September 4, 2008

When Churches Divide: On Neutrality, Deference, and Unpredictability

Mark Strasser

Available at: https://works.bepress.com/mark_strasser/11/
When Churches Divide: On Neutrality, Deference, and Unpredictability

I. Introduction

Predictions that the Anglican Communion would be torn asunder have proven false, at least for now. Nonetheless, continuing disagreements about whether Bishop Gene Robinson should be a bishop and about whether same-sex unions should be recognized provide an ever-present reason for a possible break within that Communion. Were there such a break, there might well be numerous suits regarding the ownership of various properties.

Historically, churches have split off from their denominational affiliations for a whole host of reasons including disagreements over property ownership, church leadership, or member equality. When such divisions take place, the ownership of particular buildings or tracts of land may be contested--different factions within a church may each claim ownership of the facilities, or the local church and the national denomination may each claim to own the properties in question. While the United States Supreme Court has offered some guidance with respect to the methods states may employ to determine who owns what, no particular method for determining ownership of contested property is constitutionally required. At least in part because the Court has offered too little direction in these matters, there is a surprising degree of disparity both among and within states with respect to the conditions under which a national organization will be found to be the owner of local church property. Thus, disputed property will be held to belong to a local organization in one state and a national organization in another, even on the same set of facts. Further, what might be thought dispositive in one case will be irrelevant in another. The current state of the law makes planning for and achieving desired ends much more difficult for both local and national religious organizations, and the Court could greatly facilitate planning by simply being clearer about what the Constitution permits and prohibits.

Part II of this article discusses the constitutional limitations imposed on the states with respect to the permissible methods for resolving intra-church disputes. Part III discusses the application of the doctrine in various states, highlighting how the lack of clarity in the Court’s jurisprudence has resulted in foreseeable disarray in the lower courts. The article concludes that the Court’s clarifying its own doctrine

---

1 See John F. Burns, Cast Out but at the Center of the Storm, NY Times, Week in Review, 3, 08/03/08 (“An Anglican civil war over a gay American bishop is averted. For now. Barely.”).
would greatly reduce the disparity in the analyses offered by the lower courts, which will be especially
important given the great likelihood that there will be a growing number of disputes and disaffiliations.

II. The Federal Parameters

The United States Supreme Court has decided relatively few cases implicating church ownership
of property. Basically, these cases have described the broad constitutional parameters within which states
are free to devise their own ways of handling such disputes, although these broad parameters themselves
require interpretation. Regrettably, the Court has not yet clarified how these parameters should be
understood, which has created the potential for vastly different interpretations of the same doctrine.

A. Swormstedt

One of the first cases deciding relevant issues was Smith v. Swormstedt, although that case is
rarely cited in discussions of church property ownership except insofar as class action issues are being
implicated. In certain respects, Swormstedt illustrates how not to handle some of the thorny issues that

---

2 57 U.S. 288 (1853).
3 Carl Esbeck implies that the case is not merely of interest for class action purposes, having described it in
   the following way: “When a church voluntarily separates into two parts, a bill in equity to effect a division
   of jointly held property may follow.” See Carl H. Esbeck, Table of United States Supreme Court Decisions
4 See, for example, Philip Stephen Fuoco & Joseph A. Osefchen, Leveling the Playing Field in the Garden

---
arise in these cases, although the Court’s less-than-satisfactory handling of some of the issues may have permitted the Court to avoid still thornier constitutional difficulties.

At issue was whether the Methodist Episcopal Church had divided itself into two, with each part retaining its respective property,5 or whether instead the Methodist Episcopal Church South had simply left the Church, thereby forfeiting any rights to property that might otherwise have been retained.6 The question of particular interest was whether funds dedicated to the care of travelling preachers and their families7 had to be distributed to benefit preachers in the Southern Conference or, instead, could be reserved solely for the use of Northern Conference preachers and their families.

It was 1844, and the Church had been growing increasingly divided over the issue of slavery.8 In particular, the treatment of two members of the clergy had heightened tensions between the northern and southern churches. A preacher had been suspended after he had become the owner of slaves by virtue of his marriage.9 A bishop, who had inherited one slave and had become the owner of a different slave through marriage, had been told to “desist from the exercise of his office, so long as this impediment [i.e., his ownership of slaves] remains.”10 While the Church had “never ceased to bear testimony against the owning of slaves by the ministry,”11 suspending clergy from the performance of their duties because they owned slaves was apparently unprecedented. The appellants had noted that “differences and disagreements had sprung up in the church between what was called the northern and southern members, in respect to the

---

5 See Swormstedt, 57 U.S. at 304 (“In the year 1844 the travelling preachers in General Conference assembled. . . agreed upon a plan for a division of the Methodist Episcopal Church in case the annual conferences in the slaveholding States should deem it necessary; and to the erection of two separate and distinct ecclesiastical organizations.”).
6 Counsel for the appellees had argued, It is, then, so far as the thirteen southern and south-western conferences are concerned, a case of voluntary withdrawal from the Methodist Episcopal Church as organized, and the formation of a new and separate organization; and I have already shown, that if the withdrawal be small or great, of one or many, the voluntary abandonment of the organized church is also the voluntary surrender of all the temporal privileges and immunities belonging to that organization. See id. at 295.
7 Id. at 303 (“In 1796, the travelling preachers in General Conference assembled, determined that these profits should be thereafter devoted to the relief of the travelling preachers, and their families”).
8 The appellee’s attorney suggested, “It is contended, that the secession of the southern conferences was not only justified, but compelled, by the continued agitation of the slavery question in the northern annual conferences, and also in the General Conference itself.” See id. at 297.
10 Id.
11 Id.
administration of the government with reference to the ownership of slaves by the ministers of the church, implying that a new policy had been adopted.

The General Conference had passed a resolution permitting the churches in the slave-owning states to create a separate church should they vote to do so, although there was some dispute whether the General Conference’s action had to be ratified at both the northern and southern annual conference meetings before it could become effective. Apparently, the General Conference was convinced that the Southern Conference was likely to separate itself from the Church, and was trying to reduce the difficulties that would arise from such a separation. For example, as part of the “Plan of Separation,” the Methodist Episcopal Church agreed that:

all the property of the Methodist Episcopal Church, in meeting-houses, parsonages, colleges, schools, conference funds, cemeteries, and of every kind, within the limits of the Southern organization, shall be forever free from any claim set up on the part of the Methodist Episcopal Church, so far as this resolution can be of force in the premises.

Presumably, members of the General Conference believed that permitting the southern churches to keep these properties would increase the probability that the northern and southern conferences could continue to have a positive (or at least respectful) relationship.

One of the issues argued before the Court was whether the General Conference had acted ultra vires in approving the Plan of Separation. The Court rejected that claim, instead affirming the validity of

---

12 Swormstedt, 57 U.S. at 299 (emphasis added).
13 See id.
14 Swormstedt, 22 F. Cas. at 675 (“Many of the speakers spoke, and, no doubt, voted, under a belief, that no part of the ‘Plan’ could take effect, till the annual conferences had concurred in the proposed change of the sixth restrictive rule.”).
15 See id. at 676
16 See id.
17 Id. at 675.
18 Id. at 676 (“This result [i.e., separation] was, no doubt, deemed probable; and, when it should happen, the laudable desire was evinced that it should take place without the total disruption of the ties of Christian brotherhood.”).
19 See Swormstedt, 57 U.S. at 306
It is insisted, however, that the General Conference of 1844 possessed no power to divide the Methodist Episcopal Church as then organized, or to consent to such division; and
the action.\textsuperscript{20} However, the Court’s analysis of why the General Conference was authorized to approve the separation plan was at best too fast and at worst simply wrong, although a little background information is necessary to see why this is so.

From 1784 to 1808, the General Conference was composed of all of the travelling preachers of the Church.\textsuperscript{21} Noting that the General Conference had founded the Church,\textsuperscript{22} the Court pointed out that the Conference might initially have set up two churches.\textsuperscript{23} But, the Court reasoned, if the Conference could have done that, there was no reason that it could not subsequently decide to set up two churches rather than one.\textsuperscript{24} As a related point, the Court suggested that just as the Conference had the power to set up the Church, it also had the power to divide the Church into two separate units.\textsuperscript{25}

Yet, the Court’s analysis here is unpersuasive, at least as a general matter. For example, after founding the Church, the General Conference might have set up a Constitution that would have limited its own powers by requiring that any decisions affecting the make-up of the Church had to be approved by both the General Conference and by the regional conferences.\textsuperscript{26} The General Conference thereby would have lost some of its power and would not have been able to effect certain changes unless securing the approval of others. Thus, it does not follow that the same authority establishing the church would also have

\textsuperscript{20} See \textit{Swormstedt}, 57 U.S. at 306-07 (“the General Conference of 1844 was competent to make it; and that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal Church first founded in the United States”).
\textsuperscript{21} See \textit{id.} at 307 (“In 1784, when this church was first established, and down till 1808, the General Conference was composed of all the travelling preachers in that connection.”).
\textsuperscript{22} \textit{id.} (“This body of preachers founded it by organizing its government, ecclesiastical and temporal, established its doctrines and discipline, appointed its superintendents or bishops, its ministers and preachers, and other subordinate authorities to administer its polity, and promulgate its doctrines and teachings throughout the land.”).
\textsuperscript{23} \textit{id.} (“they might have constructed two ecclesiastical organizations over the territory of the United States originally, if deemed expedient, in the place of one”).
\textsuperscript{24} \textit{id.} (“As they might have constructed two ecclesiastical organizations over the territory of the United States originally, if deemed expedient, in the place of one, so they might, at any subsequent period, the power remaining unchanged.”).
\textsuperscript{25} \textit{id.} (“this body, while composed of all the travelling preachers, possessed the power to divide [the Church] and authorize the organization and establishment of the two separate independent churches”)
\textsuperscript{26} Cf. \textit{Swormstedt}, 22 F. Cas. at 668 (“Provided, nevertheless, that upon the joint recommendation of all the annual conferences, then a majority of two-thirds of the general conference succeeding, shall suffice to alter any of the above restrictions.”).
the authority to divide it, unless the power of dissolution was an inherent power of the General
Conference,\(^{27}\) notwithstanding any constitutional limitations imposed by the conference on itself.

Perhaps the Court was overstating its case when suggesting that because the General Conference
had founded the Church it also had the power to divide the Church. Nonetheless, the Court was not forced
to discuss whether the General Conference could limit its own future actions, because no limitations were
imposed on the power of the Conference during the period between 1784 and 1808. That all changed in
1808 when the Conference voted to change its own composition by becoming a representative body\(^{28}\) --
instead of having all of the preachers invited to attend, there would be one representative for every five
preachers.\(^{29}\) At the same time that it voted to become a representative body, the Conference decided to
impose limitations on itself.\(^{30}\)

The *Swormstedt* circuit court viewed the Conference’s change into a representative body
combined with the adoption of explicit limitations on what the Conference could do as effecting an
important change in the nature of the Conference’s power. “Under the old system, the members of the
general conference represented no body but themselves, and were amenable to no earthly power for their
conduct; under the new system, they had constituents, to whom they were answerable; and they were
limited in their powers by express constitutional restrictions.”\(^{31}\) The circuit court concluded that “there are
good grounds for the conclusion, that it was one of the main objects of the change, to provide for suitable
limitations on the powers of the general conferences.”\(^{32}\) In contrast, the United States Supreme Court
viewed the limitations as themselves limited to their express terms, and that “[s]ubject to these restrictions,

\(^{27}\) *Swormstedt* 57 U.S. at 307 (“The power must necessarily be regarded as inherent in the General
Conference.”).

\(^{28}\) See id.

\(^{29}\) See id.

\(^{30}\) Id.

[C]ertain limitations were imposed upon the powers of this General Conference, called
the six restrictive articles:-1. That they should not alter or change the articles of religion,
or establish any new standard of doctrine. 2. Nor allow of more than one representative
for every fourteen members of the annual conferences, nor less than one for every thirty.
3. Nor alter the government so as to do away with episcopacy, or destroy the plan of
itinerant superintendencies. 4. Nor change the rules of the united societies. 5. Nor deprive
the ministers or preachers of trial by a committee, and of appeal: nor members before the
society, or lay committee, and appeal. And 6. Nor appropriate the proceeds of the Book
Concern, nor the charter-fund, to any purpose other than for the benefit of the travelling,
supernumerary, superannuated, and worn out preachers, their wives, widows, and
children.

\(^{31}\) *Swormstedt*, 22 F. Cas. at 669.

\(^{32}\) Id.
the delegated conference possessed the same powers as when composed of the entire body of preachers.”33
Because on the Court’s view the body that had founded the church also had the power to divide it,34 and because the power to divide the Church had not been removed by any of the adopted limitations,35 the Court concluded that the General Conference still had the power to divide the Church.36

The Court’s interpretation has surprising implications. For example, one of the adopted limitations on the General Conference was that it could not “not alter or change the articles of religion, or establish any new standard of doctrine.”37 Yet, one infers from the Court’s interpretation that the General Conference would have been permitted to dissolve the Church and then construct a new Church, perhaps with the same name, with modified articles of religion. Basically, according to the Court’s interpretation, any of the limitations imposed on the General Conference could be avoided as long as the General Conference took the indirect route of dissolving the Church first and then setting up a new Church not subject to the previously enacted limitation. But such an interpretation in effect nullifies the limitations imposed on the General Conference, a result that undercuts the plausibility of the claim that the Court’s understanding of the Conference’s powers reflected the intent of those approving the limitations.

Even had the Court’s interpretation been more plausible, there are other difficulties associated with the Court’s interpretation, not least of which is that there are both practical and constitutional problems in the United States Supreme Court’s offering an authoritative interpretation of a Church constitution. As the Court would note about twenty years later in Watson v. Jones,38 the Methodist Episcopal Church

has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage

33 Swormstedt, 57 U.S. at 307.
34 Id. (“It cannot therefore be denied, indeed, it has scarcely been denied that this body, while composed of all the travelling preachers, possessed the power to divide it and authorize the organization and establishment of the two separate independent churches.”).
35 See note 30 supra (listing the limitations).
36 See Swormstedt, 57 U.S. at 308 (“In all other respects, and in every thing else that concerns the welfare of the church, the General Conference represents the sovereign power the same as before.”).
37 Id. at 307.
38 80 U.S. 679 (1871).
and customs, which as to each constitute a system of ecclesiastical law and religious faith
that tasks the ablest minds to become familiar with.\(^{39}\)

The \textit{Watson} Court reasoned that civil court judges cannot be assumed to “be as competent in the
ecclesiastical law and religious faith . . . as are the ablest men . . . in reference to their own [religious law].”

Making a civil court the ultimate arbiter of the meaning of religious laws or constitutions would therefore
be an appeal from the more learned tribunal in the law which should decide the case, to one which is less
so.\(^{40}\) The very difficulty pointed to in \textit{Watson} was illustrated in \textit{Swormstedt}, because the \textit{Swormstedt}
Court’s interpretation of the powers of the General Conference contradicted the understanding of a variety
of members of the conference who had voted for the “Plan of Separation.”\(^{41}\)

Perhaps appreciating the precariousness of its position when offering an authoritative construction
of a Church constitution, the \textit{Swormstedt} Court suggested that it would have reached the same result even
if the General Conference had been acting \textit{ultra vires} when authorizing a split.

If the division under the direction of the General Conference has been made without the
proper authority, and for that reason the travelling preachers within the southern division
are wrongfully separated from their connection with the church, and thereby have lost the
character of beneficiaries, those within the northern division are equally wrongfully
separated from that connection, as both divisions have been brought into existence by the
same authority.\(^{42}\)

Yet, this is at best an unusual reading of what had transpired. Perhaps subject to approval by
regional conferences,\(^{43}\) the General Conference had authorized the Southern Conference to set up a separate
church should the latter feel the need to do so. The Southern Conference voted to separate. Yet, there was
no mention of the Northern Conference’s having voted to separate from the Church and, indeed, the

\(^{39}\) \textit{Watson}, 80 U.S. at 729.
\(^{40}\) \textit{Id.}
\(^{41}\) \textit{Swormstedt}, 22 F. Cas. at 675 (“Many of the speakers spoke, and, no doubt, voted, under a belief, that no
part of the ‘Plan’ could take effect, till the annual conferences had concurred in the proposed change of the
sixth restrictive rule.”)
\(^{42}\) \textit{Swormstedt}, 57 U.S. at 306.
\(^{43}\) \textit{But see id. at} 308 (“It has also been urged on the part of the defendants that the division of the church,
according to the plan of the separation, was made to depend not only upon the determination of the
southern annual conferences, but also upon the consent of the annual conferences north . . . But this is a
misapprehension.”).
Northern Conference claimed to be the same Methodist Church that had existed before the break-up.\footnote{Appellees’ counsel argued, “From 1844 to the present time, the same Methodist Episcopal Church has continued to exist identical in name, organization, discipline, and doctrine, and under a regular succession of the same officers: some conferences in the slaveholding States have withdrawn from it.” \textit{See} \textit{Swormstedt}, 57 U.S. at 293.} Thus, it was not as if the General Conference was authorizing the creation of two new conferences. Rather, it was simply authorizing the separation of the Southern Conference from the existing Church. If that authorization was void, then the Southern Conference would have separated from the Church without authorization. But the Northern Conference had not separated from anything—it remained within the Methodist Episcopal Church and thus could not be said to have forfeited rights that it otherwise might have retained.

Suppose that a few churches had left the fold without authorization. That would not result in the destruction of the Church as an organization, although it would mean that the national organization would have become somewhat smaller. At least one question raised by the Southern Conference’s having separated from the Methodist Episcopal Church was whether the number of churches leaving was so significant that the Church had thereby been destroyed, whether or not the Southern Conference’s separation was authorized.

The Court noted that the Northern Conference’s territory was only half as large as had been the Church’s territory before the split, and that the number of travelling preachers in the conference had been reduced by a third.\footnote{Id. at 305-06.} Yet, the Court was not thereby suggesting that a Church would cease to lose its identity as soon as a substantial number of churches separated themselves from the organization. For example, several circuits and societies in Lower Canada had affiliated with a different Church,\footnote{They affiliated with the British Conference of Wesleyan Methodists. \textit{See id.} at 308} and the Court nowhere implied that the identity of the Methodist Episcopal Church had thereby been threatened. Indeed, the Annual Conference of Upper Canada had also been made into an independent church,\footnote{Id.} and there was no suggestion that the Church’s identity had thereby been threatened, even though the Church’s geographical reach had been sharply diminished within the space of a decade.\footnote{The loss of the societies in Lower Canada occurred in 1820 and the independence of the Conference in Upper Canada occurred in 1828. \textit{See id.}}
When noting the disaffiliation of the Canadian churches, the Court was not discussing whether the loss of a certain number of churches would result in the dissolution of a denomination. Rather, the Court was arguing that past practice established that the General Conference had the power to permit the Southern Conference to set up an independent religious organization.49

Yet, the Court’s citing the Canadian experience to support its own interpretation of the Church constitution50 was not as helpful as might originally have been supposed. For example, it had not been claimed that the General Conference could authorize the separation of the Canadian Conference from that of the United States.51 Rather, the Conference had merely declared certain favorable terms upon which the Canadian Conference might withdraw.52 Further, the separation of the Canadian churches was not viewed as a dissolution of the Church. On the contrary, the Church was viewed as continuing to exist, albeit with a contracted territory. But this was exactly what the Church was arguing had occurred again—the Church was continuing as before, albeit with a smaller territory. Indeed, the appellees viewed the Canadian experience as supporting their interpretation of the effect of the Southern separation.53

There is an important difference between permitting a conference to withdraw under favorable terms and dividing the Church. In the former case, the Church continues to exist, although perhaps with a smaller geographical reach, whereas in the latter the Church simply ceases to exist. Where the Church

49 See Swormstedt, 57 U.S. at 308 (“These instances, together with the present division, in 1844, furnish evidence of the opinions of the eminent and experienced men of this church in these several conferences, of the power claimed, which, if the question was otherwise doubtful, should be regarded as decisive in favor of it.”).
50 See id.

In all other respects, and in every thing else that concerns the welfare of the church, the General Conference represents the sovereign power the same as before. This is the view taken by the General Conference itself, as exemplified by the usage and practice of that body. In 1820 they set off to the British Conference of Wesleyan Methodists the several circuits and societies in Lower Canada. And in 1828 they separated the Annual Conference of Upper Canada from their jurisdiction, and erected the same into a distinct and independent church.

51 Swormstedt, 22 F. Cas. at 672 (“These do not assert or pretend to claim any power in the general conference to authorize the separation of the Canada conference, from the Church in the United States.”).
52 Id. (“In their action they asserted no claim to any power to authorize the separation of the Canada conference, but simply declared certain friendly terms on which that conference might withdraw.”).
53 After discussing the Canada case, Counsel for appellees had argued

It is, then, so far as the thirteen southern and south-western conferences are concerned, a case of voluntary withdrawal from the Methodist Episcopal Church as organized, and the formation of a new and separate organization; and I have already shown, that if the withdrawal be small or great, of one or many, the voluntary abandonment of the organized church is also the voluntary surrender of all the temporal privileges and immunities belonging to that organization.

See Swormstedt, 57 U.S. at 295.
continued to exist, the benefits would only be extended to current Church members. Were the Church
dissolved, the assets would be distributed and might be used in part to benefit the Southern preachers and
their families.

The Canadian experience seemed to support the appellee’s argument in two different respects.
First, it had been argued that the split between north and south could only occur if both the north and south
conferences agreed,\(^54\) and the circuit court found that the separation of the Canadian churches supported
that claim.\(^55\) Yet, if that was so, then the Canadian example provided support for the position that the
separation of the Southern conference was not authorized because not ratified by the Northern conference.

Suppose, however, that the Canadian separation did not support the claim that the regional
conferences had to consent before a separation could occur. Even so, the Canadian experience supported
the appellee’s position in another respect, because the very issue before the Swormstedt Court had arisen in
the context of the separation of the Canadian churches, namely, whether the Canadian churches’ preachers
and their families would still be entitled to support if their churches separated from the Methodist Episcopal
Church. The circuit court explained that the “question was submitted to the vote of the annual conferences;
and such was the prevailing sentiment of the Church, that the Canada conference, by its withdrawal, had
forfeited all claim to this charity, that the vote was largely against their application.”\(^56\) Thus, if the Court
were really using the separation of the Canadian churches as a model, it might well have reached the
opposite conclusion, either because the separation itself required confirmation by the regional conferences
or because the specific issue confronting the Swormstedt Court had already been addressed when the
Canadian conferences split. Using funds to support the preachers and their families required confirmation

\(^54\) See Swormstedt, 57 U.S. at 308.
It has also been urged on the part of the defendants that the division of the church,
according to the plan of the separation, was made to depend not only upon the
determination of the southern annual conferences, but also upon the consent of the annual
conferences north, as well as south, to a change of the sixth restrictive article, and as this
was refused, the division which took place was unauthorized.

\(^55\) Swormstedt, 22 F. Cas. at 672
Without enlarging on this point, it may be sufficient to remark, that the proceedings in the
Canada case furnish no parallel to the action of the general conference of 1844, in so far
as the latter can be construed into an authorized division of the Church. So far from this,
the general conference, in the Canada case, give a very intelligible negative to the
possession or exercise of any such jurisdiction without first having obtained the assent of
the annual conferences.

\(^56\) Id. at 678.
by the regional conferences if those preachers belonged to a conference that had separated from the
Methodist Episcopal Church.

The reason that the annual conferences had to vote on whether the Canadian preachers should receive support was the same reason that the Northern Conference was required to vote on whether the southern preachers would receive that support, namely, one of the constitutional limitations adopted in 1808 precluded the General Conference from modifying the purposes for which the funds at issue would be used.⁵⁷ Members of the General Conference had understood that they were so limited, which is why they did all that they could do within their constitutional power to see that the Southern preachers and families would receive support, namely, recommend to the individual conferences that they authorize the distribution of funds to provide that support.⁵⁸ Basically, the Constitution specified that any of the six limitations could itself be changed as long as the change was supported by both the General Conference and the annual conferences,⁵⁹ and the General Conference was seeking to modify one of the limitations.

The point here is not that the Swormstedt Court was wrong as a matter of policy. The contested monies would be used to support individuals in need,⁶⁰ and it would have been difficult not to be sympathetic to the plight of the elderly or of children or of widows without other means of support.⁶¹ Further, by analyzing the case as involving an authorized dissolution of the Church, the Court was not put into the position of deciding whether the Northern rather than the Southern conference represented the

---

⁵⁷ Swormstedt, 57 U.S. at 307
At the time of this change, and as part of it, certain limitations were imposed upon the powers of this General Conference, called the six restrictive articles:–1. That they should not alter or change the articles of religion, or establish any new standard of doctrine. . . . 6. Nor appropriate the proceeds of the Book Concern, nor the charter-fund, to any purpose other than for the benefit of the travelling, supernumerary, superannuated, and worn out preachers, their wives, widows, and children.

⁵⁸ See Swormstedt, 22 F. Cas. at 675 (“the general conference, therefore, referred it to the discretion and decision of the annual conferences, whether they would enlarge the power of the general conference, so as to enable it, by a vote of two-thirds of its members, to appropriate the charter fund and the Book Concern”)⁵⁹ See id. at 668 (“Provided, nevertheless, that upon the joint recommendation of all the annual conferences, then a majority of two-thirds of the general conference succeeding, shall suffice to alter any of the above restrictions.”)

⁶⁰ Swormstedt, 57 U.S. at 301 (suggesting that at “the General Conference of 1796, it was determined that the profits derived from the sale of books should in future be devoted wholly to the relief of travelling preachers, supernumerary and worn out preachers, and the widows and orphans of such preachers”).

⁶¹ Cf. Swormstedt, 22 F. Cas. at 666 (“I am not at liberty to obey the mere promptings of sympathy”)
“true” Church. Even were the Court competent to decide which church embodied the “true” faith as a general matter, it would have been especially difficult to do in this case, because the two churches were “alike in faith, doctrine, and discipline.”

Yet, Swormstedt leaves open whether a split in a Church, if it involves enough congregations, will constitute a dissolution of a church as a matter of law. The General Conference was not authorized to do anything that contravened any of the six limitations that had been imposed upon it, and the Court interpreted the General Conference’s action as dissolving the Church and requiring the distribution of the funds at issue, notwithstanding that the Conference was expressly precluded from altering how those funds would be used. By offering an interpretation of the Church Constitution that was undermined both by the history of the Church and by the considered opinions of the Church members themselves, the Court’s opinion suggests a number of unsettling possibilities, for example, that it can offer an authoritative construction of a Church foundational document or, perhaps, that the Court will decide when a Church should be viewed as dissolved rather continuing with fewer affiliated churches. While subsequent decisions have limited the extent to which the courts can construe religious documents, these issues continue to haunt the jurisprudence in modified form.

B. Watson

Disagreements about slavery were at the center of another church dispute decided about twenty years after Swormstedt. Watson v. Jones involved competing claims about the control of church property.

---

62 Cf. Swormstedt, 57 U.S. at 306-07 (“[E]ach division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal Church first founded in the United States.”).
63 But see Watson, 80 U.S. at 727 (“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”).
64 Swormstedt, 22 F. Cas. at 665.
65 See id. at 672 (discussing the separation of the Canadian churches).
66 See id. at 675

In all this there was certainly no claim of a power to divide the Church by the direct action of the general conference, or of any right to delegate such a power to the Southern conferences; it was merely a provisional arrangement, to meet a ‘contingency’ which it was declared might happen. The debates in the general conference are clearly confirmatory of this view.
67 See notes 107-12 and accompanying text infra (discussing Watson’s limitation on civil courts’ construction of religious documents).
68 80 U.S. 679 (1871).
when a church faction disaffiliated with a national organization and instead affiliated with a competing organization.\textsuperscript{69} Ironically, Swormstedt was not even cited in Watson.\textsuperscript{70}

To understand the issue presented in Watson, it is helpful to understand the hierarchical nature of the Presbyterian Church. Each individual church elects trustees, who have legal title to the church building and property.\textsuperscript{71} These individuals, often three in number, do not have ecclesiastical duties.\textsuperscript{72} Instead, the Church Session—the Church Pastor and the ruling elders of the congregation—\textsuperscript{73} have the responsibility over spiritual matters.\textsuperscript{74}

The Presbytery, which consists of the minister plus one ruling elder from each congregation in a particular district, has various powers to protect the spiritual welfare of the churches within the district.\textsuperscript{75} The Synod includes the minister plus one ruling elder from each congregation in a larger district.\textsuperscript{76} The Synod hears appeals from Presbyteries and, in general, has the responsibility of maintaining the spiritual welfare of the Presbyteries, Sessions, and people in that district.\textsuperscript{77} The General Assembly, consisting “of

\textsuperscript{69} See Watson, 80 U.S. at 692.
\textsuperscript{70} The opinion was mentioned in Watson v. Avery, 65 Ky. 332, 396 (Ky. 1867) (Williams, J., dissenting) This omnipotent power in the State courts will endanger every church owned by the Methodists previous to their division in 1844, for nearly every church deed was then in the name of the "Methodist Episcopal Church," and was not provided for in the plan of division of the bishops, nor settled in the decision of the supreme court of the United States in (16 How 288, 298). Smith vs. Swormsteadt, but only the book concern. The Kentucky opinion was discussed and criticized by the Watson Court. See Watson, 80 U.S. at 681.
\textsuperscript{71} See id.
\textsuperscript{72} See id.
\textsuperscript{73} See id.
\textsuperscript{74} See id.
\textsuperscript{75} See id. at 682 (describing the Presbytery as having, “in general, [the] power to order whatever pertains to the spiritual welfare of the churches under their care”).
\textsuperscript{76} Id.
\textsuperscript{77} Id. (noting that the Synod has the power “to take such order with respect to the Presbyteries, Sessions, and people under their care as may be in conformity with the world of God and the established rules, and which tend to promote the edification of the church”).
ministers and elders commissioned from each Presbytery under its care, is the highest judicatory of the Presbyterian Church, representing in one body all of the particular churches of the denomination." The General Assembly had the power to hear appeals and to decide all controversies respecting doctrine and discipline, as well as of

reproving, warning, or hearing testimony against any error in doctrine or immorality in practice, in any Church, Presbytery, or Synod; . . . of superintending the concerns of the whole church; . . . of suppressing schismatical contentions and disputations; and, in general, of recommending and attempting reformation of manners, and the promotion of charity, truth, and holiness through all the churches under their care.

During the Civil War, the General Assembly of the Presbyterian Church expressed support for the federal government at its annual meetings. Once the Emancipation Proclamation had been issued, the Assembly also expressed views indicating its hostility to the institution of slavery. The Presbytery of Louisville rejected these official pronouncements, going so far as to publish a pamphlet entitled, “A Declaration and Testimony against the erroneous and heretical doctrines and practices which have obtained and been propagated in the Presbyterian Church of the United States during the last five years.”

The General Assembly did not take such a challenge lying down, instead not only repudiating the Declaration but threatening with dissolution any presbyteries subscribing to such views. The Louisville Presbytery was given an opportunity to recant, leading to a split in that presbytery—one group associated with Watson supported the Declaration and Testimony, while the other group associated with Avery and

---

78 Watson, 80 U.S. at 682.
79 Id.
80 Id. at 682-83.
81 Id. at 690-91 (“From the beginning of the war to its close, the General Assembly of the Presbyterian Church at its annual meetings expressed in Declaratory Statements or Resolutions, its sense of the obligation of all good citizens to support the Federal government in that struggle.”).
82 Id. at 691 (“when, by the proclamation of President Lincoln, emancipation of the slaves of the States in insurrection was announced, that body also expressed views favorable to emancipation, and adverse to the institution of slavery.”).
83 Id.
84 Id. at 691-92 (“The General Assembly of 1866, denounced in turn the Declaration and Testimony and declared that every Presbytery which refused to obey its order should be ipso facto dissolved, and called to answer before the next General Assembly”).
85 Id. at 692 (the General Assembly gave “the Louisville Presbytery an opportunity for repentance and conformity. The Louisville Presbytery divided”).
Hackney supported the position of the General Assembly.\textsuperscript{86} The General Assembly recognized the latter group as the lawful Synod.\textsuperscript{87} Nonetheless both the Watson group and the Avery/Hackney group claimed rightful possession of the church. The United States Supreme Court had to decide who would get to use the property without interference.

In analyzing whether the judgment of the Assembly should be respected, the Court differentiated between two types of religious organizations: (1) “the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority;”\textsuperscript{88} and (2) “the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.”\textsuperscript{89} These distinctions continue to be cited with approval today.\textsuperscript{90}

The first kind of case involves independent religious congregations. The method by which to resolve non-doctrinal controversies will depend upon the principles of government adopted by the organization. For example, if the congregation has decided that the majority will governs, then the majority of the congregation will make the relevant determination.\textsuperscript{91} If officers have been chosen in whom the authority to make decisions has been vested, then their decisions must be honored.\textsuperscript{92}

\textsuperscript{86} Cf. Watson, 80 U.S. at 692 (emphasis in original)

On the 1st of June, 1867, the Presbytery and Synod recognized by Watson and his party, were declared by the General Assembly to be "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;" and were permanently excluded from connection with or representation in the Assembly. By the same resolution the Synod and Presbytery adhered to by those whom Watson and his party opposed were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.

\textsuperscript{87} See id.

\textsuperscript{88} Id. at 722.

\textsuperscript{89} Id. at 722-23.

\textsuperscript{90} See, for example, Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 110-16 (1952) (discussing Watson with approval); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447-48 (1969) (citing Kedroff and Watson with approval).

\textsuperscript{91} Watson, 80 U.S. at 725 (“If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property.”).

\textsuperscript{92} Id. (“If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property.”).
Suppose that majority will governs and that a majority of a congregation decides that a woman should be selected to be the next spiritual leader of the congregation. A minority of the congregation objects to the choice, claiming that such a decision contravenes the established traditions of the church. The minority would be free to leave the church and join another congregation or, perhaps, start a congregation themselves. However, that minority would have no claim to church property. Rather, the majority would retain the rights in the building and land, notwithstanding the possible claim that the minority represented the traditional view and were the “true” believers.

The second kind of case is the kind most frequently heard in the courts, namely, one in which property is acquired for use by a congregation, which itself is part of a larger denomination. In this kind of case, the Court announced a rule of deference, at least with respect to determinations of religious matters. The Watson Court explained,

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

\[93\] Watson, 80 U.S. at 725 (“The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation.”).

\[94\] Id. (“This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church.”).

\[95\] Id. at 726 (noting that this class of “cases is the one which is oftenest found in the courts, and which, with reference to the number and difficulty of the questions involved, and to other considerations, is every way the most important”).

\[96\] Id. (“It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government.”)

\[97\] Id. at 727 we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.
ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.\footnote{Watson, 80 U.S. at 728-29.}

The Court reasoned that permitting secular courts to second-guess decisions about controverted matters of faith would undermine religious autonomy.\footnote{Id. at 729 (“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.”).} Instead, the only authority to whom an individual might appeal when disagreeing with a finding on a religious question would be to the appropriate authority within the religious organization itself.\footnote{Id. (“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.”).}

The matter before the \textit{Watson} Court involved the second kind of case in which a religious organization is a subordinate member of a general church, since the Presbyterian Church was a national organization with a hierarchical structure.\footnote{See notes 71-80 and accompanying text supra (describing the organization of the church). See also \textit{Kedroff}, 344 U.S. at 110 (“Hierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head.”) (citing \textit{Watson}, 80 U.S. at 722-23).}

Even so, a separate question involved what in particular authorized the General Assembly to make decisions concerning the local church. The Court noted that while neither the deed nor the charter expressly stated the connection between the local and national church, “both contemplated the connection of the local church with the general Presbyterian one, and subjected both property and trustees alike to the operation of its fundamental laws.”\footnote{\textit{Watson}, 80 U.S. at 683.}

Once it was clear that the General Assembly could determine which individuals officially represented the church,\footnote{See \textit{id}. at 692 (emphasis in original) On the 1st of June, 1867, the Presbytery and Synod recognized by \textit{Watson and his party}, were declared by the General Assembly to be ‘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;’ and were permanently excluded from connection with or representation in the Assembly. By the same resolution the Synod and Presbytery adhered to by those whom \textit{Watson and his party} opposed were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.} the remainder of the analysis was relatively straightforward, especially because one of the groups had withdrawn from the Church and instead aligned with a different Church.\footnote{See \textit{id}. (“The Louisville Presbytery divided, and the adherents of the Declaration and Testimony sought and obtained admission, in 1868, into ‘the Presbyterian Church of the Confederate States,’ a body which}
Court noted that the “the appellants in the case presented to us have separated themselves wholly from the church organization to which they belonged when this controversy commenced . . . [and] now deny its authority, denounce its action, and refuse to abide by its judgments.” At least in part because that group was no longer part of the Church, the Court thus reasoned that the Watson group had no right to the control of the property at issue.

The Watson Court made very clear that civil courts should not decide matters concerning “theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.” Otherwise, the civil courts would have to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court.

Yet, permitting the civil courts to make such decisions would “deprive these [religious] bodies of the right of construing their own church laws.” Basically, the Watson Court suggested that in certain matters the civil courts should simply defer to the decisions of the appropriate religious authorities, because it was the right of religious unions “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.” Otherwise, religious bodies would be subverted “if any

---

105 Watson, 80 U.S. at 734.
106 Id.
107 Id. at 733.
108 Id.
109 Id.
110 Id. at 729.
one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.”

Thus, the Watson Court offered a very deferential view with respect to the power of religious tribunals to make their own decisions and have those decisions binding on those who were members of the Church, justifying that position in part by noting that members of the Church had consented to accepting the decision of the highest religious authority.

c. Bouldin

The Court illustrated its position on congregational churches, i.e., non-hierarchical churches, in Bouldin v. Alexander. Albert Bouldin was a minister of the “Third Colored Baptist Church of the City of Washington.” At issue in the case, at least in part, was the identity of the trustees of the Church.

Records suggested that seven individuals had been elected trustees at an ordinary meeting. Bouldin contended that the minutes were in error and that the election had never taken place, although the Court noted that there was “little or nothing beyond Bouldin's statement to prove that this particular minute [about the election] was not entitled to as much respect as others in the book.”

Subsequently, another election took place at which new trustees were elected, although this election was by a very small percentage of the church and took place at a time not regularly scheduled for such an election. A few days later, this same small group of individuals kicked out a larger group from the church membership.

---

111 Watson, 80 U.S. at 729.
112 Id. (“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.”).
113 82 U.S. 131 (1872).
114 See id. at 133.
115 See id. at 134.
116 See id. at 134.
117 Id. See also id. at 138 (“It is true, Mr. Bouldin testified that the minute of an election is a forgery, and that no such election ever took place. But we are satisfied that he is mistaken.”).
118 See id.
119 See id.
120 Bouldin, 82 U.S. at 134 (“It was also, the reader will observe, at a time when, according to the rules of the church, an election of trustees was not in order”).
121 Id. (noting that a “few days afterwards, on the 10th or 17th of June, 1867, the same minority proceeded to ‘turn out’ forty-one members of the church, also without citation or trial.”)
The new trustees, now having control of the church property, put new locks on the church doors. Those who had been shut out of the church began to worship elsewhere with a new preacher. The trustees who had been elected at the regularly scheduled time brought suit to regain control of the church. The Court suggested that “a small minority of the church, convened without notice of their intention, in the absence of the trustees, and without any complaint against them, or notice of complaint, could [not] divest them of their legal interest and substitute other persons to the enjoyment of their rights.” In response to the claim that the appellees had withdrawn from the church and formed a new congregation, thereby relinquishing their rights, the Court agreed that “withdrawal from a church and uniting with another church or denomination, is a relinquishment of all rights in the church abandoned,” but denied that the appellees had done that.

Understanding that it had no power to interfere in church politics, the Court instead construed its own role much more narrowly, namely, as merely determining who had the right to the use and control of the property at issue. However, to decide that, the Court had to come dangerously close to doing exactly what it had said it had no power to do.

Basically, the Bouldin Court had to decide who represented the church, which meant that it had to examine the process by which certain members of the church had been kicked out. The Court accepted that it could not second-guess a church’s decision to remove an individual from the membership rolls, but believed that it had the power to determine whether that removal was in fact performed by the church or,

---

122 Bouldin, 82 U.S. at 134.
123 See id. at 135.
124 Id.
125 Id. at 138.
126 Id. at 139.
127 Id. The complainants, and those who acted with them, after the church building had been wrested from the custody and control of the rightful trustees, and after very many of them had been excommunicated in mass by the small minority, held their religious services at another place. But they formed no new organization. They still had the same trustees, the same deacons, and they claimed to be the Third Colored Baptist Church.
128 Id. (“It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership.”).
129 Id. (“We have only to do with rights of property.”).
130 Id. at 140 (“We must take the fact of excommunication as conclusive proof that the persons excommunicated are not members.”).
instead, a group falsely claiming to represent the church.\textsuperscript{131} Exercising that power, the Court concluded that the action “by which the old trustees were attempted to be removed, and by which a large number of the church members were attempted to be exsiccined, was not the action of the church, and . . . was wholly inoperative.”\textsuperscript{132} Because both the replacement of the trustees and the expulsion of so many in the congregation had been void and of no legal effect, the regularly elected trustees had the right to control the use of the facilities.

Certainly, one can understand why the \textit{Bouldin} Court was willing to take sides, since the case before it involved an “expulsion of the majority by a minority.”\textsuperscript{133} To make matters worse, that expulsion was done “without warning, . . . without charges, without citation or trial, and in direct contravention of the church rules.”\textsuperscript{134} Thus, there was ample reason to think that what had occurred was a miscarriage of justice.

Arguably, \textit{Bouldin} stands for the proposition that although the Court must be deferential in church political matters, that deference is not absolute. There are clear cases where the Court can step in and correct obvious wrongdoing.\textsuperscript{135} Nonetheless, the conditions under which courts can make judgments about who are the true church leaders and whose decisions must be respected are far from clear, which has led to disparity within the states as to whose decisions about church membership or policy must be considered authoritative.\textsuperscript{136}

\textbf{D. Kedroff}

The Court’s willingness to defer to Church authorities about church matters was put to the test in \textit{Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America}.\textsuperscript{137} At issue in particular was the right to the use and occupancy of a cathedral in New York City.\textsuperscript{138} The determination of that

\begin{itemize}
\item \textsuperscript{131} \textit{Bouldin}, 82 U.S. at 140 (“But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others.”).
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Cf. Presbyterian Church}, 393 U.S. at 447 (citing \textit{Bouldin} for the proposition that “there might be some circumstances in which marginal civil court review of ecclesiastical determinations would be appropriate”).
\item \textsuperscript{136} \textit{See}, for example, notes 263-81 and accompanying text \textit{infra} (discussing differing views expressed in the California courts with respect to the conditions under which a hierarchical church could determine which local church decisions were valid).
\item \textsuperscript{137} 344 U.S. 94 (1952).
\item \textsuperscript{138} \textit{Id.} at 95.
\end{itemize}
question depended on who was the head of the American churches religiously affiliated with the Russian Orthodox Church.\(^{139}\) Two different individuals claimed that title: Leonty, the Metropolitan of All America and Canada, the Archbishop of New York, who was elected by a sobor\(^ {140}\) of the American churches, and Fedchenkoff, who based his right by virtue of his appointment by the Supreme Church Authority of the Russian Orthodox Church as the Archbishop of the Archdiocese of North America and the Aleutian Islands.\(^ {141}\)

After offering a brief history of the relationship between the churches,\(^ {142}\) the Kedroff Court noted that “the Russian Orthodox Church was, until the Russian Revolution, an hierarchical church with unquestioned paramount jurisdiction in the governing body in Russia over the American Metropolitanate,”\(^ {143}\) and that neither “the Sacred Synod . . . nor the succeeding Patriarchs relinquished that authority or recognized the autonomy of the American church.”\(^ {144}\) The Court then examined a New York state law that sought to transfer the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to the governing authorities of the Russian Church in America, a church organization limited to the diocese of North America and the Aleutian Islands.\(^ {145}\)

This, the Court suggested, the state could not do.\(^ {146}\)

The Court appreciated that the state’s goal was to protect rather than undermine religion. The New York Court of Appeals had taken judicial notice of events indicating that “the Russian Government exercised control over the central church authorities and that the American church acted to protect its pulpits and faith from such influences.”\(^ {147}\) That court had accepted that “the Legislature's reasonable belief

\(^{139}\) See Kedroff, 344 U.S. at 95.

\(^{140}\) See id. at 96 n.1 (“A sobor is a convention of bishops, clergymen and laymen with superior powers, with the assistance of which the church officials rule their dioceses or districts.”).

\(^{141}\) See id. at 96.

\(^{142}\) See id. at 100-05.

\(^{143}\) Id. at 105.

\(^{144}\) Id. at 105-06.

\(^{145}\) Id. at 107.

\(^{146}\) Id. (“Such a law violates the Fourteenth Amendment. It prohibits in this country the free exercise of religion.”).

\(^{147}\) Id. at 108-09.
in such conditions justified the State in enacting a law to free the American group from infiltration of such atheistic or subversive influences.”\textsuperscript{148} Basically, the New York Court of Appeals agreed with the New York Legislature that the American diocese “would most faithfully carry out the purposes of the religious trust.”\textsuperscript{149}

Yet, it was not for the New York Court of Appeals to decide which church would most faithfully uphold church doctrine and practice. Basically, all that had to be shown was that the Russian Orthodox Church had had administrative control over the American diocese and that such control had never been relinquished.\textsuperscript{150} As support for its position, the Kedroff Court cited Watson in glowing terms:

\begin{quote}
The opinion 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.\textsuperscript{151}
\end{quote}

The Kedroff Court was not announcing that the civil courts had no role in adjudicating property disputes between religious parties.\textsuperscript{152} On the contrary, the courts could play a role in those cases, although the Court warned that “when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.”\textsuperscript{153} Basically, the Kedroff Court suggested that the civil courts had a very limited role to play when adjudicating property disputes between religious parties, and that role did not include the ability to determine which entity was remaining true to religious doctrine.

\textbf{E. Presbyterian Church}

\begin{footnotes}
\item[148] Kedroff, 344 U.S. at 109.
\item[149] Id.
\item[150] See id. at 120
\item[151] Id. at 116.
\item[152] Id. at 120 (“There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property.”).
\item[153] Id. at 120-21.
\end{footnotes}
Kedroff’s deferential stance with respect to civil court determinations of religious doctrine was reaffirmed in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*. At issue was a Georgia law permitting a jury to decide whether a hierarchical general church had departed from the tenets of faith as a way of deciding whether the local or national church would be entitled to particular property.

The challenge to the law arose in the following context. Two churches had withdrawn from a hierarchical church because of their disagreement with some of the church’s positions, e.g., the ordaining of women as ministers and ruling elders. When reconciliation was found to be impossible, the national church took over the local churches’ property until new leadership for those churches could be found.

The local churches filed suit to prevent the general church from trespassing on the property in question, the local churches’ having title to their respective properties. The jury was asked to determine whether “the actions of the general church ‘amount to a fundamental or substantial abandonment of the original tenets and doctrines of the (general church), so that the new tenets and doctrines are utterly variant from the purposes for which the (general church) was founded.’” The jury found for the local churches.

The *Presbyterian Church* Court began its analysis by suggesting that “the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution.” However, there are special constitutional concerns when there is a religious doctrinal dispute. While

---

155 See id. at 441 (“Under Georgia law the right to the property previously used by the local churches was made to turn on a civil court jury decision as to whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it.”).
156 See id. at 442 n.1
157 Id. at 443.
158 Id.
159 Id. at 442 n.1
160 Id. at 443-44.
161 See id. at 444.
162 Id. at 445.
163 Id. (“Special problems arise, however, when these disputes implicate controversies over church doctrine and practice.”).
suggesting that neutral principles could be applied without violating constitutional guarantees,¹⁶⁴ the Court cautionied that the Constitution would not permit church property disputes to turn on a civil court’s resolution of a controversy involving religious doctrine.¹⁶⁵ Further, precisely because courts could not decide such matters, religious organizations should structure their property arrangements so as not to require courts to resolve religious matters.¹⁶⁶

The Presbyterian Church Court might seem to have found a brilliant way to balance the competing constitutional interests. The Court reaffirms that the state cannot decide doctrinal matters, but also protects the state’s interest in resolving property disputes. Further, the Court provides an inducement for churches to make very clear in secular terms who would own what in the event of a dissolution or disaffiliation.¹⁶⁷ However, the neutral-principles approach has been much more difficult to apply than one would have inferred from the Presbyterian Church opinion.¹⁶⁸

F. Jones

In Jones v. Wolf,¹⁶⁹ the Court offered further discussion of the neutral-principles-of-law approach. At issue was a schism between a local and national church, and the question at hand was whether the

---

¹⁶⁴ Presbyterian Church, 393 U.S. at 449. See also Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 367 (1970) (suggesting that no federal question was implicated where a Maryland court had relied upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property.

¹⁶⁵ Presbyterian Church, 393 U.S. at 449. See also Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929) (“In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.”).

¹⁶⁶ Presbyterian Church, 393 U.S. at 449. See also Louis J. Sirico, Jr., The Constitutional Dimensions of Church Property Disputes, 59 Wash U L. Q. 1, 68 (1981-82) (“If a church and its members understood that a court would enforce only secular provisions, they would have a powerful incentive to reach a clear agreement about property allocations and to ensure that the legal arrangements reflect their expectations.”).

¹⁶⁷ Michael William Galligan, Note, Judicial Resolution of Intrachurch Disputes, 83 Colum. L. Rev. 2007, 2015-16 (1983) (“According to the Court, allowing the application of neutral principles in intrachurch property disputes would encourage churches to clarify their intentions about foreseeable conflicts and disputes through appropriate secular terminology.”).

¹⁶⁸ See notes 186-346 and accompanying text infra (discussing inconsistent applications of the neutral-principles approach)

property dispute could be decided based on neutral principles of law or whether instead the court had to defer to the decision of the authoritative tribunal of the hierarchical church.170

The Vineville Presbyterian Church was a member of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS).171 However, at a meeting of the church, a majority of the congregation voted to separate from PCUS.172 They informed PCUS and then affiliated with another denomination, the Presbyterian Church in America.173 The Presbytery appointed a commission to investigate, eventually deciding that the minority faction constituted the “true Congregation of Vineville Presbyterian Church.”174

Representatives of the minority sought to establish their right to the exclusive use and possession of the property.175 The trial court found for the majority using Georgia’s neutral-principles-of-law approach, and was affirmed on appeal by the Georgia Supreme Court.176 In reviewing the Georgia Supreme Court’s decision, the United States Supreme Court noted that: (1) the deeds conveyed the property to the local church,177 (2) neither the state’s implied trust statutes nor the Vineville church corporate charter indicated that the national organization had an interest in the property,178 and (3) the relevant provisions concerning property in the Book of Church Order (the PCUS Constitution) did not include any language suggesting a trust in favor of the Church.

The Court thereby illustrated how a neutral-principles-of-law approach might be used to determine whether a local or denominational church retained property when the local church split off from the denominational one.179 While civil courts must “defer to the resolution of issues of religious doctrine or

170 Jones, 443 U.S. at 597.
171 Id.
172 Id. at 598.
173 Id.
174 Jones, 443 U.S. at 598.
175 Id. at 598-99.
176 Id. at 599.
177 Id. at 601.
178 Id.
179 Id. at 602 (“the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes”).
polity by the highest court of a hierarchical church organization, they are permitted to use neutral principles of law as long as they can do so without treading on forbidden territory.

Use of the neutral-principles approach will sometimes result in the local church’s being adjudicated the owner of the dispute property and at other times the denomination’s being adjudicated that owner. The Court noted that under the “neutral-principles approach, the outcome of a church property dispute is not foreordained.” Of course, the Court suggested, there are ways that a hierarchical church can have its interests protected. For example, any time prior to the occurrence of a dispute, “the faction loyal to the hierarchical church . . . can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church.” Or, the “constitution of the general church can be made to recite an express trust in favor of the denominational church.” Were these steps taken, the courts would “be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.” However, the methods suggested by the Court for protecting denominational interests have not been nearly as effective as the Court implied that they would be.

While helpful in pointing out which documents would be of interest and some of the steps that might be taken to protect property interests, the Jones Court nonetheless left many questions unanswered. For example, suppose that the constitution of the hierarchical church did include language stating that the property of all member local churches is held in trust for the hierarchical church. Would that suffice to establish that the local church could not retain property if it chose to disaffiliate? The states have interpreted the Jones neutral principles approach in very different ways--some require the denomination to carry a heavy burden before it can be given control of local church property, whereas others seem rather deferential to the national organization, ostensible use of the neutral-principles approach notwithstanding. This variation among and, sometimes, within states has created great uncertainty with respect to the identity of the owner of property upon a local church’s disaffiliation from a denomination.

\[180\] Jones, 443 U.S. at 602.
\[182\] Jones, 443 U.S. at 606.
\[183\] Id.
\[184\] Id.
\[185\] Id.
III. Application of Neutral Principles

The Court’s analysis of the constitutional limitations imposed on the states with respect to their involvement in church matters suggests that no one method of adjudication is constitutionally required. States can adopt a deferential Kedrof approach in which they simply defer to the decision of the religious authorities with respect to who owns particular property or they can use the neutral-principles-of-law approach suggested in Jones. Further, while suggesting some of the considerations that would be appropriate when using the neutral-principles-of-law approach, the Court has not explained whether any particular factor is dispositive or what weights should be assigned to the differing factors. This lack of direction has led to much disparity between and among states when deciding religious property issues.

A. The Jones Aftermath

The Jones decision was read with interest by both national and local religious organizations. Indeed, as a New York appellate court explained in Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville, the Protestant Episcopal Church responded to Jones by amending its national canons to declare that “all real and personal property held by local parishes is held in trust for the benefit of the national Protestant Episcopal Church and the diocese in which the parish is located.” This amendment was known as the “Dennis Canon.”

186 For a chart indicating which states use neutral principles and which are deferential, see Jeffrey B. Hassler, Comment, A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife, 35 Pepp. L. Rev. 399, 457-63 (2008).


188 Id. at 285. See also Patty Gerstenblith, Civil Court Resolution of Property Disputes among Religious Organizations, 39 Am. U. L. Rev. 513, 561 (1990) (“both UPCUSA and PECUSA changed their national constitutions in response to the Supreme Court’s decision in Jones v. Wolf”).

189 Trinity Episcopal Church, 250 A.D.2d at 284.

190 Id. at 285. See also Hassler, supra note 186, at 414-15

The Jones decision was handed down just three months prior to The Episcopal Church's triennial national General Convention, at which the church was faced with an increasing number of parishes departing in response to significant doctrinal disagreements. In response to both the departures and the Jones decision, the Church's House of Bishops adopted what has come to be known as the “Dennis Canon,” stating that “[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located.” Following this adoption, several regional dioceses adopted their own versions of the Dennis Canon. In litigation, representatives of the general church have stated that the trust clauses “merely codify[] a longstanding understanding of the right of the diocese to parish property upon a parish seeking to leave the denomination,” but at least some commentators vigorously deny this is the case.
At least one issue raised by the adoption of the Dennis canon was whether its adoption involved a change in policy or, instead, a mere codification of existing policy. If the latter, then religious organizations that had acceded to the church’s canons prior to the adoption of the Dennis canon might nonetheless be found to be holding the property in trust for the denomination. If the former, then it might be necessary to show that the local church had acceded to the new canon before this canon could be used to establish that the property was held in trust for the denomination.191

Because New York uses the neutral-principles-of-law approach,192 the court explained that it should focus on the deed to the property, the language of the charter of the local church, applicable state law, and the denominational church’s constitution.193 The court noted that while the church’s charter expressly acknowledged the affiliation with the Protestant Episcopal Church, there was nothing in the certificate of incorporation specifying how the property was owned.194 To determine whether the property was held in trust for the denomination, the court looked to the actions of the church itself, e.g., that it had sought the Bishop’s permission when seeking to convey property or secure debt refinancing.195 Further, because the church had participated in diocesan activities,196 the church signified its “solidarity with the Protestant Episcopal Church.”197 Finally, the court found that the Dennis canon expressly described a relationship between the local parishes and diocese that had long existed.198 After examining all of these factors, the New York court held that the property was held in trust for the diocese.199

191 See note 203 and accompanying text infra.
192 See Trinity Episcopal Church, 250 A.D.2d at 285 (“New York has adopted the ‘neutral principles of law’ analysis”).
193 Id. at 286 (citing First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States, 464 N.E.2d 454, 460-61 (N.Y. 1984)).
194 Id. at 287.
195 Id. at 289.
196 Id. (“members of Trinity Episcopal Church actively participated in numerous Church activities, such as presenting annual reports to the Diocese regarding its financial condition and attending the annual convention of the Diocese”).
197 Id.
198 Trinity Episcopal Church, 250 A.D.2d at 288
In our view, the record supports the conclusion that the “Dennis Canon” amendment expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the Protestant Episcopal Church. By accepting the principles of the Protestant Episcopal Church and the Diocese, defendants were subject to their canons, rules and practices.
199 Id. at 289 (“In our view, there is sufficient evidence of an intent to create an implied trust to hold church property in favor of the Protestant Episcopal Church and its dioceses based upon defendants’ actions in conformity with the tenets and canons of the Protestant Episcopal Church and the national church’s more recent establishment of an express trust.”). See also In re Church of St. James the Less, 888 A.2d 795 (Pa.
While a court might view the factors mentioned by the New York court as indicating that the property was held in trust, those same factors might also be viewed in a much different light yielding a contrary result. For example, the court noted that the deeds did not indicate that the property was being held in trust. Had the deeds so specified, that might have been thought strong if not dispositive evidence in favor of the denominational church, but the fact that the deeds contained no such designation might have been emphasized by the court to show that the property was not held in trust for the denomination. That the church had participated in diocesan activities or consulted with the Bishop would indicate the then-current intention to abide by the rules, but a different court might suggest that such practices did not establish an intention to hold the property in trust for the denomination even when conditions had changed to such an extent that disaffiliation was required. Yet, either interpretation and result would be compatible with the current jurisprudence. Precisely because the United States Supreme Court has named some of the factors to consider but has neither specified the implications of those factors nor the relative weights to be assigned to them, the Court has virtually guaranteed that relevantly similar cases will be treated differently in different states and, possibly, even in the same state.

B. The Effect of a Canon Specifying that Property Is Held in Trust

The Trinity Episcopal Church court held that the Dennis canon merely codified existing practice rather than established a new requirement. Suppose, however, that a different court either held that the

2005) (holding that local church held property in trust for the national organization by virtue of the Dennis canon among other factors); Episcopal Diocese of Massachusetts v. Devine, 797 N.E.2d 916, 923 (Mass. App. 2003) (suggesting that the adoption of the Dennis canon plus the local church’s acceding to the canons of the national church provided an alternate ground for a finding that the property was held in trust for the national organization); Rector, Wardens and Vestrymen of Trinity-Saint Michael's Parish, Inc. v. Episcopal Church in Diocese of Connecticut  620 A.2d 1280 (Conn. 1993) (finding a legally enforceable trust in favor of the national church created prior to the adoption of the Dennis canon).

---

200 Trinity Episcopal Church, 250 A.D.2d at 286-87.
201 Cf. Fortin v. Roman Catholic Bishop of Worcester, 625 N.E.2d 1352, 1354 (Mass. 1994) (“At this time (and until the present day) the Bishop held legal title to all the property at issue in this dispute.”).
202 See, for example, Protestant Episcopal Church v. Barker, 171 Cal. Rptr. 541, 555 (Cal. App. 1981) We conclude that no express trust exists in the property of St. Matthias, St. Mary's, and Our Saviour. St. Matthias and St. Mary's held title to their property in their own names, paid for it out of their own funds, did not alienate it in any express manner in their articles of incorporation, and did not subject themselves to express restraints on their property by reason of the constitution, canons, and rules of PECUSA and the Diocese. It is true that these churches voluntarily conformed to certain financial requirements of the Diocese, such as filing annual financial reports and securing permission to mortgage real property. None of this, however, amounted to the creation of an express trust.
203 See From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 803 A.2d 548, 571 (Md. 2002) (“Consent to holding property in trust during the course of affiliation does not automatically constitute consent to relinquishing that property once the affiliation terminates.”).
Dennis canon was not a mere codification or, perhaps, considered analogous provisions in different hierarchical churches’ constitutions and found that they imposed a new requirement. At least one question would be whether the canon would govern the property of churches that had affiliated with the national organization prior to the canons’ adoption.

There are at least two ways to understand a local church’s accepting the canons of a national church—the church might be said only to be accepting those existing at the time of the affiliation or, instead, might be said to be accepting prospectively those canons that will be adopted in the future as long as the proper procedures are followed. At least with respect to canons involving property ownership, courts have been unwilling to impute retroactive acceptance of a canon requiring that local church property be held in trust for the national organization and, instead, have required evidence that the local church accepted the requirement that the property be held in trust.

It should not be surprising that different courts might interpret identical provisions of a national constitution differently. In First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States of America, 464 N.E.2d 454, 461-62 (N.Y. 1984), the New York Court of Appeals interpreted UPCUSA’s Book of Order as not providing a basis for a beneficial trust in favor of the national church. See also Foss v. Dykstra, 342 N.W.2d 220, 224 (S.D. 1983) (suggesting that the Book of Order did not create an express or implied trust in favor of UPCUSA. However, in Fonken v. Community Church of Kamrar, 339 N.W.2d 810 (Iowa 1983), the Iowa Supreme Court interpreted the Book of Order as creating an implied trust in favor of UPCUSA.

See Presbytery of Elijah Parish Lovejoy v. Jaeggi, 682 SW2d 465, 474 (Mo 1985) (noting that the Book of Order of UPCUSA (the United Presbyterian Church in the United States of America) did not contain a provision requiring that the local church provide in the articles of incorporation that the property was held for the national church until 1981, which was after Memorial had disaffiliated).

The Presbyterian response (or more accurately, responses) to Jones is considerably more complex, primarily because the ruling preceded by only a few years the historic merger between the northern (UPCUSA) and southern (PCUS) Presbyterian churches. Neither church’s constitution historically had contained a trust provision akin to the Episcopal Dennis Canon. The merger agreement, which resulted in the formation of the PC(USA), contained express guarantees that individual local churches could, by vote of the congregation, exempt themselves from the property provisions of the new PC(USA) constitution that were dissimilar from those contained in the prior denomination’s constitution, and instead choose to be bound by the previous terms. The PC(USA) constitution contained a trust clause from the date of the merger in 1983, but both the UPCUSA and the PCUS also amended their constitutions just prior to the merger to include trust clauses. The end result was that after 1983, all Presbyterian congregations in the PC(USA) were at least subject to the language of a general-church trust clause, although it is very likely that this was not universally known. Therefore, both of the major mainline Episcopalian and Presbyterian denominations claim the benefit of a trust provision.

See, for example, Church of God in Christ, Inc. v. Graham, 54 F.3d 522, 526 (8th Cir. 1995) (“With only its charter and constitution to point to, no evidence that Faith Mission actually acquiesced in that constitution, and all the other considerations pointing in favor of Faith Mission, we conclude that the
Sometimes, congregations will disaffiliate from a denomination precisely because of the adoption of a canon requiring that the property be held in trust for the national church.\(^{207}\) Suppose, however, that a local church remains affiliated with a national organization, notwithstanding the national organization’s having adopted a canon requiring that local property be held in trust for the national organization. At least one question would be whether the church’s having remained affiliated after the adoption of the new canon would itself signify agreement with the canon or whether, instead, more would have to be done by the local church to establish that it had acceded to the requirement that the property be held in trust for the denomination.

In *Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*,\(^ {208}\) a national religious organization had amended its charter to require that local churches hold their property in trust for the denomination, and a local church had remained affiliated. The local church subsequently disaffiliated from the denomination, and the question at hand involved the control and ownership of the property. The Arkansas Supreme Court suggested that the applicable law was the law at the time the property was acquired,\(^ {209}\) which meant that “exclusive title and control over local church property is vested in the Palmetto trustees,”\(^ {210}\) i.e., the local church, notwithstanding that the local church had remained affiliated even after the adoption of the canon requiring that property be held in trust.

Yet, a different court might suggest that when a local church accepts the authority of a denominational church, provisions in the local church documents which contradict those of the national Church cannot wrest ownership from the Faith Mission congregation under neutral principles of Missouri law.”); *Presbytery of Beaver-Butler of the United Presbyterian Church in the United States v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1323-24 (Pa. 1985) (“The history of the UPCUSA Book of Order reflects that in 1979, an amendment was proposed which would have created a trust in favor of UPCUSA with respect to property owned by affiliated churches. That amendment was not ratified and never became part of the UPCUSA constitution until May 23, 1981, after Middlesex voted to disaffiliate.”) and *Presbytery of Beaver-Butler of the United Presbyterian Church in the United States v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1325 (Pa. 1985) (holding that the local church retained the property); *Church of God Pentecostal, Inc., v. Freewill Pentecostal Church of God, Inc*, 716 So.2d 200, 208 (Miss. 1998) (holding that the local church could retain the property notwithstanding the by-laws of the national organization because “there was no evidence produced at trial that the Moss Point congregation had adopted the by-laws of Pentecostal”).

\(^ {207}\) See, for example, *Keiser v. Matamoras Community Church*, 66 Fed. Appx 358, 359 (3rd Cir. 2003) (“The General Conference in July 1994 amended its constitution to require that the property of all member churches be held in trust for the Churches of God. This prompted Matamoras to withdraw from the Churches of God and reincorporate as the Matamoras Community Church, occupying the same property as before.”)

\(^ {208}\) *40 S.W.3d* 301 (Ark. 2001).

\(^ {209}\) *Id.* at 310.

\(^ {210}\) *Id.*
church will simply be held void or of no legal effect. In an unpublished opinion, the 6th Circuit suggested that a local church’s bylaws containing provisions indicating an intent to retain control over the property in the event of dissolution were simply overridden by contrary provisions in the hierarchical church’s constitution.

C. Is It Held in Trust?

Suppose that a local church’s bylaws and the canons of a national organization are not in conflict and that each requires that the local church property be held in trust for the national organization. Surely, it might be thought, there should be no controversy in this kind of case with respect to who has the right to control the property in question should the local church subsequently decide to disaffiliate from the denomination. Yet, even this kind of case might be decided differently in different jurisdictions.

In St. Paul Church, Incorporated v. Board of Trustees of Alaska Missionary Conference of United Methodist Church, Incorporated, St. Paul Church was discontinued as a United Methodist Church, and the local and national organizations each claimed ownership of certain properties. The Alaska Supreme Court examined the Book of Discipline, which includes a section on church property. That book makes clear that all property is held in trust for the United Methodist Church. The Book further provides:

[T]he absence of a trust clause ... in deeds and conveyances executed previously or in the future shall in no way exclude a local church or church agency, or the board of trustees of either, from or relieve it of its connectional responsibilities to The United Methodist Church. Nor shall it absolve a local church or church agency or the board of trustees of either, of its responsibility and accountability to The United Methodist Church, including the responsibility to hold all of its property in trust for The United Methodist Church.

See notes 212-14 and accompanying text infra.

Kendysh v. Holy Spirit Byelorussian Autocephalic Orthodox Church, 1988 WL 68887 (6th Cir. 1988).

See id. at *1.

See id. at *2.

145 P.3d 541 (Alaska 2006).

Id. at 544.

Id.

See id.

Id. at 544-45.
This requirement that the property be held in trust even absent a trust clause in the local church’s
documents would apply if, for example, the church was known as a member of the denomination\textsuperscript{220} or if the
curch had accepted an ordained minister appointed by the bishop.\textsuperscript{221}

In this particular case, when a group of families contacted the Alaska Missionary Conference
(AMC) expressing interest in affiliating with the United Methodist Church, they were expressly informed
that were they to join the denomination the property would be held in trust for the United Methodist
Church.\textsuperscript{222} Nonetheless, St. Paul Church did not contain the required trust language in its deeds,\textsuperscript{223} and the
church repeatedly reported that it had not amended the deeds when submitting its annual reports to the
trustees of the AMC.\textsuperscript{224}

After some conflict between members of the congregation and the regional administration of the
United Methodist Church, the pastor of the church was informed that the AMC had recommended that the
church get new lay leadership.\textsuperscript{225} A meeting was held at St. Paul’s, and lay leaders were selected in a way
contrary to the wishes of AMC.\textsuperscript{226} At the annual meeting of the AMC, St. Paul’s Church association with
the United Methodist Church was discontinued.\textsuperscript{227} St. Paul Church amended its articles of incorporation,
removed all references to the United Methodist Church, and continued to hold worship services.\textsuperscript{228}

When analyzing the ownership and control of the property, the Alaska Supreme Court made clear
that the state uses a neutral-principles-of law approach.\textsuperscript{229} The court noted that the members of St. Paul
understood the implications of affiliating when they decided to do so,\textsuperscript{230} reasoning, “Given the express
trust language of the Discipline and the mutually understood connectional nature of UMC, the overt acts

\textsuperscript{220} St. Paul, 145 P.3d at 545.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 546
\textsuperscript{223} Id. at 547.
\textsuperscript{224} Id.
\textsuperscript{225} Id. at 548.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id. at 549. There was a short period during which the national church controlled the building, see id. at
548-49, but the brief hiatus does not affect the analysis.
\textsuperscript{229} St. Paul, 145 P.3d at 553 (“we adopt the neutral-principles approach when resolving property disputes
between religious organizations”).
\textsuperscript{230} Id. (“When St. Paul chose to affiliate with UMC, the record reveals that its members were fully
cognizant of the implications of affiliation.”).
undertaken by the members of St. Paul to affiliate with UMC constitute a manifestation of intent to create a trust in favor of UMC.” 231

While the deeds to the disputed properties did not contain the required trust language, 232 the court nonetheless rejected that the absence of the trust language implied that the church did not intend to hold the property in trust for the United Methodist Church. After all, the Book of Discipline expressly stated that the failure to include the trust language did not relieve the church from its responsibilities. 233

St. Paul Church argued that even if a trust had been created, it had revoked the trust when it had amended its articles of incorporation. 234 However, the court noted, the presumption in Alaska law at the relevant time was that a trust could not be revoked unless the right to do so had been reserved. 235 Because that right had not been reserved, St. Paul could not revoke the trust and retain the property. 236

Numerous factors supported the Alaska court’s holding. For example, St. Paul Church had been informed prospectively that its joining the United Methodist Church would mean that the local property would be held in trust for the denomination. 237 The surprising part of the Alaska court’s decision was its noting that Alaska trust law had since changed and, were the facts somewhat different, the Alaska Supreme Court might determine that “a trust created by a local church in favor of a parent church is revocable.” 238

Regrettably, the court did not make clear which changed circumstances would have yielded a different result, for example, whether St. Paul’s having affiliated with the United Methodist Church after the change in Alaska trust law would have been enough to warrant a different outcome or whether in addition more have been required, e.g., that there was no express statement within the Book of Discipline

231 St. Paul, 145 P.3d at 554.
232 Id. at 554 (“The deeds to the disputed properties are in the name of St. Paul United Methodist Church and they do not contain the trust clauses which the Discipline provides they ‘shall contain.’”).
233 Id. at 544-45
But the Discipline expressly provides that the absence of a trust clause does not relieve a local church of its connectional responsibilities to UMC if the intent of the founders of the church to hold the property in trust is shown through “the use of the name, customs and polity of The United Methodist Church.” Since the deeds are recorded in the name of St. Paul United Methodist Church, the deeds are consistent with the means set forth in the Discipline to manifest an intent to create a trust.
234 Id. at 557 (“St. Paul argues that, even if a trust existed, St. Paul revoked the trust when it amended its Articles of Incorporation and deleted any reference to UMC and the Discipline.”).
235 Id.
236 See id. at 561.
237 Id. at 542.
238 Id. at 557.
that the failure to have put the property in trust would not relieve the church of its responsibilities or, perhaps, that there had been no express warning about the consequences of affiliation.

The St. Paul decision is an invitation to litigate ownership and control of church property. Further, it may mean that the presence of a requirement in the denomination’s constitution that property be held in trust combined with the presence in the local church’s articles of incorporation that the property was held in trust would not entail that the property was in fact held in trust should the local church decide to disaffiliate.

In From the Heart Church Ministries, Incorporated v. African Methodist Episcopal Zion Church, the Maryland Supreme Court addressed property ownership issues that arose when a local church severed its connection with the denominational church. From the Heart Church had been organized as an affiliate of the African Methodist Episcopal Zion Church, although the deed to the property did not contain a reversion to A.M.E. Zion.

In 1991, the Board of Trustees adopted bylaws and amended its articles of incorporation. The bylaws now specified that its purpose was to ‘conduct a church for Christian religious activities,’ as contrasted with the requirement to act ‘in accordance with the Discipline of the African Methodist Episcopal Zion Church.’ Further, the by-laws vested the trustees with full control over church property and the amended articles deleted all references to the A.M.E. church.

The A.M.E. Church is hierarchical and international in scope. Its Book of Discipline specifically requires that local churches have a trust clause in the appropriate documents, and also states that the absence of such a trust provision in the relevant documents would not relieve the local church from the obligations that the presence of such a clause would impose if, for example, the church was known in

---

239 803 A.2d 548 (Md. 2002)
240 Id. at 551.
241 Id. at 552. The church had been incorporated under a different name, Full Gospel A.M.E. Zion Church See id. at 552 n.2.
242 Id. at 553.
243 Id. at 554.
244 Id.
245 Id.
246 Id.
247 Id.
248 Id.
249 Id. at 556.
the community as a member of the denomination or if the church had accepted pastors from the denomination.\textsuperscript{250}

When From the Heart expressed its intent to withdraw from the denomination, A.M.E. Zion requested that the acquired property be turned over to A.M.E.\textsuperscript{251} From the Heart declined and instead sought a declaratory judgment that it was the sole owner of the properties in question.\textsuperscript{252}

As the court pointed out, “From the Heart accepted the pastoral appointments each year and it used the A.M.E. Zion name, customs and polity so that it was known in the community as a part of the denomination.”\textsuperscript{253} The court then explained Maryland trust law, noting that once established, a trust may be modified without the beneficiaries' consent, but only if the power to do so is reserved.”\textsuperscript{254} Otherwise, the beneficiaries’ consent is required.\textsuperscript{255} A trust may be revocable or irrevocable, and “in the absence of a designation, the trust is revocable by any act sufficient to manifest the settlor's intention to revoke the trust.”\textsuperscript{256}

From the Heart noted that it had not expressly held its property in trust for A.M.E., and that A.M.E. had been aware of that.\textsuperscript{257} The Maryland court’s focus was elsewhere, however. The court pointed out that although the Book of Discipline stated that properties were held in trust for A.M.E., it nowhere said that the trust was irrevocable.\textsuperscript{258} Nor did it expressly state that it covered the situation where a local church disaffiliated with the denomination.\textsuperscript{259} The court explained that consent to holding property in trust during affiliation “does not automatically constitute consent to relinquishing that property once the affiliation terminates,”\textsuperscript{260} and then remanded the case for “a more expanded review of documents and circumstances . . . rather than merely the review of the church Discipline.”\textsuperscript{261}

The Maryland and Alaska opinions suggest that denominations cannot rest easy even if there is an express provision within the constitution requiring that property be held in trust and even if the local church

\textsuperscript{250}From the Heart, 803 A.2d at 556-57.
\textsuperscript{251}Id. at 557.
\textsuperscript{252}Id. at 557-58.
\textsuperscript{253}Id. at 561.
\textsuperscript{254}Id. at 568 (citing Milholland v. Whalen, 43 A. 43, 44 (Md. 1899)).
\textsuperscript{255}Id. (citing Allen v. Safe Deposit & Trust Co., 7 A.2d 180, 181 (1939)).
\textsuperscript{256}Id. (citing Hoffa v. Hough, 181 Md. 472, 475, 30 A.2d 761, 762 (1943))
\textsuperscript{257}Id. at 560.
\textsuperscript{258}Id. at 571.
\textsuperscript{259}Id.
\textsuperscript{260}Id.
\textsuperscript{261}Id.
includes a provision within its by-laws stating that the property is held in trust for the denomination. Because trusts are generally revocable in those states, the denomination might have to require that an irrevocable trust be set up in order to protect its interests.\footnote{Cf. From the Heart, 803 A.2d at 571 (“in Maryland, unless otherwise specifically provided, a trust is revocable”).}

Inconsistency in the resolution of these kinds of issues might simply seem to be one of the costs that must be paid in a federalist system where state courts must decide these controversies in light of state rather than federal law. Yet, the same kinds of inconsistent treatments are occurring within states.

Consider, for example, Guardian Angel Polish National Catholic Church of Los Angeles, Incorporated v. Grotnik.\footnote{13 Cal.Rptr.3d 552 (Cal. App. 2004).} The Polish National Catholic Church is and always has been hierarchical.\footnote{Id. at 553.} From its inception, the Guardian Angel Polish National Catholic Church sent financial information to the national organization annually.\footnote{Id. at 557.} Further, during that period, Guardian Angel had received administrative guidance from the national organization.\footnote{Id.} However, in 2000, a board of directors never approved by the bishop\footnote{Id.} voted to sever all ties with the national church.\footnote{Id.} The board also changed the bylaws with respect to the disposition of property upon liquidation of the church.\footnote{Id.}

The California appellate court suggested that the board of directors was not authorized to act because its election had not been approved by the Bishop,\footnote{Id. at 558.} and thus that all of the board’s actions were null and of no legal effect.\footnote{Id.} The court further found that Guardian Angel was “bound by the constitution, laws, rules and regulations of the Polish National Catholic Church.”\footnote{Id.}

The Guardian Angel opinion might be contrasted with that of the California appellate court deciding California-Nevada Annual Conference of United Methodist Church v. St. Luke’s United Methodist Church.\footnote{17 Cal.Rptr.3d 442 (Cal. App. 2004).} At issue was the ownership and control of local property when St. Luke’s disaffiliated
from the United Methodist Church. While the appellate court agreed that the property had been held in trust for the national church, the court also held that St. Luke’s could revoke that trust, because the trust had not expressly been made irrevocable.

The St. Luke’s court understood that the United Methodist Church viewed the act of the board of directors to revoke the trust as “unauthorized,” and that the Guardian Angel court had held in favor of the national denomination precisely because the board of director’s actions had been unauthorized and thus null and of no legal effect. However, the St. Luke’s court rejected that the “acts of a board of directors of a lawfully formed corporation may be viewed by a civil court to be a nullity simply because those acts are deemed unauthorized not by any recognized rule of state law, but rather only by the general church’s own rules.” The St. Luke’s court implied that its following the Guardian Angel holding would undermine the neutral-principles-of-law approach. “Although the hierarchical theory has supposedly been rejected in California, it will nevertheless live on under the label of “neutral principles of law,” if a church’s own rules are viewed as trumping state statutes.”

Basically, the dispute between the Guardian Angel and St Luke’s courts underscores one of the confusing aspects of the Court’s jurisprudence. Insofar as the United States Constitution precludes states from deciding matters of church governance, then it would seem that denominations could protect their interests in local church property by requiring denominational approval of all dispositions of property. But if that is so, then the line between the neutral-principles-of-law approach and the deferential approach becomes blurred. However, if courts can treat unapproved acts by trustees as legally binding, then it would seem that the civil courts would be deciding church governance issues.

Certainly, there are ways to guarantee that property will go to a denomination in the event of a local church’s disaffiliation or dissolution, at least in certain states. For example, a national church might

---

274 St. Lukes, 17 Cal.Rptr.3d at 444.
275 Id. at 445.
276 Id. at 452.
277 Id. at 456.
278 Id.
279 Id.
280 Id.
281 See R. Gregory Hyden, Welcome to the Episcopal Church, Now Please Leave: An Analysis of the Supreme Court’s Approved Methods of Settling Church Property Disputes in the Context of the Episcopal Church and How Courts Erroneously Ignore the Role of the Anglican Communion, 44 Willamette L. Rev. 541, 541 (2008) (“It is settled constitutional law that internal church disputes involving faith, doctrine, governance, and polity are outside of the purview of civil courts.”).
include within its constitution a requirement that local property be held in trust, and the local church might indicate within all relevant documents that the property is being held in an irrevocable trust in favor of the denomination. Assuming that local law would not permit a modification to the irrevocable trust, the denomination would receive the property upon dissolution or disaffiliation of the local church. For example, in Bishop and Diocese of Colorado v. Mote,282 a local church disaffiliated from the Protestant Episcopal Church in the United States of America (PECUSA) because of doctrinal differences.283 The Colorado Supreme Court considered numerous factors in its neutral-principles-of-law analysis,284 including that the deed only named the local church and did not even refer to PECUSA.285 However, the court held that because of a past decision to affiliate irrevocably PECUSA, the church could not now disaffiliate and keep its property.286

Yet, the above analysis regarding express irrevocable trusts would of course be inapplicable in a state in which such trusts were not permitted. In Norfolk Presbytery v. Bollinger,287 the Virginia Supreme Court explained, “As express trusts for supercongregational churches are invalid under Virginia law no implied trusts for such denominations may be upheld.”288 Basically, the Norfolk Presbytery had the “burden of proving that the Trustees of Grace Covenant have violated either the express language of the deeds or a contractual obligation to the general church.”289

D. On the Control of Property

Suppose that according to both a local church’s articles of incorporation and a national denomination’s constitution, local property was being held in trust for the national organization such that the local church’s dissolution would result in the national organization’s having control of the property. A separate question would involve what the local church could do with its property before dissolution or

282 716 P.2d 85 (Colo. 1986).
283 See id. at 87.
284 Id. at 103 (“Applying a neutral principles analysis to the facts . . .”).
285 Id. at 104.
286 Id.
287 201 S.E.2d 752 (Va. 1974)
288 Id. at 758.
289 Id.
disaffiliation. In *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore of United Presbyterian Church in U.S.* the Maryland Supreme Court addressed the validity of a gift made while a local church was affiliated with UPCUSA.

Babcock Memorial and UPCUSA had certain ecclesiastical disagreements resulting in an investigation of Babcock by an Administrative Commission. Meetings between the Commission and the congregation were unproductive. The Session made an “absolute and irrevocable gift” to Merritt Boulevard Presbyterian Church. That action was ratified by the congregation on the same day that it voted to withdraw from the denomination.

The Maryland Supreme Court noted that the consent of the Presbytery was not obtained before the gift was made to Merritt, and that “The Book of Order of United provides that a church shall not sell, mortgage or encumber its real property without the Presbytery’s consent.” The Babcock court viewed those restrictions as “equivalent to saying that property could not be alienated by a local church without permission of the Presbytery,” since holding otherwise would “permit accomplishing by subterfuge what could not be done directly.”

The Babcock analysis might be contrasted with that provided by the Georgia Supreme Court in *Georgia District Council of Assemblies of God, Incorporated v. Atlanta Faith Memorial Church, Incorporated.* Atlanta Faith Memorial Church deeded its property to Beyt Tehillah Religious Trust. About three and a half years later, the Trust sold the property, and the church voted to disaffiliate shortly thereafter.

The Assemblies of God bylaws specified that all property would revert to the Georgia District Council if a local assembly unanimously voted to disaffiliate, although there was no provision specifying

---

290 464 A.2d 1008 (Md. 1983).
291 Id. at 1009–10.
292 Id. at 1010.
293 Id.
294 See id. and id. n.4.
295 Id. at 1010.
296 See id. at 1012.
297 See id.
298 Id. at 1017.
299 Id.
300 472 S.E.2d 66 (Ga.,1996).
301 See id. at 68.
302 See id.
that property could not be alienated prior to disaffiliation. ³⁰³ Basically, the Georgia court interpreted the relevant language as granting the District Council “a conditional estate that would vest upon the condition that Memorial voted unanimously to disaffiliate and possessed real property at that time.” ³⁰⁴ Thus, because there was no express limitation on the church’s alienating its property while affiliated and because the local church owned no property at the time of disaffiliation, the denominational church was without recourse. Of course, there had been no provision in Babcock specifying that property could not be gifted, and the effect of the Georgia decision was, in the words of the Maryland Supreme Court, to “permit accomplishing by subterfuge what could not be done directly.” ³⁰⁵

E. When Does a Church Cease to Exist?

The high courts of Georgia and Maryland seem to have adopted different positions with respect to how narrowly to construe language in the denominational constitution when deciding whether a local rather than a hierarchical church could lay claim to contested property. The same kind disagreement between state supreme courts regarding construction was illustrated in two cases in which the court had to decide when a church no longer existed.

In General Convention of New Jerusalem in the United States of America v. MacKenzie, ³⁰⁶ the Supreme Judicial Court of Massachusetts considered whether the Boston Society of the New Jerusalem, Incorporated owned its own church property or whether instead the national organization with whom it had been affiliated—the General Convention of the New Jerusalem in the United States of America, Incorporated—owned it instead. ³⁰⁷ The church’s bylaws contained numerous references to the General Convention, including the following: “In the event that the religious body known as the Boston Society of the New Jerusalem, Inc. shall cease to exist, all funds and holdings shall be transferred to the General Convention of the New Jerusalem in the United States of America.” ³⁰⁸

The Massachusetts court noted that after the disaffiliation the church had continued in many respects as it had before—it had retained the same pastor and had continued to engage in many of the same

³⁰³ See Atlanta Faith, 472 S.E.2d at 69 (“Nowhere does Article IX Section 7(c) state that the local church cannot transfer property to a trust.”)
³⁰⁴ Id.
³⁰⁵ Babcock, 464 A.2d at 1017.
³⁰⁶ 874 N.E.2d 1084 (Mass. 2007).
³⁰⁷ See id. at 1085.
³⁰⁸ See id. (emphasis added)
church and charitable practices. The court interpreted the bylaw to be triggered only upon the church’s dissolution and not merely upon its disaffiliation from the national church.

In Wisconsin Conference Board of Trustees of the United Methodist Church, Inc v. Culver, the Wisconsin Supreme Court offered a different interpretation of analogous language. At issue was whether the local or denominational church was the owner of the church property after the local church had disaffiliated from the denominational church.

In 1997, the Elo Methodist Church decided to disaffiliate as a result of a disagreement over certain doctrinal matters. The Conference determined that the property at issue had been abandoned by virtue of the church’s disaffiliation. The Wisconsin Supreme Court suggested that the ultimate question was whether the church’s disaffiliation rendered it “defunct or dissolved” under the relevant Wisconsin law, which read: “Whenever any local Methodist church or society shall become defunct or be dissolved, the rights, privileges and title to the property thereof, both real and personal, shall vest in the annual conference and be administered according to the rules and discipline of said church.”

Two competing interpretations of the statute were offered. The Elo congregation argued that “as long as the church exists as a practicing congregation it cannot be considered defunct or dissolved.” In contrast, the Conference had suggested that on a “plain language reading of the statute, because the Elo church ceases to exist as a local Methodist church or society, it is defunct or dissolved.” The Wisconsin Supreme Court accepted the latter approach, reasoning that the “words ‘defunct’ or ‘dissolved’ cannot be

---

309 MacKenzie, 874 N.E.2d at 1086.
310 Id. at 1087 (“We do not locate an ambiguity in the language of the dissolution bylaw, and hold that it is triggered only upon dissolution, and not by disaffiliation.”).
311 627 N.W.2d 469 (Wis. 2001).
312 Id. at 472 (“This case requires us to address the ownership of church property when a local Methodist church breaks away from the Methodist denomination.”).
313 Id. at 473 (“The Elo church continued its affiliation with the UMC until 1997. In that year, a dispute arose between the congregation and the UMC over certain doctrinal matters. On June 25, 1997, the Elo church passed, by a near-unanimous vote of the congregation, a . . . resolution withdrawing from the UMC.”)
314 Id.
315 Id. at 475.
316 Id. at 477 (citing Wis. Stat. § 187.15(4)).
317 Id.
318 Id.
read in isolation [and] ... are modified by the term ‘local Methodist church or society.’”\textsuperscript{319} The court explained that this reading of the statute recognizes the overall purpose of the statute. The statute is designed as a whole to accommodate the Methodist organizational structure and its system of property management. The United Methodist Church is organized in a hierarchical fashion and manages its property through a system of trusts.\textsuperscript{320}

The interpretation accepted by the Wisconsin Supreme Court was exactly the interpretation rejected by the Supreme Judicial Court of Massachusetts.\textsuperscript{321} Certainly, one lesson to be derived from these differing interpretations is that both local and national religious organizations must draft their documents very carefully, but another would seem to be that the Court has permitted the current state of the law in this area to be chaotic and in need of clearer guidelines.

F. What Kind of Church Is It?

In \textit{Watson v. Jones}, the Court explained that a church could be part of a hierarchical structure or could instead be independent and, further, that the legal effect of a dissolution would depend upon which kind of church was at issue. Were the church independent, then the majority could determine what would happen to the church as long as the local organizational principles did not state otherwise. Were the church instead part of a hierarchical organization, a different rule would apply.\textsuperscript{322}

Some state courts have rejected that a church must be viewed as either independent or as hierarchical, instead suggesting that a church might fall into both camps. In \textit{Piletich v. Deretich},\textsuperscript{323} the Supreme Court of Minnesota heard a church property dispute. At issue was which faction would have control of a church. A split had occurred between the Serbian Eastern Orthodox Church (Mother Church) and the Serbian Eastern Orthodox Diocese for the United States and Canada (American Diocese).\textsuperscript{324} The majority faction had voted to continue affiliation with the American Diocese\textsuperscript{325} and had continued to use

\begin{thebibliography}{9}
\bibitem{319} \textit{Culver}, 627 N.W.2d at 478.
\bibitem{320} \textit{Id}.
\bibitem{321} \textit{See} \textit{MacKenzie}, 874 N.E.2d at 1087.
\bibitem{322} \textit{See} notes 88-100 and accompanying text \textit{supra} (discussing the \textit{Watson} treatment of these differing kinds of churches).
\bibitem{323} 328 N.W.2d 696 (Minn. 1982).
\bibitem{324} \textit{Piletich}, 328 N.W.2d at 698.
\bibitem{325} \textit{Id}.
\end{thebibliography}
the church, operating and maintaining the property. 326 The faction wishing to affiliate with the Mother Church had then stopped participating and paying dues.327

While recognizing that this was a hierarchical religious organization, the Minnesota court nonetheless found that “this general church is not ‘hierarchical’ with respect to resolution of intra-congregational disputes over local property or membership qualifications.”328 The court noted, “Although this is a hierarchical church in some respects, the general provisions of the Constitution that give the Mother Church “jurisdiction” over all church affairs are in conflict with this local charter and bylaws, and Article 5 of the Constitution of the Mother Church gives church congregations the power to ‘acquire and hold either personal or real properties, and have all the rights and obligations in that capacity.’”329 The court then concluded that “the presumptive rule of majority representation must result in judgment for the majority faction of St. Sava, under the deeds, the local charter and bylaws, and the Constitution of the Mother Church.”330

Yet, this analysis is problematic for at least two reasons. First, the Minnesota Supreme Court seems to be following the Swarmstedt Court’s example by offering an authoritative construction of a religious constitution.331 Yet, an alternative construction of Article 5, for example, might be that local churches had all of the rights and obligations of ownership within the general parameters set by the constitution, e.g., those giving the Mother Church jurisdiction over church affairs such as the disposition of church property.

When there is a conflict between provisions of a denominational constitution, one would expect courts to be very wary before offering a definitive interpretation that contradicts one offered by those most familiar with the constitution. Else, one might have, in the words of the Watson Court, “an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.”332 Secondly, it is not at all clear that the presumptive rule of majority representation should apply in a case like this involving a hierarchical church. The Court’s discussion of the presumptive majority representation rule was in the

326 Piletich, 328 N.W.2d at 698.
327 Id.
328 Id. at 700.
329 Id. at 702.
330 Id.
331 See notes 19-66 and accompanying text supra (discussing the Swarmstedt Court’s authoritative construction of a religious constitution)
332 Watson, 80 U.S. at 729.
context of a non-hierarchical church, and it is not clear that courts can or should split the difference in this way when the relationship is allegedly both hierarchical and non-hierarchical.

The Kentucky Supreme Court found that a semi-hierarchical arrangement existed in Bjorkman v. Protestant Episcopal Church in the United States of America of the Diocese of Lexington. A disagreement over property ownership arose when St. John’s Protestant Episcopal Church of Bellevue and Dayton seceded from PECUSA. After withdrawing in 1978, St. John’s conveyed all of its property in 1980 to The Anglican Catholic Parish of St. John the Evangelist, Incorporated. The Kentucky court noted that the church property was acquired exclusively by the efforts of the local congregation; that through the years title to the property was held by the church trustees and later by a non-profit corporation created by them known as St. John's Protestant Episcopal Church of Bellevue and Dayton, a Kentucky corporation; and that St. John's freely engaged in transactions such as purchase, encumbrance, and sale of its real property without any involvement by PECUSA.

PECUSA noted that Canon 45 of its own Constitution “purports to prohibit the encumbrance or alienation of any consecrated church or chapel without the consent of the bishop of the diocese.” However, the court noted that “St. John's acquired the property with no assistance from PECUSA; that the property was managed and maintained exclusively by St. John's; that St. John's improved and added to its property; and that PECUSA deliberately avoided acquisition of title or entanglement with the property to ensure that it would not be subject to civil liability.” From this evidence the court concluded that the record was “clear that PECUSA's relationship with St. John's was exclusively ecclesiastical and St. John's was at all times in control of its temporal affairs,” and held that the property belonged to the local church.

Yet, given the constitutional canon cited by PECUSA, it is difficult to see how the court could find that the relationship was exclusively ecclesiastical. Rather, the relationship seems to have involved more

---

333 See notes 88-92 and accompanying text supra (discussing the distinctions offered in Watson).
334 759 S.W.2d 583.
335 Id. at 584.
336 Id.
337 Id. at 586.
338 Id. at 587.
339 Id.
340 Id.
than that. In his dissent, Chief Justice Stephens suggested, “For lo these many years the successors to the vestry of 1907 have grown and thrived because of their membership in PECUSA. Because of a disagreement with national church policy, St. John’s cannot now repudiate a legal document executed 81 years ago.”

One issue raised by these opinions is whether the courts were correct that these denominations were hierarchical only with respect to ecclesiastical concerns. While there is no apparent reason why churches should not be able to affiliate with national organizations solely for ecclesiastical matters and maintain local control over secular matters if that is agreeable to both the local and national organization, a separate question is whether a local church should be able to do this, even if the national organization does not provide this option.

Yet another issue is whether the courts are exceeding constitutional bounds by offering authoritative interpretations of the denominational constitutions. The Jones Court cautioned that civil courts must “defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization,” and these state courts might be violating the rule set out in Jones. Even if the courts can escape that charge, there are still the institutional competence concerns articulated in Watson.

A complicating factor in the analysis of intra-church property disputes is that the range of religious organizational types may not fit neatly into the law’s categorization. Indeed, some commentators contend that labeling a church hierarchical, semi-hierarchical, or non-hierarchical is itself an exercise in arbitrariness.

---

341 Bjorkman, 759 S.W.2d at 588 (Stephens, C.J. dissenting).
342 Arlin M. Adams & William R. Hanlon, Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment, 128 U. Pa. L. Rev. 1291, 1331-32 (1980) (“A church may choose to affiliate with a separate hierarchical religious organization for certain purposes, consenting to the latter’s “authority” to resolve questions of doctrine and practice for that association, and at the same time retain its autonomy and its right to prescribe the use and control of its property.”).
343 Jones, 443 U.S. at 602.
344 See note 332 and accompanying text supra.
345 Cf. Hassler, supra note 186, at 407 (2008) (“For the purposes of this article, churches whose organizational structure falls somewhere between the extremes of hierarchical and congregational will be referred to as ‘semi-hierarchical.’”)
IV. Conclusion

Current law regarding church property disputes does not adequately serve the needs of local or national religious organizations. Not only are different state courts deciding relevantly similar cases differently when there are no express provisions regarding property ownership and control, but they are also treating similar cases dissimilarly even when there are such express provisions. This makes sensible planning very difficult for both local and national organizations.

It is simply unclear whether the chaotic state of the current jurisprudence makes the current system constitutionally vulnerable. Thus, it may be that the Presbyterian Church and Jones Courts were willing to embrace the neutral-principles-of-law approach because they optimistically believed that such an approach would adequately protect the interests of denominational churches. If that assessment was in error and the protection for denominational churches is constitutionally inadequate because, for example, denominational interests might not be protected notwithstanding express trust provisions within the denominational constitution and the local bylaws or articles of incorporation, then the whole jurisprudence may require revisiting as a constitutional matter.

Even if the Constitution does not require that the jurisprudence be revisited, current matters are simply too chaotic. Neither local nor denominational churches can adequately protect their interests given the great uncertainty that exists in this area. For example, it is simply unclear whether or under which conditions states must simply defer to claims by denominational churches that decisions by local churches regarding the disposition of property are void and of no legal effect. Yet, decisions regarding affiliation and disaffiliation are difficult enough without adding complexity and uncertainty because of ambiguous or

347 Ross, supra note 181, at 305 (“The law would better serve the needs of both national denominations and their local congregations if both sides were able to make more accurate predictions about the outcome of property disputes.”)

348 Adams & Hanlon, supra note 342, at 1335 (“State courts willing to inject their own preferences regarding church polity often will be able, in the absence of an express provision regarding church property, to adopt the presumption reflecting their own predilections.”).

349 Id. (“National and local churches alike continue to face the prospect of conflicting results depending upon the state of adjudication.”). See also Nathan Clay Belzer, Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils, 11 St. Thomas L. Rev. 109, 135 (1998) (“if religious institutions cannot predict the outcomes of potential disputes their ability to organize church polity is significantly curtailed”).

350 See notes 181-83 and accompanying text supra (discussing the Jones Court’s remarks concerning how denominational churches could assure that their interests would be protected).
inconsistent treatment in the courts. The potential for the disappointment of justified expectations regarding crucial matters is increased exponentially by the Court’s unwillingness to clarify this area.

While the Court has suggested that both the deferential and the neutral-principles-of-law approaches are constitutionally permissible, the Court has said much too little about the latter approach. The Court has specified some of the factors that might be considered in that approach, but has said so little about what those factors mean and the relative weighting to be given to them that the Court has given state courts almost unlimited discretion with respect to how to decide relevantly similar cases.

It seems reasonable to expect that there will be more disaffiliations in the coming years as national organizations continue to adopt canons with which particular local organizations disagree. Yet, this makes the Court’s clarifying the relevant jurisprudence all the more important. As a matter of public policy if not constitutional mandate, the Court must revisit this jurisprudence to clear up a chaotic area of law.

---

351 Many but not all cases involving disaffiliation have involved congregations that have been reluctant to accept progressive policies of a national church. See Hassler, supra note 186, at 404