SECULARIZATION BY INCORPORATION: CORPORATE IDENTITY AND THE RELIGIOUS CORPORATION

Bruce B Jackson, Catholic University of America
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ABSTRACT

First Amendment Religion Clause doctrine applicable to a religious organization’s internal property dispute offers civil courts an option. Provided the controversy does not involve religious doctrine, a civil court may either defer to a religious organization’s governing body, or, resolve the matter itself by applying neutral principles of law. Application of the doctrine requires a civil court to treat religious corporations with a hierarchical form of government differently from those with a congregational form of government. For religious corporations that are hierarchically organized and governed, a normative Religion Clause analysis requires a civil court to defer to the decision of the organization’s highest religious tribunal. For congregationally organized and governed religious corporations, the analysis requires deference to the decision of a majority of the congregation or other body the congregation has agreed governs. While civil courts routinely defer to the decisions of hierarchical tribunals on internal disputes involving matters of faith, doctrine, governance, polity, and administration, they routinely treat like matters within a congregational corporation as secular, corporate matters. Civil courts frequently fail to recognize or acknowledge the ecclesiastical nature of internal disputes within congregational polities in the same way they do for those of hierarchical polity. All too often, civil courts presume the controversy within religious corporations of hierarchical polity to involve ecclesiastical doctrine while considering like issues within congregational polities to be corporate contractual matters. Consequently, civil court end up deferring to the decisions of a hierarchical religious corporation’s highest tribunal, but subject a congregational religious organization to neutral principles of law allowing it to review the organization’s contracts, bylaws, constitution, minutes and resolutions.

The most significant contributing factor to this aberration is the corporate form of the congregational religious organization. While most religious organizations are organized under one form or another of a state’s incorporation statute, the form most common to the congregational religious organization is that of a not-for-profit corporation. As the creation of a state’s not-for-profit incorporation statute, the organization is required to follow the statute’s operational requirements by adopting bylaws for the governance of its affairs, passing resolutions to authorize its corporate acts, and documenting corporate decisions with minutes. Many bind
their clergy by contract. This blend of corporate processes and procedures with religious practice has a tendency to turn religious tradition and doctrine into mere circumstance. When this happens, civil courts are often seduced by the corporate side of the congregational corporation, and, internal disputes of the type that are normally handled by hierarchical tribunals, are, in the case of congregational polities, handled by a civil court judge as a corporate matter. When a court decides to take the road most familiar and follow its corporate instincts, religious freedoms are often put in peril, rules are followed but injustice is done.

This Article highlights the significant role that corporate form has played in the evolution and application of First Amendment Religion Clause doctrine, and argues that, because most religious organizations of congregational polity are not-for-profit corporations with a secular corporate form and organizational structure, they are frequently seen and treated by civil courts like secular corporations. The Article proposes that the more constitutionally sound First Amendment Religion Clause doctrinal analysis should focus on ecclesiastical essence rather than organizational corporate form.

[FULL WORK-IN-PROGRESS ARTICLE ON FOLLOWING PAGES BELOW]
INTRODUCTION

An early twentieth century fable tells the story of a man who climbed to the top of a high mountain, stood on his tiptoes and grabbed hold of the Truth. At first alarmed, Satan ultimately responded by “institutionalizing” the Truth, a move that resulted in Truth taking on an institutional character of organizational structure and corporate form.

Corporate form is at the core of Supreme Court developed Religion Clause doctrine. A normative First Amendment Religion Clause analysis involving an internal dispute within a religious organization concentrates on its internal organizational structure. Significantly, within the not-for-profit corporate shell of a religious corporation, the internal structure differs depending on whether the form of government is hierarchical or congregational. A hierarchically structured religious organization is governed by an ecclesiastical tribunal that exercises...
authority over the membership.\(^5\) Mainline Christian Protestant religious organizations (e.g. Anglicans, Presbyterians and Methodists)\(^6\) and Catholics, are hierarchically structured and so governed.\(^7\) This is in contrast to non-Mainstream Christian organizations like Baptists and Quakers, and, non-Christian organizations like Jews, Muslims, Hindus, and Buddhists, whose internal organizational structure is congregational.\(^8\) That is, where the internal affairs are governed exclusively by its members independently from any other religious tribunal or institution.

Religion Clause doctrine requires that courts abstain from involvement in a religious organization’s ecclesiastical matters\(^9\) and provides as part of a normative analysis of intra-organizational disputes that a court treat religious corporations with a hierarchical form of government differently from those with a congregational form of government.\(^10\) For instance, a normative Religion Clause analysis of an internal dispute within a religious organization that involves

\(^5\) In religious organizations governed by an ecclesiastical tribunal, the tribunal holds “general and ultimate power of control . . . over the whole membership of” its subordinate member organizations. \textit{Watson}, 80 U.S. (13 Wall.) at 722–23.

\(^6\) In this Article, I rely on the Pew Forum on Religion & Public Life / U.S. Religion Landscape Survey (2008) description of Mainline Christian Protestant: Baptist, Methodist, Lutheran, Presbyterian, Anglican/Episcopal, Restorationist (e.g. Disciples of Christ), Congregationalist (e.g. United Church of Christ), Reformed (e.g. Reformed Church of America), Anabaptist, and Friends. According to the survey, of the 78.5% Christians in the United States, 18.1% are Mainline Protestants (pp.5, 10 and 12). Of this 18.1%, 5.4% are Methodist, 2.8% are Lutheran, 1.9% are Presbyterian, 1.4% are Anglican/Episcopal. \textit{See} \textit{PEW FORUM ON RELIGION & PUBLIC LIFE, supra} note 3, at 5, 10, 12.

\(^7\) “The major hierarchical churches in America are the Roman Catholic Church, the various Eastern Orthodox Churches, the Episcopal Church [Anglican], the Church of Jesus Christ of Latter-Day Saints (Mormons), and some Lutheran (Missouri Synod) and Brethren churches.” “Churches using a connectional [presbyteral] polity include the Presbyterian Church (USA), the Reformed Church of America, the Evangelical and Reformed Church, the Christian Reformed Church, and other Calvinist and some Lutheran churches.”; “The United Methodist Church and the Church of the United Brethren in Christ use a hybrid form of presbyteral and episcopal polity, but because ultimate authority is placed above the local congregation, they are generally considered hierarchical.” \textit{BASSETT, supra} note 3, § 3:14 & nn. 9–11.

\(^8\) \textit{See e.g., BASSETT, supra} note 3, § 3:14 & n.8 (providing examples of religious organizations adhering to the non-hierarchical congregational model of polity: “United Church of Christ, Unitarian Universalists, Disciples of Christ, Baptists, The Society of Friends [Quakers], Churches of Christ, some Adventist and Lutheran churches, as well as most Jewish congregations”).


\(^10\) \textit{Watson, 80 U.S. (13 Wall.) at}
property requires a court to defer to the decision of highest religious tribunal within the organization of a religious organization that is hierarchically organized and governed.\textsuperscript{11} On the other hand, if the religious organization is congregationally organized and governed, the analysis requires a court to defer to the decision of a majority of the congregation or any other body the congregation may have agreed is the governing body.\textsuperscript{12} Paradoxically, a normative analysis that is designed to lead a court to avoid engaging in the organization’s ecclesiastical matters, such as those involving faith, doctrine, governance, polity,\textsuperscript{13} administration,\textsuperscript{14} or the organization’s right to choose who will carry out its ecclesiastical and spiritual functions,\textsuperscript{15} often leads to an opposite result.\textsuperscript{16} The result being that in application of the analysis to internal disputes, courts frequently apply the more intrusive Religion Clause doctrine of “neutral principles of law” to religious corporations of congregational polity\textsuperscript{17} than to

\textsuperscript{11} Id. at 727.
\textsuperscript{12} Id. at 724. However, a court may decide to ignore the organizational distinctions and principles of deference and apply, instead, “neutral principles of law”; provided, that is, in the application of “neutral principles”, there is no reliance on ecclesiastical matters. See Jones v. Wolf, 443 U.S. 595, 602, 604 (1979) (“[A] State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters…” (citing Md. & Va. Churches, 396 U.S. at 368)); id. at 604 (“In undertaking such an examination [using “neutral principles” to examine a religious organization’s secular documents], a civil court must take special care to…not rely on religious precepts . . . .”).
\textsuperscript{13} Kedroff, 344 U.S. at 116–17.
\textsuperscript{14} Serbian E. Orthodox Diocese, 426 U.S. at 710.
\textsuperscript{15} EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); McClure.
\textsuperscript{16} Compare Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (2006) (noting that the Catholic Church is hierarchically organized and governed and refusing to intervene in the termination of church organist on grounds that the matter involved an internal church affair which courts are prohibited from engaging), with Vann v. Guildfield Missionary Baptist Church, 452 F. Supp. 2d 651 (2006) (noting that the Baptist church is congregationally organized and governed and allowing claim of Baptist minister that he had been wrongfully terminated by Chairman of the Deacon Board). See also Ira Mark Ellman, “Driven from the Tribunal: Judicial Resolution of Internal Church Disputes,” 69 CAL. L. REV. 1378, 1406 (1981) (“Matters of governance in hierarchical churches…are ecclesiastical in nature and not to be examined by courts. The decisions of congregational churches against analogous claims can be reviewed, however. Why matters of governance are ecclesiastical in hierarchical churches but not in congregational churches remains unexplained. It would doubtless puzzle adherents of those congregational Protestant denominations that see their governance arrangements as a theoretically critical distinction separating them from churches adopting less democratic structures.”).
\textsuperscript{17} Brady v. Reiner, 198 S.E.2d 812, 827 (W. Va. 1973) (“Polity refers to the general governmental structure of a church, the organs of authority and the allocation and locus of its judicatory powers as defined by its own organic law.”); BASSETT, supra note 3, §3:6, at 3-21 (“The internal
those of hierarchical polity; and, as a corollary, are more likely to apply the Religion Clause doctrine of abstention to hierarchical polities than congregational polities.

This Article considers how corporate form and internal organizational structure affects a normative First Amendment Religion Clause analysis of a dispute within a religious corporation. This Article considers how the Janus-like face of a religious corporation, pious on one side and corporate on the other, often clouds the analysis when a court is seduced into focusing more on the organization’s corporate side than its religious side. Specifically, this Article considers how a normative First Amendment Religion Clause analysis that focuses on a religious organization’s corporate organizational structure and its secular documents can, and, often does, lead to the affairs of religious corporations of congregational polity being intruded upon more than those of hierarchical polity.

PART I
THE RELIGIOUS ORGANIZATION AS A CORPORATION

Corporations have figured prominently in the evolution of religion in America. As early as 1606, at a time when England was still an “emerging market”,18 the Virginia Company was organized as a joint stock company by English merchants19 to capitalize on what they were calculating would be a profitable economy in the New World.20 Jamestown became the Company’s organizational framework of the churches, their patterns of association, cooperation, and governance, the structures by which the churches implement their doctrine and live their religious commitment, are called church polity.”).

18 The term “emerging market” was coined during the 1980s by World Bank economist Antoine van Agtmael. NIAL FERGUSON, THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD 289 (2009); see also Chuan Li, What Are Emerging Markets?, UNIV. OF IOWA CENTER FOR INT’L FIN. & DEV., http://blogs.law.uiowa.edu/ebook/faqs/what-are-emerging-markets (last visited Feb. 24, 2012) (“Emerging markets are countries that are restructuring their economies along market-oriented lines and offer a wealth of opportunities in trade, technology transfers, and foreign direct investment.”).

19 SYDNEY E. AHLSTROM, A RELIGION HISTORY OF THE AMERICAN PEOPLE 104–05 (2d ed. 2004) (stating that the arrival at the mouth of the James River on May 2, 1607 of three ships was “an effort by a group of London and Plymouth merchants to establish a trading outpost in the New World. Having organized a joint-stock company, they obtained in 1606 a charter which designated two tracts of land along the Virginia coast . . . for colonization”).

20 Id.
flagship for creation of a new market economy and economic development in North America.\textsuperscript{21} By 1620, though, the Company was nearly bankrupt, having lost over £200,000 and nearly three-quarters of its immigrants.\textsuperscript{22} Desperately seeking ways to salvage its investment, the Company was more than receptive to inquiries by a band of Dutch Puritans who wanted to leave Holland and resettle in the New World.\textsuperscript{23} Subsequently, those whom we now embrace as the “Pilgrim Fathers” set sail on the \textit{Mayflower}\textsuperscript{24} to settle within a land grant belonging to the Virginia Company in Jamestown, Virginia.\textsuperscript{25} Two months later they landed instead far to the north within a sparsely populated land grant of the Council for New England, known today as Plymouth, Massachusetts.\textsuperscript{26}

Over the next decade that colony,\textsuperscript{27} much like the rest of New England, stagnated.\textsuperscript{28} All that changed, however, in 1630 with the arrival of John Winthrop in Salem, Massachusetts as the advance party of “England’s largest colonial migration”.\textsuperscript{29} As head of a newly created corporate entity, the Massachusetts Bay Company, formed by a group of well off Puritans in Dorchester, England,\textsuperscript{30} Winthrop’s ship, the \textit{Arbella}, was the first of eleven Bay Company ships that would arrive within the year.\textsuperscript{31} It was on the deck of the \textit{Arbella} that Winthrop, armed with a new corporate charter, coined the now famous “city on a hill” metaphor.\textsuperscript{32} He was expressing a sentiment at the core of

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\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} at 105 (“The cost of the experiment was high. The company lost over £200,000 in the enterprise, and finally collapsed in bankruptcy . . . . By 1618 the population had grown to about 1,000, yet in 1623, despite the immigration of 4,000 or more, the population still numbered only 1,200. Ravaged by Indian massacres, pestilence, misgovernment, sloth, avarice, disorderliness, and neglect, the Jamestown settlement all but expired.”).
\item \textsuperscript{23} \textit{Id.} at 137.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.} at 105.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} Increasing by no more than three hundred over the original 101. \textit{Id.} at 105–06, 137.
\item \textsuperscript{28} \textit{Id.} at 105–06.
\item \textsuperscript{29} \textit{Id.} at 144–47.
\item \textsuperscript{30} \textit{Id.} at 106.
\item \textsuperscript{31} \textit{Id.} at 144–47.
\item \textsuperscript{32} See Jeffrey A. Brauch, \textit{“John Winthrop: Lawyer As Model of Christian Charity,”} 11 REGENT U. L. REV. 343 (1999) (Winthrop “called his remarks, “A Model of Christian Charity.” In them, Winthrop reminded his fellow travelers that they had left their home in England, not for riches or their own glory, but for the glory of God. They had left to establish a people devoted to the service of God and to model for all the world a people that lived in a holy covenant with their God. The
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the Puritan ethos: that God was in a covenant relationship with the people of England that made them His “chosen people” and the New World was their promised land, a “city on a hill.” Robert Bellah points out that in Roger Williams’ view the “hill” Winthrop was making reference to, “was somebody else’s hill!”

Empirical evidence suggests that today Winthrop’s “hill” is a dynamic and religiously plural landscape, populated by religious traditions diversified and subdivided along denominational lines and made up of thousands of independent churches, temples and mosques, most organized and incorporated as either a not-for-profit corporation or as a corporation sole. Often lead by charismatic leaders and business minded trustees and directors surrounded by bankers, lawyers, accountants and consultants, these religious organizations operate as lucrative corporate enterprises driven by market principles of growth and sustainability. Those formed under not-for-profit statutes bear state charters, articles of incorporation, constitutions, bylaws, and Internal Revenue Code travelers were to form a “city on a hill.” (citation omitted)).

33 RICHARD T. HUGHES, MYTHS AMERICA LIVES BY 21–23 (2003); see also JON MEACHAM, AMERICAN GOSPEL, GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 37–39 (2007); MICHAEL B. OREN, POWER, FAITH AND FANTASY 83 (2007) (“The Puritans concluded that they were the heirs to that contract [covenant], a New Israel embarked on a second Exodus from slavery to freedom, destined for a Promised Land. Impelled by that sense of chosenness, the Pilgrims journeyed from England to Holland and from there to Plymouth Rock, their stepping-stone to salvation.”).

34 Robert N. Bellah, “Is There a Common American Culture?,” 66 J. AM. ACAD. RELIGION 3, 613, 618 (1998) (“The hill belonged to the native Americans, and if the other Puritans were inclined to overlook that, Roger Williams wasn’t.”).

35 In the form of Protestant, Catholic, Mormon, Jehovah’s Witness and Orthodox Christians; Reform, Reconstructionists, Conservative and Orthodox Judaism; Sunni and Shia Muslims; Zen, Theravada and Tibetan Buddhism; as well as Baha’is, Zoroastrians, Unitarians, Native Americans and New Age groups. PEW FORUM ON RELIGION & PUBLIC, supra note 3, at 5-9; see also Chapter 1: The Religious Composition of the United States, p. 10-11.

36 BASSETT, supra note 3, § 3:2, at 3-11 to -12 (“The DePaul Center for Church/State Studies surveyed 261 national level religious organizations in the United States to determine what type of legal structure these groups use to carry out their affairs (citation omitted). This study found that 87% of religious organizations in the United States use a religious non-for-profit corporation legal form in some manner.”); JOHN WITTE, JR. & FRANK S. ALEXANDER, CHRISTIANITY AND LAW: AN INTRODUCTION 296 (2008); (Chapter 15: Essay by William S. Bassett, Religious Organizations and the State (“Few American churches or religious organizations now are unincorporated associations. Most are incorporated under state statutes as non-profit corporations, as religious corporations, or as corporations sole.”).
Section 501(c)(3) tax exemptions and at the organizational level are virtually indistinguishable from secular corporations. Those not careful to maintain the “wall of separation” between their ecclesiastical and secular sides risk slipping into the stream of commerce where their theology becomes a packaged, marketed and distributed commodity, and their internal disputes take the shape of the kinds of internecine conflicts that infect the internal affairs of private, for-profit corporations. The internal disputes of religious organizations have long mirrored those in corporate America and secular society. Nationwide, court dockets are pockmarked with claims arising out of internal disputes within religious organizations for breach of contract\textsuperscript{37}, wrongful discharge\textsuperscript{38}, breach of fiduciary duty,\textsuperscript{39} negligent supervision,\textsuperscript{40} discrimination,\textsuperscript{41} defamation,\textsuperscript{42} trademark infringement,\textsuperscript{43} invasion of privacy,\textsuperscript{44} intentional or negligent infliction of emotional distress,\textsuperscript{45} conversion, fraud, theft,\textsuperscript{46} and sexual abuse.\textsuperscript{47} In a secular, corporate context, these types of disputes amount to nothing more than a routine day at the office for a court. When a religious corporation is a party to the litigation, however, the routine is interrupted by consideration the courts must give to the Constitution’s First Amendment Religion Clauses that prohibit courts

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\item[37] Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354 (1990) (involving a minister who filed complaint for breach of contract and age discrimination against his church).
\item[38] Vann v. Guildfield Missionary Baptist Church, 452 F. Supp. 2d 651 (W.D. Va.2006) (involving a pastor who sued his church for wrongful termination).
\item[40] Elvig v. Calvin Presbyterain Church, 367 F.3d 790 (9th Cir. 2005).
\item[41] Petruska v. Gannon Univ., 462 F.3d 294 (2006) (discussing a former chaplain of private college’s suit claiming gender discrimination and retaliation in violation of Title VII, civil conspiracy, negligent retention and supervision, fraudulent misrepresentation, and breach of contract.)
\item[44] [Cite]
\item[45] Connor v. Archdiocese of Phila., 601 Pa. 577 (2009) (discussing parents’ claims for breach of contract, violation of due process rights, defamation, negligent infliction of emotional distress, and intentional infliction of emotional distress after their child was expelled for possessing a penknife).
\item[46] Abrams v. Watchtower Bible & Tract Soc’y of N.Y., Inc., 723 N.E.2d 1161 (Ill. 1999) (addressing plaintiff’s claims the defendants engaged in a “conspiracy to defraud”).
\item[47] [Cite]
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from unwarranted involvement in religious affairs. This consideration is shaped by the corporate form of the religious organization. For example, a religious organization formed as a not-for-profit membership organization, or trustee organization will have an internal organizational structure different from one that is formed as a corporation sole. Because a First Amendment Religion Clause analysis is driven by an organization’s internal organizational structure, it is important to distinguish the more common and traditional corporate forms of religious organizations. The most common forms are the trustee and member corporate form and the corporation sole.

A. The Trustee Corporation

The trustee corporation is one of the first corporate forms used by religious organizations in this country. The trustee corporation is formed by a religious congregation who elects a body of trustees who are then incorporated under state law. As a formal corporation, the trustees hold the organization’s property and conduct the affairs of the religious organization pursuant to statutory authority and limitations. The trustee corporation is more common in hierarchical religious organizations, i.e. churches and, is recognized today in twenty-five states and the District of Columbia.

B. The Membership Corporation

In a membership corporation, it is the membership of the religious organization that is incorporated. In its corporate capacity, the membership holds and controls organizational property and conducts the affairs of the

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49 BASSETT, supra note 3, §1:20, at 1-62 (“A membership corporation is the most commonly used legal structure for church congregations…while a corporation sole is often used for dioceses in the hierarchical churches.”).
51 Kauper & Ellis, supra note 50, at 1511.
52 BASSETT, supra note 3, §1:22, at 1-66.
53 Id. §1:22, at 1-68.
54 Id.
55 Id.
56 Kauper & Ellis, supra note 50, at 1512.
organization in accordance with the organization’s custom and rules, its charter or articles of incorporation and its bylaws without involving trustees. The membership corporation is found more often in religious organizations of congregational polity. The Revised Model Nonprofit Corporation Act uses the membership corporate form as its general model for religious corporations. The membership corporation is recognized by forty states and the District of Columbia.

C. The Corporation Sole

The corporation sole is the incorporation of an official office of a religious organization and has been referred to as a “one man corporation.” The corporation sole does not have a board of directors or trustees, nor does it have officers, bylaws, official minutes, or corporate name. The power, control and authority over organizational property rests with the individual who holds the official office and passes from one incumbent to the next. The office is filled by the church hierarchy in accordance with canonical law. Consequently, any disputes may not be indulged by the courts because the matter necessarily involves ecclesiastical issue of interpreting church doctrine. Whatever the incumbent decides goes. The members of the organization have no say in the disposition. The corporation sole is used primarily by hierarchical organizations, such as Roman Catholic dioceses, Episcopal dioceses, Orthodox dioceses and the Church of Jesus Christ of Latter-Day Saints. The corporation sole is recognized or specially chartered in twenty-four states and the District of Columbia.

PART II

57 Id.; BASSETT, supra note 3, §1:22, at 1-66, 1-69.
58 BASSETT, supra note 3, §1:20, at 1-62.
59 The Revised Model Nonprofit Corporation Act has been adopted in twenty-one states with some form of modification. BASSETT, supra note 3, §1:21, at 1-63.
60 Id. §1:22, at 1-70.
61 Id.
62 Kauper & Ellis, supra note 50, at 1540.
63 BASSETT, supra note 3, §1:21, at 1-65.
64 Id. §1:21, at 1-64 (“[A]bout one-third of the Roman Catholic diocesan bishops in the United States are corporations sole. The corporation sole is also used by Episcopal dioceses, several of the Orthodox dioceses in this country, as well as the presiding bishops of the Church of Jesus Christ of Latter-Day Saints.”).
65 Id. §1:21, at 1-65.
THE FIRST AMENDMENT’S RELIGION CLAUSES: ORIGINS AND EVOLUTION

In September, 1789, a joint committee of the House and Senate of the First Congress approved a draft copy of the Bill of Rights that contained twelve amendments. The third of these twelve amendments, the result of a summer filled with debates and consideration of over twenty-five different drafts, would ultimately become the U.S. Constitution’s First Amendment containing the Religion Clauses.

The First Amendment opens with the phrase that contains the two Religion Clauses: “Congress shall make no law respecting an establishment of religion, (‘establishment clause’) or prohibiting the free exercise thereof…” (“free exercise clause”). While the original intent of these clauses continues to be debated among jurists and scholars, the general consensus is that the purpose

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67 Witte, supra note 66, at 89.

68 Amar, supra note 66, at 8.

69 U.S. Const., amend. 1.

70 Witte, supra note 66, at 89 (“What is the original understanding of the First Amendment? Is there one interpretation, or many? Is it even useful to probe such questions? The final text has no plain meaning. The congressional record holds no Rosetta Stone for easy interpretation; there is no “smoking gun” that puts all evidentiary disputes to rest. Congress considered twenty-five separate drafts of the religion clauses…ten different ones tendered by the states, ten debated in the House, five more debated in the Senate, and the final draft forged by the joint committee of the House and Senate. The congressional record holds no dispositive argument against any one of the drafts and few clear clues on why the sixteen words that comprise the final text were chosen.”); see also Mark David Hall, Jefferson Walls and Madisonian Lines: The Supreme Court’s Use of History in Religion Clause Cases, 85 Or. L. Rev. 563 (2006) (using empirical data to analyze how history has affected Supreme Court’s interpretation of the Religion Clauses); Vincent Phillip Munoz, The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress, 31 Harv. J.L. & Pub. Pol’y 1083 (2008); Steven H. Shryfrin, “The Pluralistic Foundations of the Religion Clauses,” 90 Cornell L. Rev. 9, 14 (2004) (“[T]he Framers themselves did not agree upon the appropriate relationship between religion and government. And furthermore, even if they agreed, it is not clear that a legal theory requiring us to be bound in the twenty-first century by the will of a group of eighteenth century white agrarian slaveholders would have a lot to recommend it.”). “[T]he scope of the religion clauses are more simply answered than some distinguished scholars have suggested. Two corollaries are that the Supreme Court has not committed a gross blunder in developing the scope of those clauses, and that the widely held view of the clauses as having a dual character is sound.” Kent Greenwalt, “Common Sense About Original and Subsequent Understandings of the Religion Clauses”, 8 U. Pa. J.
of the Religion Clauses was originally to protect religion from the national government.\textsuperscript{71} However, in its first Free Exercise case a hundred years after ratification, the Supreme Court seemingly failed to recognize this protection when it held that a federal law could prohibit the free exercise of religion.\textsuperscript{72} Twenty years’ later when considering its first Establishment Clause case, the Supreme Court in like fashion decided that the use of a Congressional appropriation to fund construction at a hospital run by nuns affiliated with a Catholic religious society was not a violation of that clause.\textsuperscript{73}

The Religion Clauses were originally applicable to only regulate Congress and not the states\textsuperscript{74} because religious issues were viewed as purely a state

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\textsuperscript{71} Witte, \textit{supra} note 66, at 53–54 (“The concern was to protect church affairs from state intrusion, the clergy from the magistracy, church properties from state encroachment, ecclesiastical rules and rites from political coercion and control.”); see also United States v. Balsys, 524 U.S. 666, 674 (1998). The currently received understanding of the Bill of Rights as instituted “to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches” of the National Government defined in the original constitutional articles. N.Y. Times Co. v. United States, 403 U.S. 713, (1971) (Black, J., concurring) (per curiam) (emphasis omitted); see also Stephen L. Carter, “Reflections on the Separation of Church and State,” 44 ARIZ. L. REV. 293, 294 (2002) (“The purpose of the separation was not to protect the state from religion believers but to protect the church in its work of salvation from the corruption of the state.”); Carl H. Esbeck, “Religion and the First Amendment: Some Causes of the Recent Confusion,” 42 WM. & MARY L. REV. 883, 883–87 (2001).

\textsuperscript{72} Reynolds v. United States, 98 U.S. 145, 161 (1878) (validating a congressional ban on the practice of polygamy). Mr. Chief Justice Waite, delivering the opinion of the court stated, “[t]he inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.”

\textsuperscript{73} Bradfield v. Roberts, 175 U.S. 291 (1899) (rejecting claim of taxpayer-citizen that government funding of non-profit hospital operated by order of Roman Catholic nuns was violation of disestablishment clause).

\textsuperscript{74} See Philip Hamburger, \textit{Separation of Church and State} 435–36 (2002); see also Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589, 609 (1845) (“The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws . . . .”); Barron v. City of Balt., 32 U.S. (7 Pet.) 243, 250 (1833) (“Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention.”). Compare Kent Greenawalt, \textit{Common Sense About Original and Subsequent Understanding of the Religion Clauses}, 8 U. PA. J. CONST. L. 479, 481 (2006)
The result was that some states supported churches, some banned non-Christian religious organizations, and others had religious qualifications to hold public office. John Witte describes the scene as a “patchwork quilt of laws on religious liberty….” Part of this “patchwork quilt” was state required congregationalism whose tenets of majority-rule interfered with the governance rights of hierarchical organizations. Fundamental to a religious organization of hierarchical polity is an ecclesiastical tribunal that is superior to its membership. When it is compelled to adopt a congregational, majority-rule model of governance, its religious liberties are affected. Another part of this “patchwork” was application by some states of the laws of “‘implied trust’ and the ‘departure from doctrine’” standard. Under this standard, church property was held in trust to benefit the growth and development of the church and any departure from traditional church doctrine resulted in a forfeiture of rights to the property. The Supreme Court in Watson v. Jones would find that these laws abridge religious liberties when courts, in keeping with the doctrine, “[inquired] and [decided]…not only …the nature and power of…church judicatories, but what is the true standard of faith…”.

(describing three theories regarding the scope of the Religion Clauses: the clauses created substantive restraints; they directed that religion be left to the states; or, they withdrew the subject of religion from Congress altogether).

WITTE, supra note 66, at 109; see also MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 70 (1965).

AMAR, supra note 66, at 32 (“In 1789, at least six states had government-supported churches – Congregationalism held sway in New Hampshire, Massachusetts, and Connecticut…while Maryland, South Carolina, and Georgia each featured a more general form of establishment in their respective state constitutions.” (citation omitted)).

Id. at 33.

Id.

WITTE, supra note 66, at 109.

HOWE, supra note 75, at 41–47; see also JAY ALAN, WITNESSING THEIR FAITH: RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES SEKULOW AND THEIR OPINIONS 77 (2008).


HOWE, supra note 75, at 41–47; see also ALAN, supra note 80, at 77.


Watson, 80 U.S. (13 Wall.) at 727.
In 1940 a seismic change occurred when the Supreme Court applied the Free Exercise Clause to a state for the first time.\(^6\) It did this in a creative, unusual, and controversial way: by incorporating the First Amendment into the Fourteenth Amendment, and then asserting the state had abridged the claimant’s Fourteenth Amendment’s right to “liberty” without due process.\(^7\) The linchpin to make this method work was the notion that the rights embodied in the First Amendment’s Religion Clauses are religious “liberties” protectable by the Fourteenth Amendment’s liberty guaranties.\(^8\) Seven years later the Supreme Court repeated the incorporation process, this time subjecting a state law to the Establishment Clause.\(^9\) There has been no dearth of comment and criticism on the use of the Fourteenth Amendment in this way.\(^10\) According to Witte, it was the abridgement of religious rights by the states that motivated the Supreme Court to discover a way to make states subject to First Amendment religious guaranties.\(^11\) The “way”, it turns out, was to use the Fourteenth Amendment to

\(^{6}\) *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. 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.”).

\(^{7}\) U.S. CONST. amend. XIV, § 1 (“No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”).


\(^{9}\) *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding that a state law authorizing reimbursement to Catholic parents for bus transportation of their children on busses operated by the public transportation system was not an establishment of religion issue).

\(^{10}\) Mark DeWolfe Howe’s position was the drafters and adopters never considered the Fourteenth Amendment would have any impact on religious organization. Howe, *supra* note 75, at 72–73. The Supreme Court had considered it to be primarily a “protection of the Negro against abusive state action.” Howe, *supra* note 75, at 132; see AMAR, *supra* note 66, at 139–40 (discussing the three main approaches to interpreting the relationship between the Bill of Rights and the Fourteenth Amendment: Fourteenth Amendment never incorporated any of the Bill of Rights (Justice Frankfurter); the Fourteenth Amendment incorporated all of the Bill of Rights (Justice Black); whether or not the Fourteenth Amendment incorporates any of the Bill of Rights should be determined on a right by right basis (Justice Brennan)); see also HAMBURGER, *supra* note 88, at 439.

\(^{11}\) Witte, *supra* note 66, at 109–10; see also HAMBURGER, *supra* note 88, at 448.
apply the protections of the First Amendment to the states. Accordingly, in *Cantwell v. Connecticut*, the Supreme Court agreed with the plaintiff/appellant Newton Cantwell, a Jehovah’s Witness, that the state statute prohibiting him from soliciting contributions for a religious cause without a license in violation of a New Jersey state statute was “offensive to the due process clause of the Fourteenth Amendment”, denying him and his co-defendants their freedom of speech and free exercise of religion. Relying on the Free Exercise Clause, the Supreme Court said,

“[w]e hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. 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.”

It would not be until 1952 and *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America*, though, that the Supreme Court first submitted an internal church dispute to a First Amendment Religion Clause analysis. Applying the Free Exercise Clause, the Supreme Court held that a New York statute granting control of property owned by the Russian Orthodox Church headquartered in Moscow to an American faction at odds with the Mother Church in Russia was a violation of the Free Exercise Clause. Prior to *Kedroff*, the Court had considered only three cases involving an internal church dispute,

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93 *Cantwell*, 310 U.S. at 303.

94 *Id.* at 300.

95 *Id.* at 303.

96 Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 730 (1976) (“The year 1952 was the first occasion on which this Court examined what limits the First and Fourteenth Amendments might place upon the ability of the States to entertain and resolve disputes over church property.”); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am., 344 U.S. 94 (1952).

97 Kedroff, 344 U.S. at 119; see also Serbian E. Orthodox Diocese, 426 U.S. at 730 (“This Court . . . held [in Kedroff that] the statute was a violation of the Free Exercise Clause.”).
each of which had been decided on the basis of common law principles. In Kedroff, the Supreme Court for the first time relied on the First Amendment and transformed those common law principles into a principle of constitutional law. Significantly, each of the religious organizations involved was a state chartered corporation. Two of the three were hierarchically organized and governed.

PART III

RELIGION CLAUSE DOCTRINE IN THE COMMON LAW ERA

A. Watson v. Jones

The organizational structure of religious corporations has been a key component in First Amendment Religion Clause analysis of intrachurch disputes since first being introduced by Justice Samuel Freeman Miller in the 1871 case, Watson v. Jones. In Watson the Supreme Court declared that courts must abide by the decisions of the highest tribunal within the religious organization regarding ecclesiastical matters such as questions of discipline, faith, governance, custom, or law. Relying exclusively on common law principles with no reference to the First Amendment or its Religion Clauses, the Supreme Court’s opinion laid out the rules a court must observe when considering internal disputes of religious organizations. Structurally, it rested its analysis squarely on the polity of the

98 Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871); Witte, supra note 66, at 244 (“The Supreme Court’s earliest cases on religion, beginning in 1815, were based on federal common law, not on the First Amendment . . . .”).
99 Howe, supra note 75, at 89 (“The Kedroff case established a rule of constitutional law, a rule, that is, which compels all states and the federal government, through whatever agency they may act, to abide by its requirements.”); Witte, supra note 66, at 249 (“Kedroff thus converted Watson into a constitutional principle . . . .”).
100 Watson, 80 U.S. at 679. Supreme Court has considered internal disputes within religious corporations in many cases. See, e.g., Little v. First Baptist Church, Crestwood, 475 U.S. 1148 (1986), cert denied; Jones v. Wolf, 443 U.S. 595, 602 (1979); Serbian E. Orthodox Diocese, 426 U.S. at 710; Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440 (1969); Gonzalez, 280 U.S. at 1; Kedroff, 344 U.S. at 94; Bouldin v. Alexander, 82 U.S. 131 (1872); Watson, 80 U.S. (13 Wall.) at 679.
101 Watson, 80 U.S. (13 Wall.) at 727.
102 Id. Distinguishing application of legal principles where the form of government is congregational: “the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such
religious organization. In religious corporations with a congregational form of
government, a court is bound by the decision of a majority of its members. In
those with a hierarchical form of government, a court must heed the decision of
the highest governing body within the corporation. Watson was the Supreme
Court’s initial entry into an area that was heretofore the exclusive domain of the
states. A domain that was as congregational-centric in its analysis of internal
disputes of religious organizations as today’s is hierarchical-centric.

The horrors of the Civil War left no area of American life untouched. Religious life was no exception. Pulpits in both the North and the South
proclaimed the righteousness of their respective takes on slavery and did so with
an intensity matched only by their religious beliefs. The Presbyterian Church
in the United States, a hierarchically organized and governed religious
organization, was no less vocal, and, when its General Assembly, its national
ruling body, expressed its support for the North and President Lincoln’s
Emancipation Proclamation, a schism resulted along proslavery and antislavery
lines. A month after the Civil War ended, this schism became even more

cases is that the majority rules, then the numerical majority of members must control...”.

Distinguishing application of legal principles where the form of government is hierarchical:
“[W]e 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 such decisions as
final, and as binding on them, in their application to the case before them.”

103 Id. at 725.
104 Id. at 727.
105 HOWE, supra note 75, at 70; see also JAY ALAN SEKULOW, WITNESSING THEIR FAITH:
RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES AND THEIR OPINIONS 69 (2008).
106 HOWE, supra note 75, at 82 (noting that before the Civil War, there was a “startling tendency of
state courts and state legislatures to build doctrine upon a congregational principle-to let today’s
majority decide a church’s immediate destiny, without regard to the wishes and expectations of its
founders or the preferences of its hierarchy.”).
107 See AHLSTROM, supra note 18, at 670–97.
108 The Presbyterian Church in the United States was a hierarchically organized Christian religious
organization governed by “a written Confession of Faith, Form of Government, Book of
Discipline, and Directory for Worship.” As such, it consisted of several “judicatories” consisting
of, in descending order, a General Assembly, the national level judicatory, followed by Synods,
109 Id. at 690–93.
pronounced when the General Assembly directed the Presbyteries, Board of Missions and Church Sessions to require any persons who had sided with the Confederacy to “repent and forsake their sins” as a precondition to admission as members, ministers or missionaries. A few months later, in September, 1865, the Presbytery of Louisville, Kentucky repudiated these instructions in its own publication. The General Assembly of 1866 responded by offering it an opportunity to repent and conform or risk being dissolved. With the Louisville Presbytery entrenched in its position, by June, 1867, the General Assembly declared that both the Presbytery of Louisville and the Synod of Kentucky were “in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America.” This led to a division within the Louisville Presbytery, with the proslavery adherents leaving the Presbyterian Church of the United States and joining the Presbyterian Church of the Confederate States.

Thus, in January 1866, the congregation of the Walnut Street Presbyterian Church in Louisville, Kentucky had become divided along the same proslavery/antislavery lines, with a majority of its members supporting the General Assembly’s stand against slavery while a minority of its members, embraced the proslavery position. Each faction claimed that it was the rightful owner of the church and its property. The General Assembly declared that the majority of the congregation was the lawful church. The minority faction objected, arguing that pursuant to the laws of “‘implied trust’ and the ‘departure from doctrine’” standard applicable to religious societies, the minority faction should be considered the true owner of the church and its property. The essence of this argument was that, under the “‘implied trust’ and the ‘departure

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110 The Civil War ended on April 9, 1865 when Lee surrendered at Appomattx, Virginia.
112 Id. at 682.
113 Id. at 691–92.
114 Id. at 692.
115 Id.
116 Id.
117 Id. at 694.
118 Id. at 717.
119 Id. at 694.
120 Lash, supra note 84, at 1115.
121 Adams & Hanlon, supra note 83, at 1298–99.
from doctrine’’’ standard, church property was held in trust to benefit the growth and development of the church and any departure from traditional church doctrine resulted in a forfeiture of rights to the property. Therefore, argued the minority, the antislavery stance of the majority was a departure from doctrine which should result in them forfeiting all rights to the church’s property.

1. Court Deference to Hierarchical Judicatory

In rejecting this argument, Mr. Justice Miller’s opinion pointed out that, historically, cases involving the property rights of religious organizations have fallen into one of three categories: where the use of the property is subject to express terms limiting its use to a specific form of religious doctrine or belief; where property is held by a religious organization of congregational polity; and, “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 judiciary over the whole membership of that general organization.” According to Mr. Justice Miller, the third category, where the dispute involves the property rights of hierarchically organized and governed religious organizations (like the Presbyterian Church of the United

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122 Lash, supra note 84, at 1111; see Paul G. Kauper, Church Autonomy and the First Amendment: The Presbyterian Church Case, 1969 SUP. CT. REV. 347, 349–52.
123 Adams & Hanlon, supra note 83, at 1299; see also Lash, supra note 84, at 1111 (“In the 1813 English case, Craigdallie v. Aikman, Chancellor Lord Eldon ruled that church property was held in trust for the persons who had contributed money for the original acquisition of the church. Developing this principle in the later case Attorney-General ex rel. Mander v. Pearson, Lord Eldon declared that church property was held in trust for the propagation of certain religious doctrines and that it was the duty of the court to award the property to the faction adhering to the traditional doctrines of the church. The so-called ‘Pearson Rule’ was soon adopted in the new world by way of state common law. Although application of the Pearson Rule required detailed examination of church doctrine, such inquiries fit well in a world where courts routinely decided issues of blasphemy and proper deportment on the Sabbath. However, just as theological rationales grew less routine in blasphemy cases, so the Pearson Rule came under fire as a remnant of ‘establishment England.’ By the 1840s, litigants on the side of doctrinal innovation began to cite both the state and federal constitutions for the principle that the state had no power-and the courts no jurisdiction-to interfere in matters involving religious doctrine and church government. As early as 1842, Kentucky courts had rejected the Pearson Rule, noting that ‘[t]he judicial eye of the civil authority of this land of religious liberty, cannot penetrate the veil of the Church, nor can the arm of this Court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excised members.’” (citations omitted)).
124 Watson, 80 U.S. (13 Wall.) at 722.
States), is the one that is in “every way the most important.”\textsuperscript{125} This is so, he declared, because the cases that fall within this third category showed up more often in the courts and presented the more difficult questions.\textsuperscript{126} After so declaring, he went on to announce the rule of \textit{Watson}:

“In this class of cases we think the rule of action which should govern civil courts, founded on 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 such decisions as final, and as binding on them, in their application to the case before them.”\textsuperscript{127}

The rationale for the rule, while making no reference to the Constitution, was based, nonetheless, on constitutional principles of religious liberty.\textsuperscript{128} In rejecting the English doctrine that allowed courts to “inquire and decide…not only …the nature and power of…church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard,”\textsuperscript{129} Mr. Justice Miller stated that,

“In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.”\textsuperscript{130}

The reasoning behind this rationale was that hierarchically organized and

\textsuperscript{125} \textit{Id.} at 726.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.} at 727.
\textsuperscript{128} \textit{Howe, supra} note 75, at 82–83.
\textsuperscript{129} \textit{Watson}, 80 U.S. (13 Wall.) at 727.
\textsuperscript{130} \textit{Id.} at 728–29.
governed religious organizations have their own body of esoteric laws that civil courts are incompetent to adjudicate. When it comes to ecclesiastical matters having to do with a religious organization’s discipline, faith, governance, custom, or law, so the reasoning goes, only those who are seasoned in the faith and the tradition, and not the courts, are qualified to render decisions affecting these matters. And those of sound mind who voluntarily join such organizations are considered to have consented to the organization’s authority and are bound by the organization’s ecclesiastically lawful decisions. In these circumstances, these individuals, like the court, must abide by the decision of the organization’s highest tribunal.

2. Court Relationship to Congregational Polities

The focus of the Court’s decision was clearly on the principles and doctrine applicable to hierarchically organized and governed organizations, however, Mr. Justice Miller briefly mentioned religious organizations of congregational polity. He described these religious organizations as independent organizations “governed solely within [themselves], either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government…”. He went on to say that “[i]n such cases where there is a schism [within a religious organization of congregational polity] which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations.” In other words, “the majority rules.”

The congregational model of polity was quite familiar to the judiciary of the day when it came to resolving intrachurch property disputes. After the Revolutionary War, the church affiliated municipalities in Massachusetts followed a “congregational tradition” where each was an autonomous, “self-

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131 Justice Miller mentioned, by way of example, and not by way of limitation, Protestant Episcopal, Methodist Episcopal and Presbyterian churches. Id. at 679, 729.
132 Watson, 80 U.S. (13 Wall.) at 729.
133 Contract theory.....
134 Watson, 80 U.S. at 724-725.
135 Id. at 724.
136 Id. at 725.
137 Id.
138 Howe, supra note 75, at 82.
sufficient” and “self-governing” majority-rule jurisdiction.\textsuperscript{139} South Carolina’s 1778 constitution not only established Protestantism as the state religion and expected that each Protestant denomination would become a state chartered corporation, it mandated that all church ministers be elected by a majority of its members.\textsuperscript{140} In 1784, New York adopted a statute allowing religious organizations to incorporate. An 1854 ruling by the New York Court of Appeals interpreting that statute held that the trustees of a religious corporation were bound by the decision of a majority of the members who benefited by the corporation.\textsuperscript{141} Mark DeWolfe Howe suggests, as did Mr. Justice Miller,\textsuperscript{142} that the preference of the judiciary for majority-rule, the staple of congregational polities, was its awareness of its incompetence to rule on matters buried in theology.\textsuperscript{143}

Nonetheless, the take-away of \textit{Watson} is that courts are bound to abide by the decisions of the highest judicatory within a religious organization of hierarchical polity when it comes to questions of discipline, faith, ecclesiastical rule or governance, custom or law.\textsuperscript{144} In religious organizations of congregational polity, however, it is the majority that rules, unless there are officers within the organization invested with powers of government superior to those of the congregation.\textsuperscript{145}

\textbf{B. Bouldin v. Alexander}

A year after \textit{Watson} the Supreme Court refined the common law rule announced in \textit{Watson} by holding that it could determine, as between competing individuals or judicatories, who is the lawful authority of a religious organization. In \textit{Bouldin v. Alexander},\textsuperscript{146} an 1872 appeal from the Supreme Court of the District of Columbia, the Court was confronted with a property dispute within a church of congregational polity.\textsuperscript{147} The dispute arose when Bouldin, leader of the Third Colored Baptist Church of the City of Washington, along with fifteen or so

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\textsuperscript{139} Id. 34-35. \\
\textsuperscript{140} Id. 42. \\
\textsuperscript{141} Id. 46-47. \\
\textsuperscript{142} \textit{Watson}, 80 U.S. at 729. \\
\textsuperscript{143} Howe, \textit{supra} note 75, at 37, 49. \\
\textsuperscript{144} \textit{Watson}, 80 U.S. at 727. \\
\textsuperscript{145} Id. \\
\textsuperscript{146} Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872). \\
\textsuperscript{147} Id. at 133. \\
\end{flushleft}
members loyal to him, took control of the church and locked out trustees adverse to him.\textsuperscript{148} The affected trustees, numbering eleven, and representing the interests of a majority of the membership of the church (ca. 200), filed suit against Bouldin for, \textit{inter alia}, return of control of the property to them, the lawful trustees of the church.\textsuperscript{149} The trial court agreed with the plaintiffs and Bouldin appealed.\textsuperscript{150}

In affirming the trial court, the Supreme Court expressly recognized that, consistent with the general principles laid down in \textit{Watson}, it had no power to consider or rule on ecclesiastical matters such as who should be members, officers or trustees of the church.\textsuperscript{151} It did, however, have the power to inquire into the organizational structure of a religious organization in order to determine whether the individuals or judicatory purporting to act on behalf of the religious organization was actually authorized to do so.\textsuperscript{152} In other words, courts may review whether a church followed its own internal rules and regulations. The first, last and only time the Supreme Court has considered First Amendment Religion Clause doctrine within context of a congregational religious organization.

\textbf{C. Gonzalez v. Roman Catholic Archbishop of Manila}

Following \textit{Bouldin}, the Supreme Court did not consider its next internal church dispute until 1929. In \textit{Gonzalez v. Roman Catholic Archbishop of Manila}, Gonzalez, a ten-year old, contended that he was entitled to a chaplaincy founded by the terms of an ancestor’s will.\textsuperscript{153} Affirming the decision of the Supreme Court of the Philippine Islands on common law grounds consistent with \textit{Watson}, the Court found that Gonzalez’s suit against the Archbishop of Manila for refusal to appoint him to the chaplaincy was a canonical act outside the purview of the secular courts.\textsuperscript{154} In deferring to the decision of the Archbishop, the Supreme Court said that absent “fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive...”\textsuperscript{155}

\textsuperscript{148} \textit{Id.} at 134.
\textsuperscript{149} \textit{Id.} at 135.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 137, 139-40.
\textsuperscript{152} \textit{Id.} at 140.
\textsuperscript{153} Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 14 (1929).
\textsuperscript{154} \textit{Id.} at 16.
\textsuperscript{155} \textit{Id.}
Forty-seven years later in the 1976 case of *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevich*, the Court would declare that this “fraud, collusion, or arbitrariness” exception to the *Watson* rule was nothing more than *dictum*.

**PART IV**

**RELIGION CLAUSE DOCTRINE IN THE CONSTITUTIONAL ERA**

On the heels of *Cantwell* and *Everson* in the 1940s and their application of the Religion Clauses against the states by incorporation of the First Amendment into the Fourteenth Amendment, came *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America*. *Kedroff* constitutionalized the common law principles of religious freedom it found pervasive in *Watson*.

**A. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America**

*Kedroff* is remarkable not only for it being the first time an internal church dispute was submitted to a First Amendment Religion Clause analysis, but also for the time period and context within which it was made. In 1952, the year *Kedroff* was decided, the United States was in the grips of the Red Scare, a pathological form of anti-communism fueled by McCarthyism. *McCarthyism* is named after Wisconsin Senator Joseph McCarthy who served in the United States Senate from 1947 to 1957. During the 1950s, McCarthyism demonized Soviet Russia and its brand of communism. Consequently, thousands of American citizens were investigated by the Federal Bureau of Investigation and

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157 Id. at 712.
160 *Kedroff*, 344 U.S. 94; *Milivojevich*, 426 U.S. at 730 (“The year 1952 was the first occasion on which this Court examined what limits the First and Fourteenth Amendments might place upon the ability of the States to entertain and resolve disputes over church property.”).
162 [cite not checked]. *Caute, supra* note 161; *Fried, supra* note 161.
accused and charged by the House Un-American Activities Committee of either being a Communist or Communist sympathizer. Being branded as a communist or communist sympathizer often led to ruined careers, job loss, and in some cases, imprisonment.\(^{163}\) The Supreme Court's decision in *Kedroff* in the midst of this kind of social and political climate is extraordinary.

The case history of *Kedroff* is lengthy and complex and tells of the effects of the 1917 Kerensky/Bolshevik revolutions in Russia on the Russian Orthodox Church and how that in turn affected the control of the Church’s American diocese and cathedral in New York.\(^{164}\) The controversy pitted the Supreme Church Authority of the Russian Orthodox Church in Moscow against the Archdiocese of North America. At stake was who had the right to use and occupy the Saint Nicholas Cathedral of the Russian Orthodox Church in North America located at 15 East 97\(^{th}\) Street, New York City.\(^{165}\) The Russian Orthodox Church in Moscow claimed that it had the right to occupy the Cathedral on the basis of its superior hierarchical authority.\(^{166}\) The Russian Orthodox Church of America alleging that the Church in Moscow was tainted and controlled by the communist Russian government, based its claim on statutes passed by the New York Legislature in 1945 and 1948 declaring all Russian Orthodox churches in the state to be the property of the Russian Church in America.\(^{167}\) Deciding in favor of the American contingent, the Court of Appeals of New York justified the actions of the New York Legislature with language that was representative of the anti-communist Russian ideology of that time:

> “The Legislature of the State of New York, like the Congress, must be deemed to have investigated the whole problem carefully before it acted. The Legislature knew that the central authorities of the Russian Orthodox Church in Russia had been suppressed after the 1917 revolution, and that the patriarchate was later resurrected by the Russian Government. The Legislature, like Congress, knew the character and method of operation of international communism and the Soviet attitude toward things religious.”\(^{168}\)

On appeal to the United States Supreme Court, the Russian Orthodox Church in Moscow argued that the New York statute unconstitutionally interfered

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164 *Kedroff*, 344 U.S. 94.
165 Saint Nicholas Cathedral of Russian Orthodox Church in N. Am. v. Kedroff, 96 N.E.2d 56 (N.Y. 1950).
166 *Id.*
167 *Id.* at 69.
168 *Id.* at 73-74.
with its free exercise of religion. In the face of McCarthyism and the prevailing American animus toward communism and Russia, the Supreme Court reversed the New York Court of Appeals. It found the New York statute which transferred control of the Russian Orthodox Churches from the governing hierarchy in Russia to the Russian Church in America to be in violation of the Fourteenth Amendment’s protection of religious liberty. The Court determined that the question as to who has the right to use and occupy the Cathedral to be one of “ecclesiastical government”, and, as such, should be answered by the principles of Watson v. Jones. The Court explained its position by stating that,

“The opinion [in Watson] radiates...a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”

Thus, Kedroff raised Watson’s common law principle of court deference to religious organizational hierarchy to that of a constitutional principle that the Free Exercise Clause protected religious organizations from “secular control or manipulation”. This rule of constitutional law did what Watson’s common law rule did not, nor, could it, do. It made deference of the courts to the decisions of religious organizations pertaining to ecclesiastical matters, such as internal government, faith and doctrine, the law of the land. Still, some states persisted in holding onto the old English “‘implied trust’ and the ‘departure from doctrine’” standard, where church property was held in trust to benefit the growth and development of the church and any departure from traditional church doctrine resulted in a forfeiture of rights to the property. Georgia was one of those states.

B. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church

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169 Id. at 100.
170 Id. at 107.
171 Id. at 116.
172 Witte, supra note 66, at 249.
173 Howe, supra note 75, at 89.
174 Lash, supra note 74, at 1111; see Kauper, supra note 122, at 349-52.
In 1966, two local Presbyterian church congregations in Georgia voted to withdraw from the hierarchically organized and governed Presbyterian Church in the United States, of which they were a part, alleging the general church had “abandoned and departed from the tenets of faith and practice it held at the time the local churches affiliated with it.” \(^{175}\) The Presbyterian Church in the United States, reminiscent of the hierarchical structure in *Watson v. Jones*, consists of Church Sessions, Presbyteries, Synods, and a General Assembly. Local church congregations are known as Church Sessions. All Church Sessions within a particular geographical area are part of a Presbytery. The Presbyteries within a State are part of a Synod. Overall governance is carried out by the General Assembly. \(^{176}\)

Subsequent to the withdrawal of the two local churches, the Presbyterian Church in the United States, the general church, conducted an investigation and ultimately acquiesced to the withdrawal and took control of the local church property on behalf of the general church. \(^{177}\) The two local churches responded by suing to enjoin the general church’s possession and control of the property. \(^{178}\) The general church filed a motion to dismiss, arguing that the court was without power to rule on whether it had “departed from its tenets of faith and practice.” \(^{179}\) The motion was dismissed, and, ultimately, the case went to trial. \(^{180}\) At trial, consistent with prevailing Georgia law, a jury found that the general church had abandoned the original tenets and doctrines upon which the general church was originally founded thereby forfeiting its rights to the local church property. \(^{181}\) The Supreme Court of Georgia affirmed. The United States Supreme Court granted certiorari on the First Amendment issues raised by the general church’s objection to the trial court hearing and ruling on whether it had abandoned its tenets of faith. \(^{182}\)

In reversing the Georgia Supreme Court, the Court expressly rejected

\(^{175}\) Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 441 (1969).
\(^{176}\) *Id.* at 442.
\(^{177}\) *Id.* at 443.
\(^{178}\) *Id.*
\(^{179}\) *Id.*
\(^{180}\) *Id.*
\(^{181}\) *Id.* at 443-44.
\(^ {182} \) *Id.* at 444.
Georgia’s “‘implied trust’ and the ‘departure from doctrine’” standard\(^{183}\) and validated the deference principles embodied in *Watson, Gonzalez* and *Kedroff*.\(^{184}\) Then, in an out-of-nowhere statement, it said that not every court decision involving an intrachurch property dispute implicates deference to the First Amendment.\(^{185}\) On those occasions, said the Court, “neutral principles of law” may be relied on to resolve the matter.\(^{186}\) No further explanation for this statement was offered. A fuller meaning of what the Court meant by this statement would come ten years later in *Jones v. Wolf*.\(^{187}\) Meanwhile, a year after *Presbyterian Church*, the Supreme Court gave a wink and a nod to the use of “neutral principles” in a Maryland case involving a question of who, as between two local churches and the regional church, should control the local church property.\(^{188}\) In a per curiam decision by Justice Brennan, the Court dismissed an appeal from a decision of the Maryland Court of Appeals affirming the trial court’s use of neutral principles in examining state statutes, property deeds, church constitution and church charter in deciding the intrachurch property dispute.\(^{189}\) In his opinion, Justice Brennan made a statement that would find its way into a later Supreme Court case\(^{190}\) validating the use of the “neutral principles of law” approach in the resolution of intrachurch property disputes: “a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters…”\(^{191}\)

C. *Serbian Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevich*

Those who concluded from *Presbyterian Church*’s outlier statement on “neutral principles” and *Sharpsburg*’s specious countenance of that statement that the “neutral principles of law” approach had supplanted the deference principles of *Watson, Gonzalez* and *Kedroff* raised their eyebrows when the Court handed down its decision in *Serbian Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevich*.

\(^{183}\) *Id.* at 449-50.
\(^{184}\) That civil court must abstain from considering ecclesiastical matters.
\(^{185}\) *Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. at 449.
\(^{186}\) *Id.*
\(^{189}\) *Id.*
\(^{190}\) *Jones*, 443 U.S. 595.
\(^{191}\) *Md. & Va. Eldership of Churches of God*, 396 U.S. at 368.
Canada v. Milivojevich seven years after Presbyterian Church. 192 In no uncertain terms, the Court confirmed its earlier holdings in Watson, Gonzalez and Kedroff that in matters involving intrachurch property disputes, civil courts must accept the decision of the highest ecclesiastical tribunal regarding doctrine, discipline, polity and practice.193

Serbian involved the defrockment of the Bishop of the Serbian Eastern Orthodox Diocese for the United States and Canada by the Serbian Orthodox Church in Yugoslavia (Mother Church) and reorganization of the United States Diocese into three Dioceses.194 The defrocked Bishop filed suit asking for an injunction against the Mother Church from interfering with the assets of the United States Diocese and for a declaration that he was the true Bishop of the United States Diocese.195 On appeal from the trial court, the Illinois Supreme Court found that the Mother Church had not followed its constitution and penal code in disciplining the Bishop and that the reorganization had exceeded its authority.196 Consequently, the Illinois Supreme Court finding the conduct of the Mother Church to be “arbitrary”, held its actions of invalid.197 On grant of certiorari, the United States Supreme Court, Mr. Justice Brennan delivering the opinion of the Court, reversed, holding that the inquiries of the Illinois Supreme Court leading to the conclusion the Mother Church had failed to follow its own rules and procedures in defrocking the United States Bishop had violated the First and Fourteenth Amendments.198 According to the Court, civil courts are prohibited from engaging in an inquiry that assesses whether the governing body of a hierarchical religious organization has authority to decide an intrachurch dispute.199 Such an inquiry, said the Court, requires an impermissible probing into religious law and polity.200 And when it comes to matters involving religious law and polity, explained the Court, civil courts must abide by the decisions of the “highest ecclesiastical tribunal within a church of hierarchical polity.”201 The Court went on to say that because the “arbitrariness” exception mentioned in

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193 Id. at 713.
195 Id.
196 Id.
197 Id. at 698.
198 Id.
199 Id. at 708-09.
200 Id. at 709.
201 Id.
*Gonzalez* was only “dictim”, its use by the Illinois Supreme Court to justify “marginal civil court” review was invalid.\textsuperscript{202} Echoing *Watson*, the Court reiterated and emphasized that civil courts “must accept the ecclesiastical decisions of church tribunals as it finds them.”\textsuperscript{203} Therefore, concluded the Court, an inquiry into whether or not the Mother Church had strayed from its own laws and procedures in defrocking its Bishop and reorganizing the United States Diocese is an ecclesiastical action which civil courts are incompetent to adjudicate.\textsuperscript{204}

D. *Jones v. Wolf and the “Neutral Principles of Law”: Method for Resolving Property Disputes*

Three years after *Serbian* the Supreme Court again considered an intrachurch property dispute in *Jones v. Wolf*.\textsuperscript{205} In a 5-4 decision, the *Jones* Court specifically identified the issue as being whether civil courts could, consistent with the First and Fourteenth Amendments, resolve intrachurch property disputes by application of “neutral principles of law.”\textsuperscript{206} In *Jones*, the Court dealt head-on for the first time with the application of “neutral principles of law” in intrachurch property disputes. In doing so, it reached back to its passing mention of the “neutral principles of law” in *Presbyterian Church*\textsuperscript{207} and Justice Brennan’s brief discussion of “neutral principles” in his per curiam opinion in *Maryland and Virginia Eldership of Churches of God v. Church of God*.\textsuperscript{208}

Like *Watson*, *Jones* involved controversy over property growing out of a schism within a local congregation of the hierarchically organized Presbyterian Church in the United States.\textsuperscript{209} In *Jones*, a majority of the Vineville Presbyterian Church of Macon, Georgia voted to separate from the Presbyterian Church in the United States and to join the Presbyterian Church in America.\textsuperscript{210} The majority continued to occupy and worship in the local church property while the minority

\textsuperscript{202} Id. at 712.
\textsuperscript{203} Id. at 713.
\textsuperscript{204} Id. at 713, 720-721.
\textsuperscript{205} Jones v. Wolf, 443 U.S. 595 (1979).
\textsuperscript{206} Id. at 597.
\textsuperscript{207} Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 449 (1969).
\textsuperscript{209} Jones, 443 U.S. at 597.
\textsuperscript{210} Id.
removed themselves to another location for worship.\textsuperscript{211} After a three year investigation, a presbytery appointed commission of the Presbyterian Church in the United States declared the minority congregants to be “the true congregation”.\textsuperscript{212} The minority faction then initiated legal proceedings to establish its rights to the local church property. The trial court applied Georgia’s “neutral principles of law” and awarded the local church property to the majority. On appeal, the Supreme Court granted certiorari.\textsuperscript{213}

Upon review, the Court pointed out that the use and application of “neutral principles of law” by the Georgia courts was consistent with its reversal and remand of 	extit{Presbyterian Church v. Hull Church}\textsuperscript{214} where it stated that “there are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.”\textsuperscript{215} The Court then went on to describe how the Georgia Supreme Court, in response to the reversal and remand of 	extit{Presbyterian Church v. Hull Church}, subsequently applied and refined the “neutral principles of law” approach by validating the review of property deeds, corporate charters, state statutes, and religious documents in the resolution of intrachurch property disputes.\textsuperscript{216} In approving Georgia’s application of “neutral principles of law”, the Court stated that even though the First Amendment puts significant restraints on civil courts becoming involved in intrachurch property disputes, there is nothing in the First Amendment that requires “compulsory deference to religious authority in resolving church property disputes.”\textsuperscript{217} As a matter of fact, said the Court, “the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes.”\textsuperscript{218} On the contrary, “neutral principles of law” is an

\textsuperscript{211} Id. at 598.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 598-99.
\textsuperscript{214} Id. at 599.
\textsuperscript{215} Id.
\textsuperscript{216} Id. at 600-01. On remand of 	extit{Presbyterian Church v. Hull Church}, the Georgia Supreme Court reviewed not only real property deeds and state statutes, it also reviewed the Book of Church Order (p.600). In 	extit{Carnes v. Smith}, 222 S.E.2d 322 (Ga. 1976), a controversy involving The United Methodist Church, the Georgia Supreme Court reviewed not only property deeds, corporate charter and state statutes, it also reviewed the constitution of The United Methodist Church and its Book of Discipline (p.600).
\textsuperscript{217} Jones, 443 U.S. at 604.
\textsuperscript{218} Id. at 602 (citing Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970)).
alternative means for a court to resolve an intrachurch property disputes. Finding “neutral principles of law” to be secular, flexible, objective, familiar to lawyers and judges, and obviating the need to rely on internal organizational structure in the resolution of intrachurch property disputes, the Court held that “neutral principles of law” to be an acceptable method for adjudicating church property disputes. “The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.”

E. Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission and the “Ministerial Exception”


In McClure, the Fifth Circuit triggered the “ministerial exemption” that was subsequently adopted by each of the circuits and most recently recognized by the United States Supreme Court in Hosanna-Tabor.

219 Id. at 602-03 (citing Md. & Va. Eldership of Churches of God, 396 U.S. at 368).
220 Id. at 603 (“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 organizations and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges.”); Id. at 605 (“The neutral principles approach . . . obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.”).
221 Id. at 604; see also Md. & Va. Eldership of Churches of God, 396 U.S. at 370 (“Under the ‘formal title’ doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws.”).
222 Jones, 443 U.S. at 605.
223 McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (“The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized of prime ecclesiastical concern.”); see, e.g., Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007), cert. denied, 552 U.S. 857 (2007); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698, 704 (7th Cir. 2003); Scharon v. St. Luke’s Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bryce v. Episcopal Church in the Diocese, 289
On July 19, 1970, Mrs. Billie M. McClure was terminated as a commissioned officer in the Salvation Army. Shortly thereafter, Mrs. McClure filed a lawsuit against the Salvation Army in the United States District Court for the Northern District of Georgia alleging sex discrimination in violation of Title VII. Specifically, Mrs. McClure complained that as between similarly situated male and female officers, male officers received more salary and benefits. She also claimed that in retaliation for her complaining to her superiors and the Equal Employment Opportunity Commission, the Salvation Army fired her. The Salvation Army responded by filing a Motion to Dismiss on the grounds that it was exempt from Title VII requirements pursuant to the Section 702 of Title VII, 42 U.S.C. § 2000e-1. Section 702 of Title VII, 42 U.S.C. § 2000e-1 provided an exemption to religious organizations for work associated with carrying on the organization’s religious activities. Finding that the Salvation Army is a religion and the activities of Mrs. McClure to be religious activities, the District Court sustained the Motion.

The Fifth Circuit Court of Appeals affirmed the decision but determined that Congress did not intend Section 702 to exempt religious organizations from Title VII’s prohibitions on discrimination on the basis of race, color, sex or national origin. The court said that this determination did, however, beg the question whether the application of Title VII to religious organizations violated the First Amendment Religion Clauses. After reminiscing on the deference principles of Watson, Gonzalez, Kedroff and Presbyterian Church, the court concluded that the relationship between the Salvation Army and Mrs. McClure

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226 Id.
228 Id. ("This subchapter shall not apply to …a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities . . . .").
229 Id. at 558.
230 Id. at 556, 557.
231 Id.
232 Id.
233 Id. at 559-60.
234 Id.
was one of church and minister, and any inquiry into that relationship would be a violation of the First Amendment’s Free Exercise Clause.\textsuperscript{235} Subsequent to this 1972 Fifth Circuit Court of Appeals decision, all of the circuits have adopted this “ministerial exception”.\textsuperscript{236}

Purely a creation of the lower courts, the “ministerial exception” exempts religious organizations from race and sex discrimination claims brought by any employee determined to be in a ministerial capacity.\textsuperscript{237}

D. \textit{A Free Exercise Matter}

The First Amendment’s Free Exercise Clause protects a religious organization’s right to decide matters of faith, doctrine, and church governance.\textsuperscript{238} The essence of Religion Clause doctrine is that civil courts are prohibited from considering controversies involving a religious corporation’s property, polity or administration if the controversy involves religious doctrine or practice.\textsuperscript{239} In controversies involving either religious doctrine or practice within a religious corporation of hierarchical polity, civil courts are to defer to the decisions of the organization’s highest ecclesiastical tribunal.\textsuperscript{240} Within a religious corporation of congregational polity, the doctrine requires civil courts to defer either to the majority of the organization’s members or any other internal unit it may use to govern itself when it comes to controversies involving religious doctrine or

\textsuperscript{235} Id. at 560.

\textsuperscript{236} See, e.g., Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989) (A probe of the church’s bylaws, rules, regulations would be an impermissible intrusion into ecclesiastical affairs); Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir.), \textit{cert. denied}, 552 U.S. 857 (2007); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698, 704 (7th Cir. 2003); Scharon v. St. Luke’s Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bryce v. Episcopal Church in the Diocese, 289 F.3d 648 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000).


\textsuperscript{238} Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952); see also Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 713 (1976) (“[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical policy on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.”)

\textsuperscript{239} Milivojevich, 426 U.S. at 710.

\textsuperscript{240} Id. at 724-25.
practice. However, when it comes to resolving controversies involving just a religious organization’s property, notwithstanding the principles of deference and abstention, civil courts may, through the application of neutral principles, consult the religious corporation’s organizational documents and state statutes; provided, that is, the consultation involves no consideration of religious doctrine or practice.

PART V

ARGUMENT

CONGREGATIONAL RELIGIOUS CORPORATIONS ARE MORE VULNERABLE TO ABERRANT RELIGION CLAUSE ANALYSIS THAN ARE HIERARCHICAL RELIGIOUS CORPORATIONS

A. Congregationally Organized Religious Organizations Are Seen As More Corporate Than Religious

The ubiquity of the corporation in commerce and everyday life has made it familiar to both the bench and the bar. It is rare, indeed, to find an attorney who is not familiar with the apparatus of a corporation, i.e. articles of incorporation, bylaws, minutes and resolutions. Likewise, it is of no particular moment for a civil court to find a corporation on its docket. As Mr. Justice Blackmun suggested in Jones, the rudiments of corporate law represent “objective, well-established concepts of…law familiar to lawyers and judges.” Familiarity, though, often breeds contempt. When familiarity, born of the confidence with which the courts so expertly and routinely consider corporate controversies, is applied to a religious corporation without fully recognizing or appreciating the organization’s religious essence, it amounts to an act of hubris. A hubris that not only presumes to know what is best, but, because of the corporate infrastructure of the religious organization, assumes it has all the requisite tools to resolve the

242 Jones, 443 U.S. at 603.
243 Id. at 603-05 (“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 organizations and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges.”).
244 AESOP, THE FOX AND THE LION.
matter. Consequently, ecclesiastical issues are often treated as corporate matters and First Amendment free exercise guarantees are shoved aside as insignificant.

This is the predicament of the many state chartered, incorporated congregational religious organizations. Created pursuant to state incorporation statutes and following the statute’s operational requirements, congregational religious organizations necessarily adopt the processes of a corporation, and, in some ways even begin to act like secular corporations by adopting bylaws for the governance of their affairs and passing resolutions to authorize corporate acts which are documented with corporate minutes. Many bind their clergy by contract. The blend of corporate processes and procedures with religious practice has a tendency to turn religious tradition and doctrine into mere circumstance. When this happens, intra-organizational disputes of the type that are routinely handled by internal tribunals in hierarchical polities, are, in the congregational polity, handled by a civil court judge. It is in these situations, when a court decides to take the road most familiar and follow its corporate instincts, that religious freedoms are often put in peril; when the rules are followed but injustice is done. Situations involving employment disputes between a religious organization and its clergy offer typical illustrations.

The employment relationship between an organization and its clergy is paradigmatically an ecclesiastical one entitled to First Amendment

245 Viravonga v. Wat Buddha Samakitham, 279 S.W.3d 44 (Ark. 2008) (Plaintiff members of Buddhist temple organized as Arkansas nonprofit corporation brought action against defendant members, alleging that temple's abbot had violated corporate bylaws by dismissing the board of directors and by attempting to appoint a new board of directors.)
246 See e.g., Bruss v. Przybylo, 895 N.E.2d 1102 (Ill. App. Ct. 2008) (Former members of church and of church’s board of directors brought action against church pastor and current members of church’s board for declaratory and other relief, claiming that pastor did not fulfill terms of his employment agreement).
247 JOHN LOCKE, ESSAY ON TOLERATION (Jewish Sabbath on Saturday is rooted in worship, for Christians it's a circumstance) [page?]
248 JOHN T. NOONAN, JR., PERSONS & MASKS OF THE LAW 6 (1976) (“It is no accident that in those trials which have been celebrated in literature and in the history of our consciousness – the trial of Socrates, the trial of Thomas More, the trial of Jesus – the rules were followed and yet the human judgment has always been that injustice was done, the person condemned to death was not given his due, the paradigm of justice was violated.”).
249 In McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972), the court expressly acknowledged that “[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical
An impressive line of Supreme Court cases make the point. In Gonzalez, the Supreme Court said that the appointment of clergy is a canonical act that must be accepted by “secular courts as conclusive.”\textsuperscript{251} In Kedroff, the Court declared that interference by the state with a religious organization’s appointment of its clergy “prohibits the free exercise of religion.”\textsuperscript{252} In Serbian, the Court reversed the Illinois Supreme Court on First Amendment grounds when it interfered with a religious organization’s defrockment of its clergy.\textsuperscript{253} Most recently, in Hosanna-Tabor, the Court validated the forty year old lower court created “ministerial exemption” that recognizes the First Amendment implications of the special relationship between a religious organization and its minister.\textsuperscript{254} These are the cases that have shaped the development of First Amendment Religion Clause doctrine applicable to the resolution of internal disputes within religious organizations. Conspicuously absent from this jurisprudence are any cases involving a religious organization of congregational polity. As a matter of fact, the Supreme Court has decided only one case involving an internal dispute.

\textsuperscript{250} Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am., 344 U.S. 94, 116 (1952) (“Freedom to select the clergy…we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”); see also Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16-17 (1929) (“Because the appointment [of a chaplain] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.”).

\textsuperscript{251} Gonzalez, 280 U.S. at 16-17.

\textsuperscript{252} Kedroff, 344 U.S. at 107.


\textsuperscript{254} McClure, 460 F.2d at 560 ("The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized of prime ecclesiastical concern."); See, e.g., Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); Petruska v. Gunnion University, 462 F.3d 294 (3d Cir. 2006); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir.), cert. denied, 552 U.S. 857 (2007); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698, 704 (7th Cir. 2003); Scharon v. St. Luke’s Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bryce v. Episcopal Church in the Diocese, 289 F.3d 648 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S.Ct. 694 (2012).
within a religious organization of congregational polity and that case made no mention of or reference to *Watson*, which had been decided just one year prior.

Yet, civil courts frequently fail to recognize or acknowledge the ecclesiastical nature of the relationship between a religious organization of congregational polity and its clergy in the same way they do for those of hierarchical polity. For example, civil courts easily presume that the duties of a Roman Catholic priest are determined by Catholic doctrine with the corollary being that any consideration by the court of these duties will lead to a prohibited entanglement in religious doctrine. On the other hand, with organizations of congregational polity, the duties of its clergy are often considered to be corporate or contractual obligations capable of interpretation by application of neutral principles through review of the organization’s contracts, bylaws, constitution, minutes and resolutions. For instance, where the duties of a Protestant pastor are not presumed to be so much a matter of religious doctrine but more those of a president of a voluntary association or nonprofit corporation, a court will tend to treat the matter as just another secular corporate dispute.

This often leads to an application of neutral principles to controversies that are beyond the scope of the doctrine. The line of Supreme Court cases out of which the “neutral principles of law” doctrine arose, each involving a Christian church of hierarchical polity, repeatedly refer to “property” as the subject-matter

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255 Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872). *But see* Little v. First Baptist Church, 475 U.S. 1148 (1986), and Justice Marshall’s dissent (joined by Justice Brennan) to the Court’s refusal to grant certiorari (Pastor of congregational church challenged the authority of church to terminate him. Trial court enjoined pastor from church property and church affairs.).


257 See e.g., Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008).

at the core of the controversy.\textsuperscript{259} Nothing in these cases involving exclusively churches of hierarchal polity allows for the application of the “neutral principles of law” doctrine to any other controversy than those involving an intra-church property disputes. Yet, civil courts repeatedly apply “neutral principles” in the resolution of non-property related disputes polities.\textsuperscript{260}

B. \textit{Hierarchically Organized Religious Organizations Are More Venerated and Respected Than Religious Organizations of Congregational Polity}

C. \textit{Judicial Bias Favors the Hierarchical Christian Polity Over the More Pluralistic Congregational Polity}

\textbf{CONCLUSION}

The more constitutionally sound First Amendment Religion Clause doctrinal analysis should focus on whether or not the essence of the controversy is ecclesiastical, not on corporate form.

\[\text{[In Progress]}\]

\textsuperscript{259} Jones v. Wolf, 443 U.S. 595 (1979) (The Court allowed for the application of “neutral principles of law” in resolving an internal dispute over local control of a church’s property.); Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367(1970) (Dispute as to which, of two church factions, controlled church property); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 441 (1969) (Church property dispute between two local churches and the hierarchical general church).

\textsuperscript{260} Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402 (6th Cir. 2010) (Trademark infringement claim by hierarchically organized Seventh Day Adventist Church against former member); Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244 (9th Cir. 1999) (Trademark infringement controversy between congregational Sufi order and its leader); Rosen v. Lebewohl, 28 Misc. 3d 1226(a) (N.Y. 2010) (Neutral principles used to determine whether congregational Jewish Synagogue Center followed bylaws in conduct of election of officers); Beach v. Budd, No. A10-1471, 2011 WL 1642579 (Minn. Ct. App. May 3, 2011) (Neutral principles applied to resolution of claims by member of hierarchical Methodist church for negligent retention, negligent supervision, and sexual exploitation against church pastor); \textit{Waverly Hall Baptist Church}, 625 S.E.2d 23 (Court used neutral principles to justify ordering a congregational church to hold church meeting to determine whether incumbent pastor would remain); Cross Church Men’s Soc v. Exec. Comm, No. F044805, 2005 WL 555270 (Cal. Ct. App. Mar. 9, 2005) (Applying neutral principles, court found congregational church to not have followed laws regulating nonprofit corporations); \textit{Viravonga}, 279 S.W.3d 44 (Neutral principles applied by court to determine that congregational Buddhist temple should hold an election, and to justify court supervision of the election).