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Churches and the Free Exercise of Religion

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ARTICLES

CHURCHES AND THE FREE EXERCISE OF RELIGION

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The first amendment says that "Congress shall make no law . . . prohibiting the free exercise" of religion. This rule is most often used to protect individuals (religious speakers, pacifists, people claiming public benefits.)[1] This is hardly surprising. We naturally think that free exercise is an individual right, as we think that religion is a personal and private affair. I want to dispute (more modestly, to qualify) that view. I will argue that we should (sometimes) see the freedom of religion as a group right, which can conflict with, and take precedence over, individual rights.

As a way of making these points, I want to consider the law about disputes over church property. The cause of such a dispute is often a schism. A local congregation divides over some controversial issue and can no longer live together under the same roof. Or a local church wants to split off from a larger religious community. Who gets the building and the land it sits on?

These fights involve real estate, so they are generally fought in the state courts. But the Supreme Court has addressed their constitutional aspects on several occasions, and its views have recently undergone some change. I will begin by stating the first amendment rules that the Court has laid down. I then want to examine the principles behind these rules. I will argue that there are actually two distinct principles, which sometimes point in opposite directions. The first is a principle of individual freedom. The second is a principle of group freedom. Under the Court's rules, the two principles collide (and the first generally prevails) when church factions have failed to

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1. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987); United States v. Seeger, 380 U.S. 163 (1965); Cantwell v. Connecticut, 310 U.S. 296 (1940).

provide in advance for the unhappy contingency of discord. I will suggest that in these cases we should opt for the principle of group freedom.

I. THE RULES GOVERNING CHURCH PROPERTY DISPUTES

The oddest aspect of this corner of the law is that the Court has allowed the states to choose between two rules for resolving church property disputes,[2] and the rules can produce diametrically opposite results. The first is the rule of "neutral principles"; the second is the rule of "deference" (to some authority in the church polity).

The neutral principles rule is the Court's most recent pronouncement on the subject.[3] Suppose that the local Presbyterian church, a member of the Presbyterian Church of the United States, wishes to sever ties with the general church on account of its decision to ordain women. There then ensues a dispute between the local and the general church over who shall control the building and land hitherto used by the local church. The neutral principles rule solves this dispute in two steps. The first is to collect the relevant documents—the deed, the corporate charter of the local church (if it has one), the constitution of the general church—and apply to them the usual principles of trust and property law.[4] The deed might give title to the local church (incorporated as a membership corporation), or to trustees chosen by the local church (organized as a trustee corporation, or as an unincorporated association).[5] But the local church's charter or the general church's constitution might contain an express trust provision in favor of the general church. One or the other might say, for example, that "[a]ll real property now or hereafter acquired by the local church shall be held in trust for the use and benefit of the Presbyterian

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2. [T]he First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters[.]"

Jones v. Wolf, 443 U.S. 595, 602 (1979) (quoting Maryland & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (emphasis in original)).

3. It was developed in 1979 in Jones v. Wolf, 443 U.S. 595 (1979).

4. Some courts will restrict their inquiry even more narrowly and look only at the language in the deed to the property. This is called the "formal title" doctrine. *See, e.g., Maryland & Va. Churches*, 396 U.S. at 370 (Brennan, J., concurring).

5. *See* Kauper & Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1538-43 (1973).

Church of the United States."[6] If there is no such reservation, the local church wins.

Step two is necessary when it is not clear who the "local church" is. If the pastor, the local administrative body, and the congregation are unanimous in their desire to sever ties with the general church, this question does not arise. But suppose that the local congregation is divided 200-150. Which faction should a court side with? Here neutral principles favor a presumption of majority rule.[7] The minority can rebut the presumption by pointing to some provision in the local charter, or in the constitution of the general church, dealing with identity of local churches. But if the court really sticks to neutral principles, the minority may be hard put to make this rebuttal. Rules of ecclesiastical governance cannot easily be stated in neutral (*i.e.*, secular legal) terms. Suppose that the general church constitution directs its governing body to "order whatever pertains to the spiritual welfare of the churches under its care."[8] Whether this embraces questions of property management depends on how one interprets the term "spiritual welfare," and that is a theological question. If this is the only available rebuttal, either the local majority wins or the court must depart from neutral principles.

Let me turn now from neutral principles to the rule of deference. This rule is easier to state. It is this: if a court finds that there is a mechanism of church government with authority to decide the property dispute, the court must defer to the decision of that body.[9] I must clarify two points about this statement. If there has been a schism and the church government favors faction A, faction B will dispute the church's governmental authority. Hence the court must determine authoritativeness from an *ex ante* perspective. For purposes of making this determination the Supreme Court distinguishes between hierarchical and congregational churches. The former is a general organization of churches "having similar faith and doctrine with a common ruling convocation or ecclesiastical

6. *Cf. Wolf*, 443 U.S. at 600 n.2.

7. It is not self-evident that they should. If a majority of the people of Kentucky voted to secede from the Union we would not respect their wishes. But the neutral principles approach does, as I am about to explain, let the minority show that the local church is like Kentucky in this respect.

8. *See Wolf*, 443 U.S. at 609 n.7, (quoting the BOOK OF CHURCH ORDER OF THE PRESBYTERIAN CHURCH § 16-7(19) (1972)).

9. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871).

head."[10] Here the Court recognizes as authoritative the decision of the highest tribunal within the church organization. A congregational church is an autonomous local unit. While it might affiliate with a larger organization, it may also withdraw at will.[11] Here the Court generally follows the wishes of the majority, and the rule of deference merges with the rule of neutral principles.[12]

The authority of the church polity depends on the nature of the dispute as well as on the church's internal organization. Suppose there is no schism and faction B concedes, even *ex post*, the authority of church tribunals over matters within their jurisdiction. Faction B might still argue that the church tribunals lack authority over this particular dispute, because it involves no religious issues. In principle this objection is sound. If the local pastor buys a car from a member of his congregation and fails to pay, the matter is not one for a church court. But church property disputes invariably involve issues of "doctrine and practice"[13] (in our example, the ordination of women). And in such cases the courts will not inquire into the jurisdiction of church tribunals.[14]

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10. *Kedroff*, 344 U.S. at 110. *See also Watson*, 80 U.S. (13 Wall.) at 726.

This is obviously a very rough cut. We might subdivide it further into episcopal and presbyterian forms. The former give all authority to certain ecclesiastical officers. Examples include the Episcopal, Methodist, Roman Catholic, and Eastern Orthodox Churches. The latter give authority "to an ascending succession of judicatories composed of laymen as well as ministers." Examples include the United Presbyterian Church of North America, the Presbyterian Church in the United States, and the Assemblies of God. *See* Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1292 n.6 (1980).

11. Examples include the Quakers, Jewish congregations, the Church of Christ, and the numerous Baptist bodies. Adams & Hanlon, *supra* note 10, at 1292 n.6.

12. Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); *Watson*, 80 U.S. (13 Wall.) at 724-25.

13. *Wolf*, 443 U.S. at 616 (Powell, J., dissenting).

14. *Serbian Eastern Orthodox Diocese*, 426 U.S. at 713-14.

If the church tribunal has jurisdiction over a case, it will award the property to the party holding what it considers to be orthodox views in the underlying dispute. A donor of property might preclude this result by including an express dedication in his deed or will. "If, for example, the donor expressly gives his church some money on the condition that the church never ordain a woman as a minister or elder, . . . he is entitled to his money back if the condition is not fulfilled." Presbyterian Church v. Hull Church, 393 U.S. 440, 452 (1969) (Harlan J., concurring) (citations omitted). But such dedications are unenforceable if they require the court to decide a religious question. That makes drafting difficult, because it is precisely matters of faith that such donors are interested in. *See* Mansfield, *The Religion*

II. INDIVIDUAL FREEDOM

In Section I, I tried to show that the Court has proposed two different rules, and that the rules can lead to conflicting results. In this section I want to look at one explanation for those rules. Both of them can be seen as efforts to promote the goal of individual freedom (though the rule of neutral principles promotes it more vigorously, which explains why the rules sometimes conflict). There are three aspects to this freedom, and they have a curiously alphabetic character: association, belief, and contract. I must apologize for taking them up out of alphabetical order.

A. *Freedom of Contract*

One might say that in devising rules to resolve church property disputes, the Court has tried to protect the private ordering of religious activity through voluntary agreements. The rule of neutral principles, for example, can be overridden by contract:

> [T]he neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. . . .
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> . . . At any time before the dispute erupts, the parties can ensure [any desired disposition of property]. They can modify the deeds or the corporate charter . . . . Alternatively, the constitution of the general church can be made to recite an express trust . . . . And the civil courts will be bound to give effect to the result indicated by the parties . . . .[15]

The rule of deference, though it seems to squelch individuals in the name of corporate religion, is also sometimes justified by freedom of contract.

> "The right to organize voluntary religious associations . . . and to create tribunals for the decision of controverted questions of faith . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent . . . if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed."

Clauses of the First Amendment and the Philosophy of the Constitution, 72 CALIF. L. REV. 847, 866-68 (1984).

15. *Wolf*, 443 U.S. at 603-06.

> . . . "[T]he decisions of the proper church tribunals . . . are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."[16]

According to this view people get together and organize churches by a kind of corporate contract. Membership is voluntary. New members consent to the rules when they contract in. And the parties can rewrite the contract at any time before a dispute arises. The Court does not say why church property rules should preserve this contractual system, but there is an obvious explanation. It is that freedom of contract is a way of exercising and enlarging the autonomy of the individual contractors. It lets people do what they want, and secure the aid of others in doing so. This is particularly important here, where what people want to do is to practice their religion.[17] In short, freedom of contract serves the free exercise of religion.

B. *Freedom of Association*

The contracts the Court has in mind, however, are not simple two-party agreements. They bind together a number of people, like the contracts that create corporations. In fact the contracts in question often *do* create corporations. People may organize a church body as a membership corporation. (The members are the corporate body, but they do not hold stock.)[18] They may also write a constitution for the general church—a kind of social contract for a religious society. When property disputes arise, the parties to the dispute will usually be bodies of this kind—the local church, the general church—and not individual members.

But according to the principle of individual freedom, these groups are nothing more than aggregations of their members. Joining together to form a group is just a more complex version of contracting. We call it freedom of association rather than freedom of contract, but the difference is one of size rather than kind.[19]

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16. *Serbian Eastern Orthodox Diocese*, 426 U.S. at 711-12, (quoting *Watson*, 80 U.S. (13 Wall.) at 728-29, and Gonzalez v. Archbishop of Manila, 280 U.S. 1, 16 (1929)). *See also Presbyterian Church*, 393 U.S. at 446-47.

17. *See generally* C. FRIED, CONTRACT AS PROMISE (1981); Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1400-21 (1981).

18. Kauper & Ellis, *supra* note 5, at 1539-40.

19. *Cf.* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 199-200 n.14 (Cook ed. 1923); A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 178 (J. Mayer & M. Lerner ed. 1966).

It follows that associations (church groups) have, in the final analysis, no independent interest of their own in freedom of religion. Though they can be parties to litigation and hold title to real estate, those are procedural devices for simplifying the unwieldy process of adjusting a multitude of individual claims. Associations exist to promote the freedom of their members. As Ira Mark Ellman notes: "[I]t is hard to see how the central organization could have any independently derived rights. The organizational entity deserves constitutional protection because it is an instrument of the faithful in advancing their religious beliefs."[20]

Dissent presents a difficulty for this view of churches. How can a church be said to serve its members when they are divided (say, over the ordination of women)? The membership contract provides one solution. If people who join the church agree to be bound by decisions from which they dissent, the church serves this larger intention of each member even in cases of division. But suppose that a court cannot find such an agreement?[21] In that event the principle of freedom of association suggests that the fractured church should subdivide into smaller, less fractious groups, each of which can serve its members without internal conflict. In that event, to put it bluntly, schism is a good thing.

The rule of neutral principles carries out this idea[22] by letting local groups split off from the general church and take their property with them.[23] Dissent within local churches is a

20. Ellman, *supra* note 17, at 1404. *See also* Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U.L.J. 275 (1986); Gedicks & Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1584-85 (1987); Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U.L. REV. 391, 422 (1987); Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 761-78 (1986); Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83.

21. This will frequently happen since, as I will explain presently, courts are not permitted to interpret the rules of internal governance expressed in ecclesiastical documents.

22. This is not the *only* idea behind the rule. Another is the idea that courts should not decide religious issues, which I discuss below.

23. This is not its inevitable effect. The general church can avoid it by taking title to local property in advance of a dispute, or by putting careful language in the local charter or the general constitution. *Compare* Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 868 (1976) *with* Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied*, 396 U.S. 1041 (1970), Maryland & Va. Churches v. Sharpsburg Church, 396 U.S. 367 (1970); Jones v. Wolf, 443

trickier problem. They too can be subdivided into smaller, more harmonious groups, but one of them will be left without a church to worship in.[24] Under these circumstances majority rule best carries out the ideal of individual freedom. If our ultimate concern is the religious liberty of the individual members (and if we assume that one member's liberty is as important as another's), the best we can do is to satisfy as many individuals as possible. This has long been the solution for property disputes in congregational churches. But the rule of neutral principles lets courts also apply it (at the local level) to hierarchical churches.

C. *Freedom of Belief*

Freedom of association and freedom of contract go a long way toward explaining the rules of neutral principles and deference that the Court has applied to church property disputes, but they are not the only principles at work. Another factor in the equation—in fact, the one most frequently mentioned—is the undesirability of having civil courts decide "questions of discipline, or of faith, or ecclesiastical rule, custom, or law."[25] It is a strong point in favor of both the neutral principles rule and the rule of deference that they make such an inquiry unnecessary—the former by tying the outcome to property and trust law,[26] the latter by deferring to the decisions of church courts.[27] The Court rejected a third rule (the departure-from-doctrine rule, which I discuss below) precisely because it required such an investigation.[28]

The reason usually given for not deciding theological questions is the plea of judicial incompetence.[29] Theological

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U.S. 595 (1979). By doing so it employs freedom of contract to override the default rule in favor of local churches. But that is consistent with the principle of individual freedom.

24. Naturally, it is hard to divide the property between two groups when the major asset is the church and the land it stands on. Time-sharing is a possibility. Kentucky actually has a statute that requires it. K.R.S. § 273.120. But it has been interpreted to apply only until a winner is chosen, and only to property acquired by donation. *See* Jones v. Johnson, 295 Ky. 707 175 S.W.2d 370 (1943); Thomas v. Lewis, 224 Ky. 307, 6 S.W.2d 255 (1928).

25. Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871).

26. *Wolf*, 443 U.S. at 602-03; *Maryland & Va. Churches*, 396 U.S. at 368.

27. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09, 712-24, 714 n.8 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 113-16 (1952).

28. Presbyterian Church v. Hull Church, 393 U.S. 440, 449-50 (1969).

29. Here is what the Court said in *Watson*, 80 U.S. (13 Wall.) at 729:

> Each of these [churches] . . . has a body of constitutional and

disputes, it is often said, are simply too abstruse to be fairly and judiciously adjudicated by civil courts. There is obviously something to this. It would be hard for a judge to say whether it was orthodox to assert "[t]hat the birth of the spirit is not necessary except to see the church here in time; that there is no hell beyond this life; and that goats are sheep in disobedience."[30] Such theological questions might be like political questions, for which there are no "judicially discoverable and manageable standards."[31], or like questions committed to agency discretion, for which there is "no law to apply."[32]

I think there is more to it than that, though. After all, the English courts decide such issues.[33] The state courts did too, until the Supreme Court told them to stop in 1969.[34] And not all ecclesiastical questions are so mind-numbing that their answers must be taken on faith. Quite apart from the question of competence, there must be some affirmative reasons for not wanting the courts to do theology. We can discover these by considering why the Court rejected the departure-from-doctrine rule.

This rule actually had two parts. The first was the implied trust doctrine, which held that property given to a church was impressed with a trust in favor of the doctrines and usages prevailing at the time of the contribution.[35] As the word "implied" suggests, this was not a rule for carrying out a settlor's intent. Calling the contribution a trust rather than a gift was a fiction.[36]

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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 and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

30. Canterbury v. Canterbury, 100 S.E.2d 565, 569 (W. Va. 1957).

31. Baker v. Carr, 369 U.S. 186, 217 (1962).

32. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. Rep. 752, 79th Cong., 1st Sess., 26 (1945)).

33. *See* Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1145-49 (1962).

34. Presbyterian Church v. Hull Church, 393 U.S. 440 (1969).

35. Attorney General v. Pearson, 3 Mer. 353, 36 Eng. Rep. 135 (Ch. 1817); Craigdallie v. Aikman, 1 Dow. 1, 3 Eng. Rep. 601 (H.L. 1813).

36. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347, 350.

The second part of the rule was the departure-from-doctrine standard, which held that when there were property disputes, courts should prefer the group faithful to the trust.[37] This rule was not often applied to hierarchical churches. But when it was, the general church usually won. Courts tended to use denominational affiliation as a proxy for religious tenets (so that leaving the general church *was* a departure from doctrine). Besides, it was often a fundamental doctrine of hierarchical churches that the hierarchy controlled doctrine. The rule was applied more often to congregational churches. There it allowed a local minority to prevail if the majority tried to change denominations or renounce important theological principles.[38]

Why was there this tendency to "imply" such trusts and enforce them against departures from doctrine? The obvious explanation is that the law saw churches as entities, defined by doctrinal coherence, which ought to be held together.[39] To put it bluntly, the law saw heresy as a bad thing, whether because (i) it led to social instability, or (ii) it frustrated the purposes of churches as legal persons,[40] or perhaps (iii) it led to damnation. I will have more to say about this point of view in the next section. Now I want to emphasize just two things about it. The first is its plainly undemocratic aspect. Its most notable effects were to sustain the authoritarian character of hierarchical churches and to permit rule by orthodox minorities in congregational churches. The second is that it saw belief as a social phenomenon. Courts did not actually decide where revealed truth lay. But they did measure the beliefs of disputants against what their group had believed in the past, and held for the side that clung to that social reality.

In *Presbyterian Church v. Hull Church*[41] the Supreme Court rejected the departure-from-doctrine standard. *Hull Church* is an odd case, because it concerned a dispute in a hierarchical church (where the departure-from-doctrine standard was not often used), and even more so because the state court ruled in favor of the local churches (which typically lost when the stan-

37. *Id.*

38. Note, *supra* note 33, at 1151-52, 1167-75.

39. *See* Kauper, *supra* note 36, at 355; Note, *supra* note 33, at 1168.

40. *See* Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953).

41. 393 U.S. 440 (1969).

dard *was* used).[42] We have to abstract from those anomalies to appreciate the true significance of the Court's decision.

The Court's explanation of why the departure-from-doctrine standard violated the first amendment was brief:

> If civil courts undertake to resolve such [doctrinal] controversies in order to adjudicate the property dispute, the hazards are ever present of *inhibiting the free development of religious doctrine* and of implicating secular interests in matters of purely ecclesiastical concern.[43]

This assumes that the "free development of religious doctrine" is something the first amendment is designed to promote. That is not self-evident. Loosely translated, it means that heresy is a good thing.[44] It may be,[45] but not from the point of view of the orthodox faithful. Behind the Court's assumption about the virtue of heresy is the further assumption that the first amendment stands in the shoes of the heretic. As the Court has said in a related context, "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[46] In other words, the freedom of belief that the first amendment protects is that of individuals, not groups.

The most obvious effect of *Hull Church* was to free congregational majorities to believe as they like. They no longer need to fear the charge that they have departed from doctrine, and thus have lost the use of property dedicated to orthodox beliefs. Rather, they are free to operate democratically and to do what the majority wants. The case thus strikes a blow for freedom of association as well as for freedom of belief.[47]

The case may have a similar effect within hierarchical churches, though this is a subtle issue. *Hull Church* expressly rejected the departure-from-doctrine standard. It did not, however, expressly reject the implied trust doctrine.[48] A court can still rule that local church property is impressed with a trust

42. Presbyterian Church v. Hull Church, 224 Ga. 61, 159 S.E.2d 690 (1968).

43. 393 U.S. at 449 (emphasis added).

44. *Id.* at 446 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.")).

45. The notion does have a familiar first amendment ring about it. *See* Smith, *The Special Place of Religion in the Constitution*, *supra* note 20, at 92.

46. Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981). *See also* United States v. Ballard, 322 U.S. 78, 86 (1944).

47. Kauper, *supra* note 36, at 375.

48. 393 U.S. at 449-50.

in favor of the general church. The general church will then prevail in property disputes under either the rule of neutral principles (which looks to trust law) or the rule of deference (which looks to the church hierarchy). But state law may require that the two parts of the rule stand or fall together. This is what the Georgia courts said on the remand of *Hull Church*.[49] In that event there will be no trust in favor of the general church. When a dispute arises, the Church's property will be pulled away by centrifugal force.[50]

III. GROUP FREEDOM

I now want to look at a very different kind of explanation for the Court's behavior in this area. It is this: the freedom the law seeks to protect is not the freedom of individual church members but the freedom of churches as groups. The group is a legal and moral person distinct from its members; its interests may conflict with theirs. Its freedom is not a compound of individual liberties, like the effort of ten horses drawing a single load;[51] it is a right to act in ways peculiar to the group. The freedoms of association, belief, and contract discussed in Section II play no part in this scheme of things.

Cases applying the rule of deference sometimes make this view explicit. In such cases, the central authority in a hierarchical church disputes the ownership of property with a schismatic local church. The property dispute has arisen from a disagreement over some point of theological doctrine or ecclesiastical governance. The rule of deference requires that a court decide in favor of the general church. (More accurately, it requires a court to respect the disposition of the case decreed by the highest authority within the general church.) The reason usually given is that the free exercise rights of the organization require that outcome.

Consider *Serbian Eastern Orthodox Diocese v. Milivojevich*.[52] The dispute there concerned the property and assets of the American-Canadian Diocese. One of the contending parties

49. Presbyterian Church v. Eastern Heights Church, 225 Ga. 259, 167 S.E.2d 658 (1969).

50. Thus it is no accident that the Presbyterian Church in the United States, though it won the battle in *Hull Church*, ultimately lost the war in the case, and in the next case to come before the Supreme Court. *See* Jones v. Wolf, 443 U.S. 595, 599-601 (1979).

51. *See* W. HOHFELD, *supra* note 19, at 199-200 n.14. *See also* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

52. 426 U.S. 696 (1976).

was the Serbian Orthodox Church, an episcopal church governed by the Holy Assembly of Bishops (which had legislative and judicial authority) and the Holy Synod (an executive body). The Church was opposed by the diocesan bishop, whom the Synod had suspended and the Assembly had defrocked for acts of defiance. The Court held for the general church, saying:

> [T]he First and Fourteenth Amendments permit hierarchical *religious organizations* to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised . . . the Constitution requires that civil courts accept their decisions as binding upon them.[53]

The split in *Milivojevich* is similar to the split within the Russian Orthodox Church at issue in *Kedroff v. St. Nicholas Cathedral*.[54] The cathedral was held by a New York corporation, and New York had passed a statute giving the local archbishop (Leonty) beneficial use of the property. Leonty had been chosen by the American churches, which began to act on their own after the Russian Revolution because the Moscow hierarchy was in some disarray. After the turmoil subsided, the Mother Church appointed its own candidate (Benjamin) as archbishop. Benjamin disputed with Leonty over the right to use the cathedral. The Court held that the case turned on the principle of

> *freedom for religious organizations* . . . [the] 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 . . . [is] a part of the free exercise of religion . . . .
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> . . . New York's [statute] directly prohibits the free exercise of *an ecclesiastical right, the Church's choice* of its hierarchy.[55]

Commenting on this case, Mark DeWolfe Howe concluded that this statement would have considerable significance if it were taken seriously: "Not only does it imply that the Church as a spiritual body has liberties which will be given protection directly rather than derivatively, but it gives that protection to liberties which, in their essence, differ from those possessed by the members of the Church."[56]

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53. *Id.* at 724-25 (emphasis added).
54. 344 U.S. 94 (1952).
55. *Id.* at 116, 119 (emphasis added).
56. Howe, *supra* note 40, at 92.

The Orthodox Church cases are not the only evidence for this view. In fact, with the exception of two recent cases stressing the importance of neutral principles,[57] one might fairly say that it has been a dominant theme in the Court's handling of church property disputes.[58] But the Court has never tried to explain how a church group can have its own free exercise right, separate and distinct from the rights of its members. That is the question I now want to explore.

A. *Alternatives to Contract*

The principle of individual freedom holds that individuals form groups by contracting together. But this is not how many people join religious groups. One often becomes a member without doing any conscious act. A child of Jewish parents is born a Jew.[59] The rite of initiation for Christian churches is baptism, which is often administered to infants. The effect of baptism is usually understood to be permanent. It is not like a contract that can be breached, nullified, or rescinded. One who leaves the church and then reenters would not be rebaptized.[60]

Freedom of contract is a way of exercising and enlarging the autonomy of the individual contractors. The good envisioned by autonomy is that of choosing one's own "life as a free and rational being."[61] But that is not necessarily what people who join religious groups think they are doing. They might say that they are not choosing their own lives—it is God who chooses them, sometimes whether they like it or not. Jews con-

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57. Jones v. Wolf, 443 U.S. 595 (1979); Maryland & Va. Churches v. Sharpsburg Church, 396 U.S. 367 (1970) (per curiam).

58. *See* Presbyterian Church v. Hull Church, 393 U.S. 440, 448 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (per curiam); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871); *cf.* Ponce v. Roman Catholic Church, 210 U.S. 296 (1908).

Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872), involved a dispute within a congregational (Baptist) church. As I explained in Section I, such cases are consistent with a rule of deference because the church itself gives authority to the majority. Thus in *Bouldin* the Court set out to "inquire whether the resolution [by which a minority took control of the property] was the act of the church . . . ." It concluded that it was not, because in "a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church." *Id.* at 140.

59. R. SCHERER, AMERICAN DENOMINATIONAL ORGANIZATION: A SOCIOLOGICAL VIEW 131 (1980).

60. *See, e.g.*, R. MCBRIEN, CATHOLICISM 739-40, 751 (1981).

61. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1226 (1979).

sider themselves the "chosen people."[62] Christians frequently speak of themselves as having been 'called' by God. (St. Paul says that he was stricken to the ground and blinded so that he would get the point.[63])

The faith to which many Christians say they are called is generally spoken of as a gift from God.[64] Of course they must assent. But the nature of God's demands may undermine the very notion of autonomy, because God is often understood to demand submission of the individual's intellect and will.[65]

These ideas about baptism and faith are hard to reconcile with individualist notions of freedom of contract and autonomy.[66] Contract principles do not explain the bonds that unite many individuals to their churches. Nor is autonomy the good that they seek in joining. In the case of infant baptism, it seems that the churches are playing an active role of their own—reaching out to claim members. In some descriptions of faith it seems as though the individual plays a passive role—being called and giving over her will to God. The idea of churches as non-associative groups, to which I now turn, helps to explain these anomalies.

B. *Alternatives to Association*

Freedom of association has several distinctive qualities. It envisions a group that is identical to the sum of its members. The group is held together by contracts among the members. When there is dissent that the contracts do not resolve, the group must rely on majority rule or split up. (Those solutions respect the individualist assumptions underlying the group.) Individuals associate in this way to advance their own interests by concerted action. The group is thus a procedural device for

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62. *See* Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 791-92 (1986).

63. *Acts* 9:3-20.

64. *John* 6:44-46, 6:65 ("No one can come to me unless the Father who sent me draws him"); *Ephesians* 2:8 ("[S]alvation is yours through faith. This is not your own doing, it is God's gift"); Second Vatican Council, *Dogmatic Constitution on Divine Revelation* ch. 1, art. 5 (1965).

65. *Luke* 22:42 ("[N]ot my will, [Lord,] but thine").

66. I do not mean to suggest that the views I have mentioned are standard across Christian denominations. There are sects whose norms are more compatible with autonomy and freedom of contract than the examples I have used. *See, e.g.*, Smucker, *Rauschenbusch's View of the Church as a Dynamic Voluntary Association*, in VOLUNTARY ASSOCIATIONS: A STUDY OF GROUPS IN FREE SOCIETIES 159 (D. Robertson ed. 1966); Gustafson, *The Voluntary Church: A Moral Appraisal*, in *id.* at 299.

coordinating large numbers of similar interests and amplifying individual efforts.

People do not look at churches (particularly hierarchical ones) in this way. The church is usually viewed as a kind of unified whole, different from the sum of its parts. The glue that holds it together is not contractual. The method for dealing with dissent is often not majoritarian or democratic. The church is thought to be something real with a good of its own, not a procedural device for advancing members' interests.

Consider first the idea of the church's unity and distinctness. This understanding of what a church is is expressed by a variety of metaphors. One is the idea that the church is the "body of Christ":

> For Christ is like a single body with its many limbs and organs, which, many as they are, together make up one body. For indeed we are all brought into one body by baptism, in the one Spirit, whether we are Jews or Greeks, whether slaves or free men[.][67]

This suggests a unified, organic whole, and something more.[68] The body is animated by the Holy Spirit.[69] And Christ is the head.[70] These contributions, which keep the body going, are not made by the individual members.

Another metaphor for the same idea is that the church is the "people of God."[71] This comparison, though political rather than biological, stresses the same themes of unity and distinctness. The notion of the "people of God" is not Christian but Jewish in origin. Israel understood itself as the people of God, called by God.[72] But the people were a whole, a corporate personality. "The individual [took] on meaning, importance, and even destiny insofar as the individual [was] involved with the people."[73] Many Christians understand their churches in the same way. Consider Rudolf Bultmann's description:

> Not the individual but the "church" is called, to it belongs the promise. . . . [T]he individual . . . finds

67. *Corinthians* 12:13. For a useful bibliography on the idea, see H. KUNG, THE CHURCH 225 (1967).

68. O. VON GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES 145 (G. Heiman ed. 1977).

69. *Ephesians* 4:4.

70. *Ephesians* 5:23; *Colossians* 1:18, 2:19.

71. *See* Second Vatican Council, *Dogmatic Constitution on the Church* ch. 2 (1964); A. DULLES, MODELS OF THE CHURCH 47-62 (1978).

72. *Exodus* 6:7, 19:5, 23:22; *Deuteronomy* 7:6, 14:2, 26:18.

73. R. MCBRIEN, *supra* note 60, at 593; E. GARDNER, THE CHURCH AS A PROPHETIC COMMUNITY 111-12 (1967).

> deliverance, but only because he belongs to the . . . community, not because of his personality.[74]

These metaphors do not imply that individual members are fused into one homogeneous lump. Churches do have members. But as I explained above, the members are not held together by contracts. Nor do they always govern themselves in the democratic, majoritarian ways typical of voluntary associations. Consider what the Roman Catholic Code of Canon Law has to say about the Pope:

> The bishop of the Church of Rome . . . is head of the college of bishops, the Vicar of Christ and Pastor of the universal Church on earth; therefore, in virtue of his office he enjoys supreme, full, immediate and universal ordinary power in the Church, which he can always freely exercise . . . .
>
> There is neither appeal nor recourse against a decision or decree of the Roman Pontiff.[75]

The Protestant Episcopal Church at the national level is governed by the Presiding Bishop and the General Convention. The General Convention is comprised of a House of Bishops (which elects the Presiding Bishop, subject to confirmation by the other House) and a House of Deputies (to which each diocese sends equal numbers of clergy and lay people).[76] Though the structure parallels a political government with a chief executive and a bicameral legislature, it is obvious that individual lay members do not exercise sovereign authority over church decisions.

Churches that have these characteristics (*i.e.* that are unified, distinct, non-associative) are not just procedural devices for aggregating individual actions. To say that they are "persons" is not a legal fiction.[77] They are, as Frederick Maitland said, "an ultimate and unanalysable moral unit: as ultimate and unanalysable, I mean, as is the man."[78] I have been arguing that churches are units, ultimate and unanalysable. I now want to address the sense in which they can be considered "moral" units.

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74. R. BULTMAN, JESUS AND THE WORD 47 (1958).

75. 1983 CODE c.331, 333, § 3.

76. Sirico, *Church Property Disputes: Churches as Secular and Alien Institutions* 55 FORDHAM L. REV. 335, 340 (1986).

77. *See* F. HALLIS, CORPORATE PERSONALITY Pt. I, ch. 1 (1930).

78. 3 F.W. MAITLAND, COLLECTED PAPERS 319 (1911).

C. *Alternatives to Individual Belief*

I said in Section II that the Supreme Court has often treated freedom of belief as applicable only to individuals. Here I will contend that churches as groups may also claim a right to the free exercise of religion. This is what I mean by saying that they can be "moral" units.

It is revealing to note that, regarding the ecclesiastical turmoil we are considering, fights are always over a *church*. Churches (buildings) symbolize the idea that it is good to worship God as a group. We need to make certain theological assumptions to explain why that should be. But the first point to notice is that people believe it to be so. Those who believe it is good to worship God as a group disagree with Justice Douglas's claim that "[r]eligion is an individual experience."[79]

I will confine my theological speculations about why we build churches to one example which suffices to make my point. The Roman Catholic tradition maintains that the church (as a group) acts as a mediator between God and his people. As one theologian expresses it, "God's relationship to us and our relationship to God is not exclusively, nor even primarily, individual and personal. It is corporate and communal." What the Catholic church calls sacraments are "actions which the Church performs, or means by which the Church makes grace available."[80] They are, in other words, understood as *group* actions, which an individual cannot perform.

A second kind of group action that people attribute to churches occurs within the group. Dietrich Bonhoeffer describes the church as an interpersonal community: "The community is constituted by the complete self-forgetfulness of love. The relationship between I and thou is no longer essentially a demanding but a giving one."[81] Here the action takes place on a horizontal rather than a vertical plane. The acts in question are not specific, ritualized observances, but something more like the activities that take place in families. These activities result in love between the members, an interpersonal rather than individual good.

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79. Wisconsin v. Yoder, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting).

80. R. McBRIEN, *supra* note 60, at 731, 733.

81. D. BONHOEFFER, THE COMMUNION OF SAINTS 123 (1963).

IV. Two Rules, Two Principles

I have explained that the law for dealing with church property disputes involves two rules and two principles. The two rules are: (i) neutral principles and (ii) deference. The two principles are (i) individual freedom and (ii) group freedom. In this Section I will argue that we should resolve all such disputes by using rule (ii) and principle (ii).

It would be tidy if I could begin by saying that there was a natural correspondence between the rules and principles—that neutral principles was married to individual freedom, and deference was married to group freedom. That is largely true but not entirely so. This is how they match up:

(Ri, Pi) The rule of neutral principles is perfectly consistent with individual freedom. The first part of the rule relies on property and trust law for disputes between general and local churches. This avoids inquiry into matters of belief, which are by hypothesis private. It also promotes association in smaller groups by letting local churches win more often. The second part of the rule is a presumption of majority rule within local churches. This also promotes freedom of association. Finally, neutral principles promote freedom of contract by allowing churches and members to override the default rules by advance agreement.

(Ri, Pii) The rule of neutral principles often frustrates the goal of group freedom. The first part of the rule pulls local churches away from hierarchical organizations in cases where the rule of deference would not. The second part imposes majority rule on noncongregational churches that cannot rebut the presumption.

(Rii, Pi) I said in Section II that the rule of deference can be seen as a way of promoting individual freedom. The rule binds dissenting members to the dictates of hierarchical church authorities, but this might follow from the dissenters' freedom of contract. Deference also requires majority rule in congregational churches, which promotes freedom of association.

I must now qualify those claims in light of my conclusions in Section III. We cannot rely on freedom of contract to justify hierarchical church rules if members do not contract in. The rule of deference in such organizations may simply be inconsistent with the principle of individual freedom.

> Moreover, the rule for congregational churches is not entirely consistent with the principle of individual freedom. Majority rule is democratic, but in church schisms it leaves the minority with nothing. Respect for the individual would seem to require a more even distribution of church assets. Clearly there is another principle at work.
>
> (Rii, Pii) The rule of deference matches quite well with the principle of group freedom. Both rule and principle say that courts should permit religious groups to act as they wish, and to resolve their own problems in their own way.

In short, there does seem to be a fairly natural correspondence between Ri and Pi, and between Rii and Pii. Stated more elaborately, the rule of neutral principles serves the goal of individual freedom; the rule of deference, the goal of group freedom. But there are still two matters unresolved. The first concerns the principle of group freedom. In a church schism there are, by definition, different contending groups. Why should the principle prefer one group over another? The second matter is even more fundamental: How can the law choose between group and individual freedom?

A. *Which Group Counts?*

The rule of deference prefers the general church over the local church in hierarchical organizations. It prefers the majority over the minority in congregational organizations. But liberal political philosophy holds that the government must treat all persons as worthy of equal concern and respect. Maybe the same should go for groups. It seems illiberal to make judgments about the worthiness of groups, particularly when there is an alternative. The rule of neutral principles is "neutral" precisely because it is indifferent to the identity of the parties before the court.[82]

This statement of the matter misses the point. The rule of deference does not prefer certain groups because their status makes them more worthy. It does not say, for example, that the Presbyterian hierarchy should prevail because it is more pleasing in the sight of God and the law than is a group of local apostates. The outcome in such a case rests on a judgment about freedom, not equality. The general church prevails because that is the choice the formerly united group made, *ex*

82. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

ante, for its own self-government. And the free exercise of religion protects the right to make and carry out choices about ecclesiastical governance.

One might contend that the local church is making a different choice about ecclesiastical governance now, and that its choices are deserving of the same respect. For the future they are. But the locals were members of the larger group when it decided that the highest church court had the last word on property disputes, and are thus bound by that choice for all disputes that arose before they severed ties. They are not bound because they made a contract to that effect. There is no contract. They are bound because they were members, and church groups exercise sovereign authority over their members in religious matters.

B. *Why Prefer Group Freedom?*

But there is an assumption hidden in my conclusion that church groups exercise sovereign authority over their members. I am not just describing a set of practices to which communing members adhere. I am saying that the law should recognize the group's primacy when a member has left and wants to undo the effect of a group choice. This is a proposition of constitutional law, not just of church governance: under the first amendment the freedom of groups should prevail over individual freedom in cases where the two conflict. Why should this be?

There are two kinds of reasons for preferring the freedom of church groups over the freedom of individual members. The first kind relies upon a general social benefit. The second focuses on the return to those who form church groups.

Zechariah Chafee, writing about the internal affairs of nonprofit associations in general, proffered the first kind of reason:

> The health of society will usually be promoted if the groups within it which serve the industrial, mental, and spiritual needs of citizens are genuinely alive. Like individuals, they will usually do most for the community if they are free to determine their own lives for the present and the future. . . . Legal supervision must often be withheld for fear that it may do more harm than good.[83]

We need not look very hard to discover how church groups promote the health of society. " '[C]hurch and religious

83. Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1027 (1930).

groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education.' "[84]

More broadly, the social benefit of organized religion is not confined to its influence on the legislature.[85] Indeed, in many ways its most useful public service is the protection of individuals *against* the legislature and other organs of government. Religious groups are one of the most important of those associations that stand intermediate between the individual and the state, and provide a buffer that is the best protection for personal freedom:

> Totalitarianism has been well described as the ultimate invasion of human privacy. But this invasion of privacy is possible only after the social contexts of privacy—family, church, association—have been atomized. The political enslavement of man requires the emancipation of man from all the authorities and memberships . . . that serve, in one degree or another, to insulate the individual from external political power.[86]

It sounds rather establishmentarian to suggest that we should adopt a rule in favor of churches in order to secure a social benefit. But in this context there is no way of avoiding this result. Both plaintiffs and defendants in these cases represent religious claimants, and courts must rule in somebody's favor. The question is really whether we prefer the social benefits of individual or of group religion.

There is, however, a second kind of reason for preferring the freedom of church groups over the freedom of individual members. This is simply that that is what the participants in the practice generally want. Those who are devoted to communitarian forms of religious life believe that the ends of group worship—the good pursued by their group—are more important than individual aspirations. As I explained in Section III,

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84. McDaniel v. Paty, 435 U.S. 618, 641 n.25 (1978)(Brennan, J., concurring) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 866-67 (1978)).

85. *See* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985); C. MOONEY, PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION (1986); B. WILSON, RELIGION IN SOCIOLOGICAL PERSPECTIVE 34 (1982); H. BERMAN, THE INTERACTION OF LAW AND RELIGION (1974).

86. R. NISBET, THE QUEST FOR COMMUNITY 202 (1953) (emphasis omitted). *See* Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 332 & n.138.

members of such churches think that the individual finds meaning and importance in the fact of belonging to a particular community. And the kinds of actions that freedom protects—bringing grace and love to community members—are things that can only be understood as group actions.

It is more difficult to reconcile this justification with the establishment clause. The argument seems to be that the law should prefer one view of religion over another because of its religious merits. But my claim is actually more modest. The rule of deference, like the rule of neutral principles, is only a "default" rule. Religious individuals are free to affiliate with and contribute to the religious group that best embodies their views of God and church. In particular, they can reject hierarchical churches that show too little respect for individual freedom. Moreover, the members of any religious group (hierarchical or congregational) remain free, in advance of a dispute, to provide for any disposition of property that suits them. I only suggest that, when they fail to do so, we should allow groups to resolve their own disputes and enforce the outcomes on which they settle.

But should the law favor one view of religion over another even in that narrower class of cases? I think so. It seems to me profoundly unrealistic to pretend as though the free exercise clause is not designed to secure the kind of freedom that its beneficiaries want. And the rule of deference just adopts the predominant view of what they want.