved religious doctrinal or authority concepts. This would require a return to square one, the *Watson* polity approach. Arguably, at that point, the heavens have labored and brought forth a mouse.[85]

Nevertheless, several state supreme courts have adopted the neutral principles approach. Texas provides an illustrative example of this decision. The Texas Supreme Court in *Masterson v. Diocese of Northwest Texas*[86] affirmed the court of appeals' ruling that the trial court was correct to defer to the Episcopal bishop's exercise of ecclesiastical authority, *but yet* the neutral principles approach is still the state's preferred approach.[87] To reach this conclusion, the Texas Supreme Court first stated that "courts are precluded from exercising jurisdiction over matters the First Amendment commits exclusively to the church, even where a hierarchical religious organization fails to establish tribunals or specify how its own rules and regulations will be enforced."[88] At

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83. Fennelly, *supra* note 31, at 332 (citing *Wolf*, 443 U.S. at 603–04).

84. *See Wolf*, 443 U.S. at 602 ("Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976)).

85. Fennelly, *supra* note 31, at 334.

86. 422 S.W.3d 594 (Tex. 2013).

87. *See id.* at 608 ("Whether Bishop Ohl was authorized to form a parish and recognize its membership, whether he could or did authorize that parish to establish a vestry, and whether he could or did properly recognize members of the vestry are ecclesiastical matters of church governance.").

88. *Id.* (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 186 (2012)); *see also* Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952).

the same time, when courts are not called to rule on a matter of exclusive ecclesiastical decision (e.g., theological doctrine), the Texas Supreme Court held that the courts have jurisdiction and should employ neutral principles:

> Courts do not have jurisdiction to decide questions of an ecclesiastical or inherently religious nature, so as to those questions they must defer to decisions of appropriate ecclesiastical decision makers. But Texas courts are bound to exercise jurisdiction vested in them by the Texas Constitution and cannot delegate their judicial prerogative where jurisdiction exists. Properly exercising jurisdiction requires courts to apply neutral principles of law to non-ecclesiastical issues involving religious entities in the same manner as they apply those principles to other entities and issues.[89]

This distinction is central to the rationale that many states provide when endorsing the neutral principles approach, namely, that the resolution of church property disputes does not touch an inherently ecclesiastical matter. But Belzer challenges this view, arguing that what might *appear* a secular topic actually is actually rooted in doctrinal viewpoints: "What appears to be a mere property dispute easily resolved through secular property law, is in essence a dispute over membership—an inherently religious and doctrinal matter."[90] This difference in characterization is the crux of the debate.

Texas's adherence to the neutral principles approach was seen again in *Episcopal Diocese of Forth Worth v. Episcopal Church*.[91] There, the national episcopal church filed suit against the local diocese that had left the church over doctrinal differences.[92] Under the compulsory deference approach, the Texas Supreme Court would have deferred to the determination of the national episcopal church, since that level of the church's hierarchy is superior to the local diocese. But the Texas Supreme Court employed the neutral principles approach,[93] ruling that the local diocese that withdrew from the national church

89. *Masterson*, 422 S.W.3d at 605–06.

90. Belzer, *supra* note 75, at 128–29.

91. 602 S.W.3d 417 (Tex. 2020); *see also* David Paulsen, *Fort Worth Episcopalians Look to Future While Grieving Loss of 12-Year Church-Property Battle*, EPISCOPAL NEWS SERV. (Mar. 1, 2021), https://www.episcopalnewsservice.org/2021/03/01/fort-worth-episcopalians-look-to-future-while-grieving-loss-of-12-year-church-property-battle ("St. Luke's in the Meadow is one of six congregations in and around Fort Worth that may need to give up their worshipping spaces after the U.S. Supreme Court on Feb. 22 declined to review the diocese's court case."); All Saints' Episcopal Church (Fort Worth) v. Episcopal Diocese of Fort Worth, 141 S. Ct. 1373, 1373 (2021) (mem.) ("Petition for writ of certiorari to the Supreme Court of Texas denied.").

92. "Following a disagreement over religious doctrine, the Episcopal Diocese of Fort Worth and a majority of its congregations withdrew from The Episcopal Church. The church replaced the diocese's leaders with church loyalists, and both the disaffiliating and replacement factions claimed ownership of property . . . ." *Episcopal Diocese of Fort Worth*, 602 S.W.3d at 420.

93. The Texas Supreme Court recognized that "[c]hurch property disputes involving hierarchical church organizations, like TEC [The Episcopal Church], are challenging because their organizational structure requires subordinate units to accede to ecclesiastical control by higher authorities." *Id.* at 427. Nevertheless, the Texas Supreme Court maintained its adherence to the neutral principles method: the Court explained that this approach relies "exclusively on objective,

was entitled to the disputed property.[94] The United States Supreme Court declined to grant the certiorari petition on February 22, 2021,[95] effectively finalizing the Texas Supreme Court's ruling in favor of the withdrawing church faction.

The Texas Supreme Court in *Episcopal Diocese of Fort Worth* conceded that the neutral principles method has potential drawbacks:

> But the neutral principles approach is not without limitations. When ecclesiastical questions are at issue, "deference is compulsory because courts lack jurisdiction to decide ecclesiastical questions." So while neutral principles of law are applied to issues "such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved," if an instrument "incorporates religious concepts" so that "interpretation of the instruments of ownership would require the civil court to resolve a religious controversy," the court must defer to the authoritative ecclesiastical body's resolution of that issue. And in some instances, "deferring to decisions of ecclesiastical bodies in matters reserved to them by the First Amendment may . . . effectively determine the property rights in question."[96]

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well-established concepts of trust and property law that are familiar to judges and lawyers and produce outcomes reflecting the parties' intentions before the dispute erupted." *Id.* at 428 (citing Jones v. Wolf, 443 U.S. 595, 603, 606 (1979)).

94. "Applying neutral principles of law, we hold that the majority faction is the Fort Worth Diocese and parishes and missions in union with that faction hold equitable title to the disputed property under the Diocesan Trust." *Id.* at 433.

95. *See* Daniel P. Dalton, *The U.S. Supreme Court Allows Local Churches to Keep Their Property in Religious Property Disputes*, DALTON TOMICH (Feb. 22, 2021), https://www.daltontomich.com/trust-clause/the-u-s-supreme-court-allows-local-churches-to-keep-their-property-in-religious-property-disputes ("The list of cases denied by the Supreme Court included *All Saints' Episcopal Church v. The Episcopal Diocese of Fort Worth*, 20-534, *The Episcopal Church v. The Episcopal Diocese of Fort Worth*, 20-536 and *Schulz v. Presbytery of Seattle*, 20-261."). For the formal denial of the certiorari petitions, see All Saints' Episcopal Church (Fort Worth) v. Episcopal Diocese of Fort Worth, 141 S. Ct. 1373, 1373 (2021) (mem.) ("Petition for writ of certiorari to the Supreme Court of Texas denied."); The Episcopal Church v. Episcopal Diocese of Fort Worth, 141 S. Ct. 1373, 1373 (2021) (mem.) ("Petition for writ of certiorari to the Supreme Court of Texas denied."); Schulz v. Presbytery of Seattle, 141 S. Ct. 1371, 1371 (2021) (mem.) ("Petition for writ of certiorari to the Court of Appeals of Washington, Division 1 denied."). Interestingly, *Presbytery of Seattle v. Schulz*, 449 P.3d 1077 (Wash. Ct. App. 2019), was decided by means of the compulsory deference approach, not the neutral principles of law approach. The Washington Supreme Court in *Presbytery of Seattle, Inc. v. Rohrbaugh*, 485 P.2d 615 (Wash. 1971), had settled on compulsory deference, so the Court of Appeals of Washington in *Schulz* was bound by vertical stare decisis to rule by the same method: "Because our Supreme Court decided *Rohrbaugh* [by means of compulsory deference], it is binding on this court and the doctrine of vertical stare decisis does not allow this court to reconsider it." *Schulz*, 449 P.3d at 1084.

96. *Episcopal Diocese of Fort Worth*, 602 S.W.3d at 428 (first quoting Masterson v. Diocese of Nw. Tex., 422 S.W.3d 594, 602, 606 (Tex. 2013); then quoting *Wolf*, 443 U.S. at 604; and then quoting Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976)).

Nevertheless, the Court adhered to neutral principles of law because it considered church *property* not to be an inherently ecclesiastical matter.[97] But this Article has emphasized that doctrinal disagreements constitute a common, significant way how church property disputes arise in the first place. In such a scenario, the church's superior hierarchical level determines which faction is the "true church" based on which faction has maintained doctrinal purity. Accordingly, this faction, now considered the "true church," should keep title to the disputed property. But the neutral principles approach would allow courts to consult neutral documents to conclude that the opposing faction is entitled to the property, cutting against the church's hierarchy's *theologically rooted* decision. In this way, the neutral principles method *does* risk interfering with ecclesial doctrinal resolutions in an indirect, yet still exceedingly significant, manner. By contrast, the compulsory deference approach draws a larger circle around what should be considered an "ecclesiastical matter," deferring to religious communities not only in regard to the proverbial rock dropped in the pond (i.e., the doctrinal matters themselves), *but also* in the ripples that the dropped rock creates (i.e., property disputes stemming from doctrinal differences).

III. THE UNIQUE POSITION OF THE ROMAN CATHOLIC CHURCH

The Roman Catholic Church is the example par excellence of a consistently organized hierarchical institution. Therefore, *Watson* requires compulsory deference for cases involving the Roman Catholic Church. To begin, one can mischaracterize the Roman Catholic Church as merely different parishes scattered in a geographic area, or as a massive umbrella organization led by the Pope in Rome, but neither formulation comprehends the uniform structural integrity of the institution which claims catholicity (that is, universality) as one of its defining marks.[98] To summarize briefly, Catholic *parishes*—the local church communities headed by a more experienced priest with the title of pastor and sometimes aided by a less experienced priest with the title of associate pastor—all come under the leadership of the bishop of the *diocese* in which the local parishes are located.[99]

Camella thus surveys the wide-ranging scope of the Roman Catholic Church's influence and service in the United States:

> The Church is not exclusively a religious body that serves its members. With almost 68 million Catholics worshipping in thousands of parishes within 195 dioceses, the Church sponsors

97. *Id.* at 429 ("But what happens to the property is not, *unless the [local entity's] affairs have been ordered so that ecclesiastical decisions effectively determine the property issue*." (quoting *Masterson*, 422 S.W.3d at 607)).

98. *See* The Nicene Creed, *reprinted in* 1 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 27–28 (1877) ("[I believe] in one, holy, catholic and apostolic Church").

99. *See* McConnell & Goodrich, *supra* note 11, at 328 ("The 'hierarchical' label best fits the Roman Catholic Church, where local parishes are subject to strict, ascending levels of authority—from priests, to diocesan bishops, to the Pope. Typically, Roman Catholic parishes hold property in the name of the diocesan bishop—thus ensuring hierarchical control.").

> about 6,500 elementary and secondary schools; 221 colleges and universities; and 549 hospitals serving 88 million patients annually, employing over half-a-million full-time workers and almost 225,000 part-time, and providing substantial community benefit. Numerous Catholic Charities entities, organized at the diocesan level, provide over $3.8 billion in social services (much of that as contractors for government agencies), serving over 8.5 million people annually . . . .[100]

This wide reach gives the Roman Catholic Church a unique stature that the Supreme Court has recognized over time.[101]

A. The Particularities of Catholic Church Property Ownership

McConnell and Goodrich observe that it is common in the Roman Catholic Church to set up property ownership in such a way that "title to the property is vested in a denominational officer such as a bishop."[102] The logic of such a methodology is straightforward: "Placing title in a denominational official ensures that the property will always remain within the denomination."[103] Because the Roman Catholic Church is by its nature universal, it does not have the same disputes as other Christian denominations such as schisms or emerging factions. Nevertheless, the Roman Catholic Church seeks to establish title to its property in a way that maintains its vested interest prudently.[104] The diocesan bishop serves as the leader of the diocese,[105]

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100. Carmella, *supra* note 7, at 3 (footnotes omitted).

101. *See id.* at 29 ("Forty years [after *Watson*], the Court addressed an autonomy defense by a bishop in *Gonzalez v. Roman Catholic Archbishop of Manila*, holding that his decision not to name the plaintiff to an ecclesiastical office, made under canon law, could not be adjudicated by a civil court." (citing Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929))). Furthermore, Carmella writes that "autonomy promotes institutional free exercise and avoids the distortion of teaching and mission that results when government intervenes in internal matters." *Id.* at 31.

102. McConnell & Goodrich, *supra* note 11, at 309.

103. *Id.* at 343.

104. "There can be no reasonable doubt that, with the exception of the monasteries which possessed their goods as independent institutions, though even then under the superintendence of the bishop, the whole ecclesiastical property of the diocese was subject to the bishop's control and at his disposal." Herbert Thurston, *Ecclesiastical Property*, CATH. ENCYC. (citation omitted), https://www.newadvent.org/cathen/12466a.htm (last visited Nov. 18, 2022); *see also* Bernard C. Huger, *Diocesan Real Estate Transactions—Canon and Civil Law Implications*, 27 CATH. LAW. 213, 215 (1982) ("In Missouri, there is no statutory provision for a corporation sole, nor is there any statutory or case law prohibiting any specific mode of tenure of Church property. The dioceses are thus free to select whatever method they consider most suitable." (citing Kimberly Hughes, Comment, *The Role of Courts in Church Property Disputes*, 38 MO. L. REV. 625, 636–37 (1973) (describing Missouri's neutral position towards control of Church property))).

105. There are several hierarchical variations to consider briefly here. A bishop who is the head of a diocese is called an Ordinary. An archbishop is usually the head, the Ordinary, of an archdiocese, which is larger than a regular diocese and often is the large metropolitan area around which exist smaller dioceses. In an archdiocese, for pastoral needs, an auxiliary bishop may be required to help support the archbishop in his ministry. In this common scenario, the auxiliary

but he will not remain the bishop indefinitely— he will inevitably be replaced when he retires or dies. Accordingly, the title to the property is not vested in the bishop as an individual but rather in the *office* of the bishop,[106] so that the title to the property endures from one bishop to the next.

B. The Compulsory Deference Method as the Preferred Judicial Posture for Catholic Church Property Litigation

The office of the bishop provides a source of stability for the title to the property. If a court employed the neutral principles approach in litigation involving the Roman Catholic Church, it is possible that the court, by examining the applicable neutral documents, might conclude that the Roman Catholic Church does not actually hold title to the property.[107] This decision would run contrary to the church's decision vesting title in the office of the bishop, causing conflict between the secular court and the church. But if the secular court employed the compulsory deference approach, the court would defer to what the Catholic Church hierarchy determined concerning who holds title to the property. In other words, the bishop would demonstrate title to the property, and the court would defer to that determination.[108] In this way, the compulsory deference approach avoids interference into the Roman Catholic Church's internal affairs and thus ensures that the First Amendment guarantees afforded to the Church remain respected.

C. Evaluating More Radical Solutions: Formulations of Federal Legislation

Brian Schmalzbach proposes passing federal legislation to eliminate what he perceives to be current judicial confusion stemming from varying versions of the neutral principles approach used in different state courts.[109] This federal statute, which Schmalzbach hopes would standardize the judicial landscape and thus bring uniformity to a tumultuous—and often politically contentious—area of the law, would have three key purposes:

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bishop would likely not have title to the property of the archdiocese, but rather the archbishop would retain the title.

106. "Centralization of this kind, however, leaving everything, as it did, in the bishop's hands, was adapted only to peculiar local conditions and to an age which was far advanced in commerce and orderly government." Thurston, *supra* note 104.

107. One might critique this viewpoint by contending that the scenario posited would ideally be rare. It would indeed be better for such a situation to be rare than commonplace, but the frequency of occurrence is not the heart of the issue here. Rather, it is a matter of principle that a hierarchical church such as the Roman Catholic Church—and indeed, *any* hierarchically oriented church—should not be beholden to the determination of a secular tribunal.

108. One might object arguing that this compulsory deference approach creates an overly obsequious disposition in the court, and rather the court should be more assertive in determining for itself the truth of the matter. At a certain point, these opposing viewpoints become truly mutually exclusive in that a via media option is quite difficult, if not impossible, to achieve.

109 Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 VA. L. REV. 443, 470 (2010).

> First, it will preempt state statutory and common law as it applies to church property disputes. Second, it will replace state law with the following rule of decision: a supercongregational church that does not already hold title to local church property shall be entitled to beneficial ownership of that property if it can demonstrate the existence of a trust for the supercongregational church. Finally, a supercongregational church can establish the existence of such a trust through statements in the deed to the property, provisions in the local church charter or articles of incorporation, or provisions in the supercongregational church's constitution or canons.[110]

Schmalzbach admits that this statute "would be a recognizable form of the neutral principles approach."[111] But in the case of the Roman Catholic Church, the Church's particular organizational structure as well as its unique ways of holding title to its property both cut against endorsing Schmalzbach's proposed federal statute. This is because the proposed legislation would codify a form of the neutral principles method that would apply against the Roman Catholic Church as well as to churches generally. As this Article has demonstrated, the only permissible judicial method for adjudicating property disputes involving the Roman Catholic Church is the compulsory deference approach.

Critics of this Article's unwavering adherence to the compulsory deference approach might object to the rejection of this proposed federal statute. These critics might argue that the statute brings uniformity across the entire national legal landscape and accomplishes in one act of legislation what others might seek to achieve more incrementally. Schmalzbach contends that his proposed federal legislation would limit pernicious government interference: "By virtually eliminating the inconsistency problem with neutral principles as currently applied in the states, this proposed federal statute would cure the problem of supercongregational churches being coerced into adopting forms of governance that are not traditionally and doctrinally their own."[112] As laudable as this aim may be, the neutral principles method *nevertheless* allows courts to examine evidence to make an independent determination about which litigant is entitled to the property, regardless of how the church's hierarchy decided the matter. In the context of the Roman Catholic Church, a worldwide organization that maintains a clear, defined hierarchical structure from the smallest parish to the Vatican, Schmalzbach's proposed federal statute codifying the neutral principles method still falls short of guaranteeing that the Church will exist free of any court's attempts to decide the Church's internal affairs. Instead, returning to the compulsory deference method is the only way to ensure in the long run that both the Free Exercise Clause and the Establishment Clause are respected in the church property dispute context.[113]

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110. *Id.*

111. *Id.*

112. *Id.* at 471.

113. Certain Supreme Court Justices have consistently given a similar principle-rooted rationale in preferring formalism over functionalism in cases, for example, involving Congressional authority to allocate judicial power to non-Article III federal tribunals. In *Wellness International*

Now, there are many ways to return to the compulsory deference approach. The pertinent actors—courts, legislatures—may choose one way or another due to practical exigencies while still remaining committed to the compulsory deference in principle. Taking Schmalzbach's proposed federal legislation as a guide, it is now appropriate to examine federal legislation no longer for codifying the neutral principles method but now for returning to the compulsory deference method. There are stronger and weaker forms of this proposed federal legislation.

The strongest form of this hypothetical legislation would be to pass a statute dictating that in church property disputes, courts must always use the compulsory deference model in litigation involving church property disputes, full stop. Such sweeping legislation would effectively overrule *Jones v. Wolf* because *Wolf* allowed the neutral principles method in addition to the compulsory deference method as constitutionally permissible approaches, whereas here Congress would *require* courts to use the compulsory deference approach. On the other hand, such a broad federal intervention would likely not be compatible with federalism and the original intended scope of the federal government being a government of limited and enumerated powers. It is probable that this formulation of the hypothetical federal legislation is too strong to balance all the competing factors and interests appropriately.

Alternatively, a weaker form of the federal statute would leave intact state regimes in all cases other than when considering hierarchical churches. In other words, states could still use the neutral principles approach when addressing disputes involving congregational, non-hierarchical churches. This formulation has the advantage of not preempting state regimes as severely as the "strong" legislation described above. But at the same time, a question that emerges from this statutory formulation becomes whether the church at issue is a hierarchical church under the statute. The church's internal structure may not be as readily apparent as the Roman Catholic Church, which is easy to categorize as hierarchical. But the question then becomes whether Congress should empower

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Network, Ltd. v. Sharif, 575 U.S. 665 (2015), the Court used functionalist reasoning to conclude that "that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts." *Id.* at 679. In dissent, Chief Justice Roberts expressed his adherence to a formalist approach to the separation of powers instead:

> The Court justifies its decision largely on pragmatic grounds. I would not yield so fully to functionalism. The Framers adopted the formal protections of Article III for good reasons, and "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."

Id. (Roberts, J., dissenting) (quoting INS v. Chadha, 462 U.S. 919, 944 (1983)). Analogously, even if utilitarian or consequentialist reasons to select the neutral principles method of adjudicating church property disputes appear appealing in the short-term, the compulsory deference method remains *in principle* the surest way to prevent a slow-but-sure diminishment of First Amendment religious protections over time by means of secular involvement in religious affairs. This secular intrusion by means of the neutral principles method could be minor or seemingly innocuous when considering only short-term interests and the disposition at hand, but the long-term effects and precedential influence can be enormous. The compulsory deference method avoids all uneasiness about secular involvement in the first place.

secular courts with the task of examining church structures in such a radical way. Ultimately, this formulation of the federal statute is too broad to accomplish the legislative aims without creating new—and potentially more severe—problems.

Finally, the most narrowly tailored federal statute would require courts to use the compulsory deference approach only in cases involving the Roman Catholic Church. The advantage of this "weakest" form of federal legislation is that it imposes on states a regime that is the least invasive of the three formulations presently discussed. Additionally, this formulation of the statute would only involve the Roman Catholic Church, which is already easily identifiable as a hierarchical church. As a result, litigation costs would be low because the Church's hierarchical structure would already be accepted. But the disadvantage of this statutory formulation—even the "weakest," least invasive form—is that it treats the Roman Catholic Church in a special way, singling it out from among all other religions for a particular judicial treatment. While one could accept such a distinction given the particular qualities of the Roman Catholic Church, others would not readily accept the secular government appearing to favor one religion over all other types. For this reason, even this weakest formulation has significant problems. Accordingly, this Article advises departing from any federal statutory regime concerning church property disputes.

In lieu of federal legislation, this Article proposes embracing the current system rooted in federalism and advocating for the compulsory deference approach state-by-state. Such advocacy would extend first to cases involving the Roman Catholic Church and then more broadly to encompass all hierarchical churches. This approach is not a "quick fix" like the federal legislation could be, but it does the least violence to federalism and seeks to honor the already existing state regimes. State law reform often begins with one state supreme court decision, so the patient, long-term vision of state-by-state change is preferrable to any blunt, top-down federal approach.

CONCLUSION

Part I of this Article examined the Constitutional foundations for church property disputes and explained how the United States Supreme Court in *Watson* and *Wolf* established the compulsory deference and neutral principles approaches, respectively, from which developed varying progeny. Part II discussed the compulsory deference and neutral principles approaches in greater depth. Considering that both approaches have been considered constitutionally permissible, this part analyze their strengths and weaknesses *for specific applications*. This part showed how each approach has advantages and disadvantages, but the compulsory deference approach maintains a superior judicial posture towards hierarchical churches.

Part III considered the analysis of Parts I and II in the context of the Roman Catholic Church. This part examined the specific characteristics of how the Roman Catholic Church structures title to property, often placing title in the name of the diocesan bishop. Applying the conclusions of Parts I and II to this

application, this part demonstrated that the compulsory deference approach is the preferred approach for litigation involving the Roman Catholic Church. Reforming judicial regimes at the state level is also better than imposing a new federal legislative regime, even if such an intervention would be a quicker fix than a state-by-state approach.

In conclusion, it is apt to return to the core[114] of the debate. Fennelly thus writes that "[a]bsent a compelling justification, contemporary jurisprudence should aim at protecting *all* religious conduct against unwarranted government control."[115] This Article has focused on the Roman Catholic Church and the need for the secular government to respect its place in society. But in the ultimate analysis, the principles grounding this Article's analyses also apply to protecting religious freedom for *all* religions. The compulsory deference approach remains the surest way for the secular state to adjudicate claims consistently while simultaneously ensuring that government does not overreach into the affairs of religion. The way that jurisdictions decide this issue will affect religion's place in the public sphere for generations to come.

114. It is crucial to remain focused on the broader societal issues when evaluating church property disputes and permissible judicial postures to resolve the adjudication. Instead of becoming distracted by *only* focusing on the details of the litigation at hand, it is better rather to examine the details of the litigation *along with* appreciating the larger ramifications of potential judicial intervention. At stake is the broader issue of the proper relationship between church and state in the twenty-first century. This Article has vigorously maintained that in litigation involving the Roman Catholic Church, courts should adopt the compulsory deference approach. But if one sees judicial intervention into religious affairs as problematic *in principle*, then the compulsory deference approach—the method whereby courts "give religion the most room" to operate in the public sphere without interference—becomes attractive not only for litigation involving the Roman Catholic Church—and other similarly situated hierarchical churches—but also for religious communities in general, regardless of their structural orientation.

115. Fennelly, *supra* note 31, at 355 (emphasis added).