Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 57 | Issue 1 Article 6

Winter 1982

Church Property Disputes in the Age of "Common-Core Protestantism": A Legislative Facts Rationale for Neutral Principles of Law

Roger Wm. Bennett
Indiana University School of Law

Church Property Disputes in the Age of "Common-Core Protestantism": A Legislative Facts Rationale for Neutral Principles of Law

If there is any legal procedure which produces results strikingly unjust from the perspective of one set of litigants, it is that procedure in disputes over control of church property which requires judicial deference[1] to the decision of the very denominational hierarchy whose conduct may have caused the dispute.[2] To illustrate the injustice, suppose that two independent local churches, alike in every respect, choose to forsake their complete independence by affiliating with denominational organizations of generally compatible beliefs. Assume further that neither congregation is alert to church polity[3] distinctions, and by happenstance one affiliates with a Baptist[4] group while the other affiliates with a Presbyterian[5] group. Subsequently, both local churches are torn by internal dissension over their denomination's actions and the majority in each local church votes to disaffiliate from its denomination. When sued by the dissenting

---

[1] *See, e.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). Although this is the official citation for *Watson*, the reporter of the case had great discretion in organizing the opinion. *See id.* at 684 n.* (use of italics and convenient designation of Watson faction as "pro-slavery"). A version easier to follow is in the parallel citation, 30 L. Ed. 666.

[2] *See, e.g., Exodus from United Methodist Church Accelerates*, 25 CHRISTIANITY TODAY 1299 (1981).

[3] Church polity is the form or method of government of a church. Civil courts recognize only two polities—congregational and hierarchical. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 722-23 (1871). The former refers to churches which are "strictly independent of other ecclesiastical associations, and so far as church government is concerned, [owe] no fealty or obligation to any higher authority," *id.* at 722, while the latter refers to systems within which "there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete . . . ." *Id.* However, denominational councils within a congregational polity may have strong advisory or admonitory powers, thereby rendering the courts' test somewhat vague. *See, e.g.*, S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 155-56 (Yale ed. 1972). *See also* note 190 & accompanying tex *infra*. If the distinction is the presence of *legally* coercive power, it is conclusory.

Theology, in contrast, recognizes three *basic* polities, and many hybrids, by introducing an intermediate polity variously designated presbyterian, connectional, or associational. *See generally* F. MEAD, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES (6th ed. 1975); 1 J. MELTON, ENCYCLOPEDIA OF AMERICAN RELIGIONS (1978); 1 J. SCHAVER, THE POLITY OF THE CHURCHES (1947). Not all denominations—*i.e.*, aggregates of affiliated individual churches—are hierarchical in the courts' terms. *See* Casad, *Church Property Litigation: A Comment on the Hull Church Case*, 27 WASH. & LEE L. REV. 44, 45-46 (1970). *See also* F. MEAD, *supra*; notes 147-59 & accompanying text *infra*.

[4] Baptist polity is congregational. 1 J. SCHAVER, *supra* note 3, at 41.

[5] Presbyterian polity, in the dichotomy of the courts, is hierarchical, *e.g.*, Jones v. Wolf, 443 U.S. 595, 597-98 (1979), but theologically presbyterial, connectional, or associational. *See generally* F. MEAD, *supra* note 3, at 217-30; 1 J. MELTON, *supra* note 3, at 109-43; 1 J. SCHAVER, *supra* note 3, at 53-60.

minorities for control of church property, the formerly Baptist church majority prevails whereas the formerly Presbyterian church majority loses its property to the minority. The reason for the disparate results is that the formerly Presbyterian church majority, by an old, wooden, and eccentric judicial polity distinction,[6] is deemed to have expected and implicitly consented to the control of its property by the denomination. Although the denomination invariably looks out for its own, the court must defer to the denomination's decision.

In resolving such disputes, however, some courts have adopted another procedure, neutral principles of law.[7] Under this method,[8] courts may resolve church property disputes by simply determining the legal ownership of the property, whether there are other beneficial interests or restrictions on the property,[9] and whether the identity of the legal owner, in the absence of beneficial interests or restrictions, is determined other than by majority rule.[10] Under this method, both local church majorities would likely prevail on typical facts.[11] Both the deference[12] and the neutral principles[13] methods have been held constitutionally permissible for judicial resolution of church property disputes.[14] That both methods are constitutional, however, does not mean that one is no better than the other.

Both methods can be criticized as violating, in some measure, the policies underlying the first amendment[15] and as excluding relevant evidence of the parties' actual expectations prior to schism and the subsequent formulation of allegations for litigation.[16] For these reasons, a recent com-

---

[6] *See* notes 82-87 & 147-59 & accompanying text *infra*.

[7] This is the method of the Georgia courts after Jones v. Wolf, 443 U.S. 595 (1979). *See* Jones v. Wolf, 244 Ga. 388, 260 S.E.2d 84 (1979), *cert. denied*, 444 U.S. 1080 (1980).

[8] *E.g.*, Jones v. Wolf, 443 U.S. 595 (1979). Under the neutral principles approach of *Jones*, courts may examine "certain religious documents, such as a church constitution," *id.* at 604, in order to determine ownership of church property, provided that interpretation of such religious documents would not "require the civil court to resolve a religious controversy." *Id.* Commentators, however, have proposed narrower versions of the neutral principles method, which would look only to secular documents or to documents of title for ownership, beneficial interests, or restrictions. *See* notes 17, 168 & 175 & accompanying text *infra*.

[9] *See* Jones v. Wolf, 443 U.S. 595, 603 (1979) (referring to "reversionary clauses and trust provisions").

[10] *See id.* at 607-10. Presumably, the identity of the holder of a beneficial interest would be similarly analyzed should such an issue arise.

[11] *See, e.g., id.* at 607 ("If in fact Georgia has adopted a presumptive rule of majority representation . . . we think this would be consistent with both the neutral-principles analysis and the First Amendment.").

[12] *E.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

[13] *E.g.*, Jones v. Wolf, 443 U.S. 595 (1979).

[14] The constitutional provisions implicated are the first amendment's religion clauses: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[15] *See* Sirico, *The Constitutional Dimensions of Church Property Disputes*, 59 WASH. U.L.Q. 1, 51-61 (1981).

[16] *Id.* at 52, 67.

mentator concluded that both methods are merely pragmatic ways for courts to resolve disputes peacefully, and that the church members' expectations to which both allude are legal fictions.[17] This note, in contrast, argues that the expectations of church members[18] can be ascertained as legislative facts,[19] that these expectations are justifiable because they are not belied by clear church teaching or doctrine, and that such expectations largely justify the presumptions and outcomes of the neutral principles method.

The note surveys chronologically the four most relevant United States Supreme Court decisions in church property disputes[20] and shows that church members' expectations regarding church government in general, and church property control by logical extension, have so changed as to discredit the assumptions of the seminal Supreme Court case, *Watson v. Jones*.[21] It then summarizes the constitutional doctrine underlying the particular dispositions of the cases and uses the two doctrines—nonentanglement and flexibility—to evaluate the deference and neutral principles methods. The note rejects deference because it entangles courts too frequently and too deeply in religious disputes, and because it is too inflexible for some denominational polities. In contrast, the note supports the neutral principles method in *Jones v. Wolf*[22] as nonentangling religiously, and as very flexible toward the needs of churches. Finally, the note suggests that denominations whose polity expectations are frustrated by either the deference or the neutral principles method may take steps to embody their expectations in a way which will enable—or even require[23]—courts constitutionally to enforce them.

---

[17] *Id.* at 63-68. Professor Sirico advocates a neutral principles variant which would look only to "secular documents," *id.* at 68, on an explicit rationale of judicial efficiency, *id.* at 71. Much of the force of his argument is undermined if the unmodified neutral principles method can be shown to accord with actual church members' expectations, rather than proceeding on fictitious and unascertainable expectations.

[18] The church members considered in this note are Protestants.

[19] "Legislative facts are ordinarily general and do not concern the immediate parties . . . . [W]henever a tribunal engages in the creation of law or of policy, it may need to resort to legislative facts, whether or not those facts have been developed on the record." K. DAVIS, ADMINISTRATIVE LAW TEXT § 15.03, at 296 (3d ed. 1972). "[T]he formulation of law and policy . . . obviously gains strength to the extent that information replaces guesswork or ignorance or hunch or intuition or general impressions." *Id.* § 15.03, at 297. "[T]he opinion which specifically identifies extra-record materials used in creating law or in determining policy may involve less reliance on extra-record information than the more conventional opinion . . . which in fact is heavily dependent upon the assumption of unproved facts which are left vague and unidentified." *Id. See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-141 (1921); K. DAVIS, *supra* § 15.03; Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

[20] For a discussion of all United States Supreme Court opinions in church property disputes, see Sirico, *supra* note 15, at 7-51.

[21] 80 U.S. (13 Wall.) 679 (1871).

[22] 443 U.S. 595 (1979).

[23] *See id.* at 606 ("[C]ivil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.").

EVOLUTION OF THE LAW AND REVOLUTION IN CHURCH LIFE

Deference and Its Rationales

Early church property disputes in American courts[24] often were decided by deference to the assumed intent of the donors of the property. Under this rationale for judicial deference, it was assumed that the donors expected the recipient local church to remain faithful to both its denominational affiliation and doctrinal commitments at the time of the gift.[25] Thus, an apparent gift created an "implied trust" in favor of those who remained so faithful.[26] In the event of a local church schism, the faction loyal to the denomination would be awarded control of the property unless the denomination had committed such a departure from doctrine as to violate the doctrinal terms of the implied trust.[27] The donor's intent regarding doctrine was deemed to outweigh that regarding denomination;[28] thus, by a legal fiction[29] the law subjected local churches and denominations to a dead hand control which discouraged doctrinal change by the risk of property forfeiture.[30] Moreover, in the face of multiple donors during a period which encompassed minor, unprotested doctrinal changes, the implied trust rationale was unworkably complex in operation.[31]

---

[24] For more extended discussion of methods used before the period treated in this note, see Sampen, *Civil Courts, Church Property, and Neutral Principles of Law: A Dissenting View*, 1975 U. ILL. L.F. 543, 546-58; Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1149-54 (1962).

[25] Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347, 349-50.

[26] *Id.*

[27] *Id.*

[28] *See* Comment, *Constitutional Law: Neutral Principles of Law and Majority Rule Presumption Applied in Disputes Over Church Property*, 19 WASHBURN L.J. 590, 591 (1980).

[29] Kauper, *supra* note 25, at 350; *see* First Baptist Church v. Fort, 93 Tex. 215, 54 S.W. 892 (1900). In *First Baptist*, "[a] church building was erected . . . and paid for by subscription from the members of the church and others." 93 Tex. at 224, 54 S.W. at 894. The court assumed, "as a matter of common knowledge," *id.* at 225, 54 S.W. at 895, that such subscriptions usually were "not confined to the membership of the particular church or denomination, but, in fact, [included] members of all denominations, as well as those who belong to no church . . . ." *Id.* The court criticized the implied trust rationale as based on the fictional assumption that such varied donors invariably expect the recipient church to remain faithful to its teachings at the time of the gift:

> The contributing Jew—they are not few—is presumed to be especially anxious that the Messiahship of Christ should be taught, though the failure to believe it cast down his temple and broke down the walls of his holy city, making his people wanderers upon the earth. . . . [T]he Methodist brother who aided to build the house could interfere and say "No, you must teach immersion as the only valid mode, because my gift was based upon your continuance in teaching that error." . . . The fallacy lies in presuming the existence of a purpose of which there is no proof.

Id. at 226, 54 S.W. at 895-96.

[30] Kauper, *supra* note 25, at 352.

[31] *See* Sampen, *supra* note 24, at 550 (noting the difficulty of identifying particular donors, and "the relevant doctrines on behalf of which the property was conveyed").

In the landmark case of *Watson v. Jones*,[32] the United States Supreme Court abandoned the implied trust rationale[33] in federal common law[34] and devised instead an implied consent rationale for deference.[35] The facts, controversies, and holding in *Watson* were complex, but because they are frequently misconstrued,[36] they merit close consideration.

As the Civil War opened, a schism opened as well in the Presbyterian Church in the United States (PCUS).[37] Soon after May 1865, it was found that most members (the Jones faction) of the Walnut Street Presbyterian Church (WSPC) in Louisville, Kentucky, concurred with the pro-Unionist and antislavery resolutions and actions of the denomination's highest authority, its General Assembly.[38] The majority (the Watson faction) of both the WSPC Session (elders) and the WSPC trustees,[39] however, sympathized[40] with a declaration of the Louisville Presbytery (the church authority immediately above the Session) which viewed the very passage of the General Assembly's resolution as a "usurpation of authority,"[41] and perhaps opposed the resolution's substance as well.[42] When the conflict between the church members and the elders of the WSPC Session became

---

[32] 80 U.S. (13 Wall.) 679 (1871).

[33] *Id.* at 727-29; Kauper, *supra* note 25, at 359.

[34] *Watson* was originally a federal common law decision. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115-16 (1952). Its holding, however, was subsequently elevated to constitutional status, *id.* at 116, perhaps because of the intervening decision in Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938), declaring that "[t]here is no federal general common law." *Cf.* M. HOWE, THE GARDEN AND THE WILDERNESS 84 (1965) (abolition of federal common law accompanied by expansion of scope of constitutional law). *But see* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 60, at 279 (3d ed. 1976) ("It is clear . . . that there is a 'federal common law' even if not a 'federal general common law.' ").

[35] 80 U.S. (13 Wall.) at 729 ("All who unite themselves to [a hierarchical church] do so with an implied consent to [its] government, and are bound to submit to it.").

[36] *See* notes 64-74 & accompanying text *infra*.

[37] 80 U.S. (13 Wall.) at 684, 690-91; Mulder, *The Long, Rocky Road to Reunion*, UNITED PRESBYTERIAN A.D., Nov. 1981, at 14-17 (describing the division of American Presbyterians during the Civil War and current efforts toward reunification of northern and southern denominations).

[38] 80 U.S. (13 Wall.) at 690-91, 693. The polity of the PCUS at the time of *Watson* consisted, in order of increasing authority, of a "series of 'judicatories,' known as Church Sessions, Presbyteries, Synods, and a General Assembly." *Id.* at 681.

[39] The trustees, though "[c]onnected with each local church," *id.* at 681, served no ecclesiastical function. *Id.* Rather, they were persons "in whom [was] vested for form's sake, the legal title to the church edifice and other property; the equitable power of management of the property being with the Session." *Id.* The Church Session controlled the daily affairs of the local church, and included the pastor and "ruling elders" drawn from the local church's congregation. *Id.*

[40] *See id.* at 691, 693.

[41] *Id.* at 691.

[42] *See id.* (noting the doctrine announced by some Southern churches that slavery was " 'a divine institution,' " and that it was " 'the peculiar mission of the Southern church to conserve [it]' "). *But see id.* at 684 n.* ("pro-slavery" designation of Watson faction a mere convenience); Mulder, *supra* note 37, at 14-15 (suggesting that Southern Presbyterians believed that the church, as a purely spiritual body, should not involve itself in political and social matters).

serious, the Synod of Kentucky (the next higher authority above the Presbytery) appointed a committee to conduct an election of additional elders to the WSPC Session.[43] Three additional elders belonging to the Jones faction were elected over the opposition and protest of the existing pro-Watson elders,[44] thereby granting the Jones faction a controlling majority within the Session.[45] Continuing opposition by the pro-Watson elders led the Jones faction to file a bill in the Louisville Chancery Court to assert the right of the newly elected elders to participate "in the management of the church property."[46] The Court of Appeals of Kentucky reversed the decree of the chancellor awarding property control to the Jones faction[47] and, after further litigation, ordered that control be restored to the Watson faction.[48]

At least until this election and the commencement of the chancery suit, both sides in the local WSPC dispute professed loyalty to, if not agreement with, the same Presbytery, Synod, and General Assembly.[49] Only after the election of additional elders did both the Synod of Kentucky and the Presbytery of Louisville divide formally over the General Assembly's actions.[50] As the chancery suit progressed, WSPC factions aligned themselves with sympathetic Presbytery and Synod factions.[51] However, until the General Assembly, on June 1, 1867, recognized the Synod and Presbytery factions which concurred in their resolutions and repudiated the dissident factions, both sides of the WSPC still professed loyalty to the General Assembly.[52] Only then did the Synod faction opposed to the General Assembly's actions equivocally resolve " 'that in its future action, [this Synod] will be governed by this recognized sundering of all its relations to the . . . revolutionary body (the General Assembly) by the acts of that body itself.' "[53] Because the Watson faction remained loyal to the protesting Synod faction, it, too, implicitly recognized its severance from the General Assembly.[54]

---

[43] 80 U.S. (13 Wall.) at 684-85.

[44] *Id.* at 685.

[45] A majority of the Session's members was sufficient to control the Session, which in turn controlled the local church. *Id.* at 681. The election of the three additional elders tranformed the Session's two-to-one majority in favor of the Watson faction into a four-to-two majority in favor of the Jones faction. *See id.* at 685-86. *See also id.* at 687 (noting that the Louisville Chancery Court's subsequent order of July 23, 1866, recognizing and enforcing the validity of the election, effectively granted "exclusive *control*" of the church property to the Jones faction (emphasis in original)).

[46] 80 U.S. (13 Wall.) at 685.

[47] *Id.* at 687.

[48] *Id.* at 689-90. The final order of the Court of Appeals of Kentucky came in 1868, *id.*, after the Watson faction had seceded from the PCUS. *See id.* at 692-93.

[49] *Id.* at 692.

[50] *See id.* at 685, 692.

[51] *Id.* at 692.

[52] *Id.*

[53] *Id.* at 693.

[54] *Id.*

In 1868, after the secession of the Watson faction from the PCUS, and after the ruling by the Court of Appeals of Kentucky in favor of the Watson faction, the Jones faction sued in diversity in the then federal circuit court.[55] The suit claimed the faction was entitled to the property because of the General Assembly's recognition of the Presbytery and Synod factions with which the Jones faction aligned itself.[56] The action sought to enjoin the Watson faction from attempting to disturb the Jones faction's possession of the WSPC property.[57] Although both the deed and the WSPC charter subjected the property and its trustees to the operation of the fundamental laws of the PCUS,[58] and although both WSPC factions professedly remained loyal to the General Assembly before its resolution of the controversy,[59] the Supreme Court in affirming the circuit court decision for the Jones faction went beyond these sufficient facts to engage in broad dicta.[60]

After distinguishing two other classes of church property disputes from those arising in hierarchical churches like the PCUS,[61] the Court broadly stated in a further dictum that those who unite with a hierarchical denomination "do so with an implied consent to [its] government, and are bound to submit to it."[62] Thus, unlike the result under the implied trust rationale for deference, a denomination could, with impunity, alter profoundly its doctrinal standards. The implied trust bias toward doctrinal stability was replaced in federal common law with a bias toward institutional stability.[63]

Because *Watson* did not constitutionally limit judicial action,[64] state courts freely rejected it[65] or limited it to churches with hierarchical polities.[66] Even courts which followed *Watson* were occasionally careless in stating its holding, for example, by citing it as authority for forfeiture of church property upon disaffiliation from a denomination,[67] rather than

---

[55] *See id.* at 690, 694.

[56] *Id.* at 695-96.

[57] *Id.* at 696.

[58] *Id.* at 683. The deed and charter did not expressly subject the property to such control, but both factions conceded that such was their intention. *Id.*

[59] *Id.* at 692.

[60] *Id.* at 722-35.

[61] *Id.* at 722-26.

[62] *Id.* at 729.

[63] Sirico, *supra* note 15, at 15; *see* 1977 WIS. L. REV. 904, 917.

[64] *But see* note 34 *supra.*

[65] *See* M. HOWE, *supra* note 34, at 85.

[66] Kauper, *supra* note 25, at 362-63; *see* Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 443 (1964).

[67] *See* Gaff v. Greer, 88 Ind. 122, 132 (1882) ("This judgment [of the presbytery] establishes the fact that the majority had seceded from the church; having done so, they thereby forfeited all right to any portion of the church property. This proposition is well settled.") (citing *Watson*). The quoted language is dicta, however, as the court in *Gaff* did not actually rest its decision on the mere fact of secession, but also on the presbytery's implicit award of the property to the minority which remained loyal to the denomination. *See* 88 Ind. at

for deference to whatever disposition the relevant church authority might make. Commentators also have misread *Watson*'s facts, for example, by placing the Watson faction's withdrawal from the PCUS immediately after the PCUS' pro-Unionist, antislavery pronouncements in 1865,[68] rather than after the 1867 General Assembly,[69] or by suggesting that the antislavery substance of the PCUS declarations, rather than a dispute over the right of the PCUS to voice an opinion at all, was the source of the WSPC schism.[70] Such misinterpretations have obscured the *Watson* decision's following simply and logically from the relevant facts—adjudicative[71] and otherwise[72]—and the decision's amounting to enforcement of the decree of an arbitrator chosen by the parties.[73] This confusion has created the illusion that any departure from *Watson*'s dicta must be a repudiation of precedent, rather than an application of similar logic to now different legislative and adjudicative facts.[74]

During the ensuing century, the separate rationales of implied trust and implied consent coexisted and coalesced in state court decisions, until the distinction between them was so obscured that "implied trust" came to signify, somewhat inaccurately,[75] either rationale for deference.[76]

---

131. The decision therefore follows *Watson*'s deference approach, despite the court's inaccurate restatement of *Watson*'s holding.

[68] *E.g.*, Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religions Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1298 (1980).

[69] *See* text accompanying notes 52-54 *supra*.

[70] *Compare* Adams & Hanlon, *supra* note 68, at 1299 (attributing schism to the antislavery substance of the General Assembly's declarations) *with* S. AHLSTROM, *supra* note 3, at 648 (Presbyterian Church of the Confederate States of America, which constituted the seceders from the PCUS, *see* 80 U.S. (13 Wall.) at 692, declared in 1861: " 'We have no right, as a Church, to enjoin [slavery] as a duty, or to condemn it as a sin.' "), *and* 1 J. MELTON, *supra* note 3, at 135 ("Presbyterians in the South claimed the Assembly had no right to make . . . a political statement."), *and* Mulder, *supra* note 37, at 14-15 (similar view). *But see* text accompanying note 42 *supra*.

[71] Both factions in *Watson* conceded the church property to be subject to the laws of the PCUS, and both factions acknowledged the General Assembly as the highest authority within the PCUS up to the moment of the Assembly's resolution of the controversy. *See* 80 U.S. (13 Wall.) at 683, 692. Hence, the Court did not need to create a fiction of "implied consent" applicable to all hierarchical polities, *see id.* at 729, since the adjudicative facts established that consent to the authority of the Assembly to decide the dispute *actually* existed.

[72] Although the Court did not expressly utilize any legislative facts, the general religious climate of the period also supports the conclusion that church members of a hierarchical denomination as in *Watson* actually expected to be governed by the decisions of their denomination's highest authority. *See* notes 77-79 & accompanying text *infra*.

[73] *See* notes 71-72 *supra*.

[74] *See* notes 80-95 & accompanying text *infra*. *See also* K. DAVIS, *supra* note 19, § 15.03.

[75] The two rationales differ significantly in their theoretical bases. Implied consent is founded upon the assumed consent of present church members to be governed by their denomination's highest authority, while implied trust is based upon the assumption that donors expect the recipient church to adhere to the religious practices followed at the time of the gift. *See* notes 25-30 & 62-63 & accompanying text *supra*. Implied trust therefore promotes doctrinal stability, while implied consent promotes institutional stability even in the face of doctrinal changes. *See* text accompanying note 63 *supra*.

[76] *E.g.*, United Methodist Church v. St. Louis Crossing Indep. Methodist Church, 150

Beyond this merely conceptual confusion, however, there developed two significant and related phenomena—"common-core Protestantism" and the neutral principles method.

The Emergence of "Common-Core Protestantism" as an Appropriate Legislative Fact

Protestants' attitudes toward their churches changed markedly. In the era of *Watson*, the nation was embroiled in a frenzy of denominationalism and sectarianism.[77] Church members were so generally aware of distinctions in forms of church polity as well as other doctrinal matters that the broad reference in *Watson* to "implied consent"[78] was to a consent which most likely existed in fact.[79]

In contrast, the recent era in American church life is characterized by "common-core Protestantism."[80] Church members are largely unaware of denominational distinctions. As one commentator has noted: "In practice the church places less stress on denominational distinctiveness. . . . As standards for church membership become inclusive, correct doctrine is no longer the test for membership. . . . [L]ess emphasis is placed on indoctrination and inculcation of distinctive denominational teachings, tending thereby to minimize and obscure theological differences."[81] Moreover, the denominational polity distinctions so crucial to the implied consent rationale for deference[82] do not survive the leveling effects of common-core Protestantism. Rather, " '[t]he Presbyterian type has become more congregational, and the Congregational type has become more presbyterian and representative. . . . [T]hey have all thoroughly assimilated the principle of democracy and are allowing any *jure divino* theories to fall into oblivion.' "[83] Indeed, it has been estimated that " '[n]inety percent of the procedures of any denomination today are untainted by denominational

---

Ind. App. 574, 579, 276 N.E.2d 916, 919 (1971) ("[A] hierarchical polity serves as the foundation for the implied trust theory . . . .").

[77] S. AHLSTROM, *supra* note 3, at 468-69; *id.* at 472-90 (sectarian revival); *id.* at 740 ("rising denominational self consciousness" during half century preceding Civil War); R. LEE, THE SOCIAL SOURCES OF CHURCH UNITY 77 ("hyper-denominational emphasis" among "American Protestants in the nineteenth century"). *See also* H.R. NIEBUHR, THE SOCIAL SOURCES OF DENOMINATIONALISM (1929).

[78] 80 U.S. (13 Wall.) at 729.

[79] *See* note 77 *supra*. The adherence to the General Assembly by both factions in *Watson*, *see* notes 58-59 & accompanying text *supra*, further supports such an observation.

[80] S. AHLSTROM, *supra* note 3, at 842-43, 845, 847, 962; R. LEE, *supra* note 77, at 83.

[81] R. LEE, *supra* note 77, at 86; *accord*, S. AHLSTROM, *supra* note 3, at 845, 962; R. STARK & C. GLOCK, AMERICAN PIETY 22-56, 141-62 (1968).

[82] *See* notes 147-48 & accompanying text *infra*.

[83] R. LEE, *supra* note 77, at 93-94 (quoting A. BASS, PROTESTANTISM IN THE UNITED STATES 275 (1929)); *cf.* J. KENNEDY, PRESBYTERIAN AUTHORITY AND DISCIPLINE 68 (1965) ("Presbyterianism can degenerate into congregationalism, and congregationalism into *laissez-aller* . . . .").

association.' "[84] The truth of such assertions about doctrinal and polity compromise is reflected in "free movement from denomination to denomination, or the seemingly interchangeable membership of the laity. . . . [D]enominational 'passing' is commonplace and done with relative ease. . . . Denominational differences to the lay mind seem to be eroding."[85] Even church architecture, hymnody, Sunday school literature, and sanctuary furnishings are virtually interchangeable.[86] Finally, nondenominational seminaries have become an important source of pastoral training,[87] still further eroding denominational distinctiveness.

This does not mean, however, that church members are unaware that the church, like any other institution, must govern itself somehow, nor that they are without tacit agreement regarding how, in fact, their own churches are governed. American individualism so pervades church members' thinking[88] that one American religious scholar, describing the American church to English readers, observed that there is some truth to the judgment that

> all churches in America, whatever their polity, are congregational. . . . . . [W]hen the average American thinks of his church, he thinks . . . of the four walls of the building where he worships on Sunday and of the group of familiar friends and neighbours whom he meets

---

[84] R. LEE, *supra* note 77, at 83 n.18 (quoting Horton, *Now the United Church of Christ*, CHRISTIAN CENTURY, June 12, 1957, at 733).

[85] R. LEE, *supra* note 77, at 86-87; *accord*, S. AHLSTROM, *supra* note 3, at 847 ("Denominational interchangeability was a feature of common-core Protestantism, and the movement of individuals within the system served to accentuate its overall homogeneity."). *See also* J. KENNEDY, *supra* note 83, at 64-66 (similar situation in Scottish "kirk"). One study has shown that 46% of Protestant church members have changed denomination, R. STARK & C. GLOCK, *supra* note 81, at 184, and of these 24% have changed more than once, *see id.* at 184 n.4. Lutheran, Episcopal, and Baptist denominations—the denominations which arguably differ most from other Protestant denominations—tend more to retain their members. *See id.* at 186 (Lutherans and Episcopals); Roof & Hadaway, *Denominational Switching in the Seventies: Going Beyond Stark and Glock*, 18 J. SCIENTIFIC STUDY RELIGION 363, 367 (1979) (Baptists). A common cause of denominational change is a change of residence. *See* Hadaway, *Denominational Switching and Membership Growth: In Search of a Relationship*, 39 SOC. ANALYSIS 321, 322 (1978). Curiously, those who are more religious as measured by attendance are most likely to change denomination, *id.* at 323, suggesting that mere exposure to church teaching does not produce greater denominational fidelity. *See also* notes 80-84 & accompanying text *supra*.

[86] *See* S. AHLSTROM, *supra* note 3, at 842-43; R. LEE, *supra* note 77, at 83. Moreover, much of the work formerly done by particular churches, such as missionary work and care for the aged, is now undertaken by secondary religious organizations which may serve more than one primary religious body or church. *See* 1 J. MELTON, *supra* note 3, at viii.

[87] *See* R. LEE, *supra* note 77, at 92. In 1970-1971, for example, 20% of non-Catholic seminarians were enrolled in nondenominational or interdenominational seminaries. *See* AMERICAN ASSOCIATION OF THEOLOGICAL SCHOOLS IN THE UNITED STATES AND CANADA, FACT BOOK ON THEOLOGICAL EDUCATION 1970-71, at 40 (1971) [hereinafter cited as THEOLOGICAL SCHOOLS]. If Episcopal (including Canadian Anglican), Lutheran, and Baptist seminarians are excluded, *see* note 85 *supra*, the figure exceeds 36%. *See* THEOLOGICAL SCHOOLS, *supra*, at 40.

[88] *See* W. SPERRY, RELIGION IN AMERICA 9 (1946); *cf.* J. KENNEDY, *supra* note 83, at 65-66 (noting similar individualistic trends in Scotland).

> there.... Even his denomination, which must constantly be preached to him as a larger truth, means less to him than the particular parish. . . .[89]

He went on to remark:

> The Church of England in its totality is felt as present in each [English] parish church; [n]onconformity in its entirety [is] in each [English] chapel. At this point our [American] religious life is far more parochial and provincial. There is no clause in the Apostles' Creed more difficult for the typical American to understand than . . . 'the communion of saints' . . . .[90]

Thus, for good or ill—an inquiry forbidden the civil courts[91]—to the average American church member the "church" which governs itself is the local body, and its polity is democratic. Furthermore, there appears to be no reason to believe that a faction which claims the benefits of a hierarchical polity in a church property dispute believed any differently than the average member before the dispute arose.

The practical day-to-day autonomy of local churches, even within allegedly hierarchical denominations, most likely reinforces church members' expectations of congregationalism.[92] Moreover, church documents may be too ambiguous to give such constructive notice of hierarchical polity as would make church members' congregationalist assumptions unreasonable.[93] Although judicial inquiry into religious

---

[89] W. SPERRY, *supra* note 88, at 9-10.

[90] *Id.* at 131-32.

[91] 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.").

[92] *See* 1 J. SCHAVER, *supra* note 3, at 191-94 (describing nearly complete breakdown of Protestant church discipline); *cf.* J. KENNEDY, *supra* note 83, at vii, 65-67 (noting breakdown of discipline within Scottish Presbyterian "kirk").

[93] For example, the *Westminster Confession of Faith* "is the confession [*i.e.*, codification of religious doctrine] that has had the greatest impact on U.S. churches in the Reformed-Presbyterian tradition." 1 J. MELTON, *supra* note 3, at 111. As such, it is a central religious document in many Presbyterian denominations in the United States, *see id.* at 127, 129, 131-33, including the United Presbyterian Church in the United States of America (UPC). *See* PART I OF THE CONSTITUTION OF THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA (THE BOOK OF CONFESSIONS) §§ 6.001-.178 (1970 ed.) [hereinafter cited as I CONST.]. In several places it would appear to limit church discipline to spiritual sanctions. *See Westminster Confession of Faith* ch. XXIII, 3-4; ch. XXX, 1-4; ch. XXXI, 4 (1647), *reprinted in* I CONST., *supra*, §§ 6.121-.122, 6.154-.157, 6.161.

Within the UPC, the more secular portion of its constitution similarly limits church authority. *See* PART II OF THE CONSTITUTION OF THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA (THE BOOK OF ORDER) § 31.08 (1980 ed.) [hereinafter cited as II CONST.] ("Since ecclesiastical discipline must be purely moral or spiritual in its object, and not attended with any civil effects, it can derive no force whatever but from its own justice . . . ."); *id.* § 35.03 ("[J]udicatories ought not . . . to impose any civil penalties. Their power is wholly moral or spiritual . . . ."). The UPC's *Book of Church Discipline*, II CONST., *supra*, §§ 81.00-94.06, also states that "[r]emoval from office or membership is the highest degree of censure." *Id.* § 90.05. Finally, the UPC constitution leaves property and general residual powers to the local church session (elders). *See id.* §§ 41.08, 62.04, 62.08.

Although these and other provisions might be *somewhat* ambiguous, they seem to justify

precepts in church documents involved in a particular case would be improper,[94] prevailing attitudes which both reflect and may be viewed together with the practical day-to-day autonomy of local churches and the congregationalist assumptions of church members are legislative facts[95] which form a basis for rejecting the implied consent rationale for deference: the rationale has become a perversely inaccurate fiction.

Constitutional Evisceration of Deference Rationales and the Emergence of the "Neutral Principles" Method

Whatever factual basis may have remained for deference after the emergence of "common-core Protestantism" was weakened by Supreme Court decisions in 1969 and 1976. The implied trust rationale survived

---

a belief that constituent congregations have the power, if not the right, to withdraw, by vote of their sessions, without property forfeiture to the denomination or a loyal minority. *Cf.* Master v. Second Parish, 124 F.2d 622, 627 (1st Cir. 1941) ("The agreement is not to be read through the eyeglasses of experts versed in the subtleties of Presbyterian church law. Rather, it should be interpreted from the viewpoint of the local folks worshipping in neighboring churches in Portland who sought to get together . . . ."); Casad, *supra* note 3, at 64 (suggesting that church property control be placed where an ordinary lay member would be justified in believing it to be). *See generally* 3 J. POMEROY, EQUITY JURISPRUDENCE § 803, at 187 (5th ed. 1941) ("[W]hen one of two innocent persons . . . must suffer a loss, it must be borne by that one of them who by his conduct—acts or omissions—has rendered the injury possible." (footnote omitted)); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

The General Assembly of the UPC, in response to Jones v. Wolf, 443 U.S. 595 (1979), proposed in 1980 to amend its constitution. 24 CHRISTIANITY TODAY 782-83 (1980). *See also* 443 U.S. at 613 n.2 (Powell, J., dissenting) ("[C]hurches may deem it necessary, in light of today's decision, to revise their constitutional documents . . . ."). The requisite presbyteries ratified the amendment in the ensuing year, and the amendment became effective in 1981. MINUTES OF THE GENERAL ASSEMBLY OF THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA (pt. 1) 21 (1981) (Overture A) [hereinafter cited as MINUTES (pt. 1)]; UNITED PRESBYTERIAN A.D., June-July 1981, at 44. The amendment creates a new Chapter XLII within II CONST., *supra*, which expressly subjects property to a trust "for the use and benefit of the United Presbyterian Church." Overture A, 1980, § 2, MINUTES (pt. 1), *supra*, at 24 (to be codified at II CONST., *supra*, § 72.02). The "formal title" or "secular documents" approaches may be criticized as unable to consider an amendment such as § 72.02. *See* note 17 & accompanying text *supra*; notes 168 & 175 & accompanying text *infra*.

[94] *E.g.*, Jones v. Wolf, 443 U.S. 595, 605 (1979) (examination of church documents may well involve " 'a searching and therefore impermissible inquiry into church polity' ") (quoting Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 (1976)).

[95] The distinction drawn by the text is that between adjudicative facts and legislative facts. The former "relate to the parties, their activities, their properties, their businesses," K. DAVIS, *supra* note 19, § 15.03, at 296, while the latter are "general and do not concern the immediate parties," *id.* Most significantly, adjudicative facts are "those to which the law is applied," *id.*, while legislative facts, in contrast, help to determine "the content of law," *id.* While the settlement of a church property dispute on the basis of that church's particular doctrine or practice would be constitutionally impermissible, Jones v. Wolf, 443 U.S. at 602, 605, the use of religious precepts reflecting the prevalence of common-core Protestantism to invalidate the implied consent rationale for judicial deference would not fall within such a prohibition. Such use of wholly general religious precepts would amount

Watson v. Jones[96] and continued to live among the state courts[97] until *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church.*[98] In *Hull Church*, the Supreme Court held that judicial review for departure from doctrine, as required under the implied trust theory, was constitutionally impermissible: "[T]he [first] Amendment . . . commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, . . . religious organizations . . . must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."[99] The invalidation fatally wounded the implied trust rationale for deference by forbidding courts which utilized it from enforcing their assumption that the settlors of any fictitious trust expected the recipient church to remain "essentially the same church."[100] The Georgia Supreme Court on remand[101] mercifully let the rationale die and, apparently, no court has yet permitted its resuscitation.[102]

The implied consent rationale for deference was weakened, perhaps as grievously, in *Serbian Eastern Orthodox Diocese v. Milivojevich.*[103] There, the Supreme Court struck down, as inconsistent with "the essence of religious faith,"[104] judicial review for "arbitrariness" in ecclesiastical decisionmaking.[105] Although the Court did not expressly invalidate judicial

---

to the use of legislative facts, *see generally* sources cited at note 19 *supra*, used not to adjudicate the claims of the parties, but to shape the content of law—for example, by establishing a presumption to reflect prevailing religious attitudes as the neutral principles method would do. *See* note 171 & accompanying text *infra*.

The same legislative facts suggest that following the emergence of common-core Protestantism, donors would not intend that property be held in trust for the denomination. However, it would not be totally unreasonable—if a state's implied trust doctrine survived Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969)—to hold that older properties are impressed with implied trusts. *But see* notes 96-102 & accompanying text *infra*.

[96] *See* notes 34 & 64-65 & accompanying text *supra*.

[97] *See* Kauper, *supra* note 25, at 362-63; Note, *supra* note 24, at 1157-58.

[98] 373 U.S. 440 (1969). The Georgia courts had awarded control of church property to two local congregations because of their denomination's departure from doctrine. *Id.* at 441-45.

[99] *Id.* at 449. *See also* Note, *Religious Societies—Applicability of Hierarchical Church Law to Property Disputes Resolved by Civil Courts*, 30 N.Y.U. L. REV. 1102, 1110 (1955).

[100] *See* Casad, *supra* note 3, at 53.

[101] Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied*, 396 U.S. 1041 (1970).

[102] This author's research revealed no case after *Hull Church* in which a court has clearly continued an implied trust rationale formally conditioned on nondeparture from doctrine. Tennessee, however, appears to favor implied trusts as a rule of construction for any property transfers to voluntary associations with specific purposes. Thus, where property was transferred to a corporation whose charter disclosed that the purpose of the corporation was to be affiliated with a denomination, an implied trust arose in favor of the denomination. *See* Fairmont Presbyterian Church, Inc. v. Presbytery of Holston, 531 S.W.2d 301 (Tenn. Ct. App., *cert. denied* by Tennessee Supreme Court 1975).

[103] 426 U.S. 696 (1976).

[104] *Id.* at 714.

[105] *Id.* at 712-13.

review for ecclesiastical fraud or collusion,[106] it may have done so by implication.[107] The fiction of implied consent was thus broadened to encompass the notion that church members consent even to unfair treatment from the denominations with which they affiliate—a startling conclusion[108] forced by the Court's procrustean effort to save implied consent from its free exercise clause infirmity.

With the death of the implied trust rationale for deference and the weakening of the implied consent rationale, there arose a need for either another deference rationale[109] or another method altogether. Fortunately, the Supreme Court in neither *Hull Church* nor *Milivojevich* insisted that deference be continued. Instead, in *Hull Church* the Court left open the

---

[106] *Id.* at 713 & n.7.

[107] *See* 45 FORDHAM L. REV. 992, 1001 (1977); 45 MO. L. REV. 518, 521-22 (1980).

[108] Formerly, it was recognized that even if church members of a hierarchical church consent to be governed by their denomination, they expect at least procedural fairness from their denomination. *See* Gonzalez v. Roman Catholic Archbishop, 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 . . . ."); Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1118 (1965).

[109] At least two other rationales would appear possible. Professor Howe suggested that courts promote pluralism by deference. *See* M. HOWE, *supra* note 34; Howe, *The Supreme Court, 1952 Term—Foreward: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953) [hereinafter cited as Howe, *Foreward*]; *cf.* CHURCH, STATE, AND PUBLIC POLICY (J. Mechling ed. 1978) (churches as "mediating structures"). A few reservations concerning such a thesis may be voiced, however. First, as Howe concedes, "[p]luralism of churches is only to be commended when the state permits each church to choose from a multiplicity of means for self-government that which is best suited to its needs." M. HOWE, *supra* note 34, at 34. The only form of deference now remaining, namely implied consent, would seem to restrict as well as obscure the choices available to churches. *See* notes 160-65 & accompanying text *infra*. Second, the promotion of pluralism under the guise of religious liberty may, ironically, create an "establishment [of] the egalitarian type," M. HOWE, *supra* note 34, at 100, which raises "the [constitutional] danger that an outlawed establishment may reappear in the disguise of a preferred liberty," *id.* at 110. Third, and related to the second objection, imputing such pluralistic intent to the constitution's framers seems implausible, Howe, *Foreward, supra*, at 91, and as a justification for deference seems to increase threats which the framers likely feared, such as the undermining of government's authority, *id.*, because church denominations' social pronouncements in recent years have tended to be critical of government. *See, e.g.*, Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. at 442 n.1. To the extent that denominational dissenters have tended to favor the government, *see id.*, deference would also seem to promote oppression of individuals, a result also feared by the framers. *See* Howe, *Foreward, supra*, at 91-92. For these reasons, the legitimacy of pluralism as a rationale for deference seems questionable.

Professor Casad, in contrast, has suggested that deference may be justified as an equitable claim by a denomination to a stable list of affiliates, arising from people's reliance on denominations' names when choosing their churches. *See* Casad, *supra* note 66, at 448-49. *See also* Comment, *The Role of Courts in Church Property Disputes*, 38 MO. L. REV. 625, 644 (1973); 44 TUL. L. REV. 370, 375-76 (1970). However, denominational allegiance is comparatively unimportant when most people choose their church, R. LEE, *supra* note 77, at 88, and a denomination of congregational polity, *see* note 3 *supra*, theoretically would disclaim such an entitlement. Thus, affiliation may give no rise to any entitlement to stable affiliations on a theory that a church member otherwise could be seduced and abandoned.

possibility of using "neutral principles of law,"[110] applicable to all property disputes, which could be followed without establishment clause infirmity.[111]

The Georgia Supreme Court on remand of *Hull Church*[112] developed a method which it thought legally neutral. It searched deeds, the local church charter, the state's statutes, and the denomination's constitution for any language of trust, reversion, or other legal restriction on the church property.[113] Finding no such restrictions in favor of the denomination, it again awarded control to the local congregations.[114] Although *Milivojevich* later cast a fleeting shadow over the validity of such a method,[115] the United States Supreme Court in *Jones v. Wolf*[116] upheld the Georgia neutral principles method, except for one ambiguity.[117]

In *Jones v. Wolf* the members of a local congregation had voted 164 to 94 to withdraw from its denomination, the Presbyterian Church in the United States (PCUS).[118] The Augusta-Macon Presbytery (the next higher authority over the local church Session) appointed a commission to investigate and resolve the local dispute.[119] The majority of the congregation that had voted to withdraw took no part in the commission's inquiry and did not appeal the commission's findings to a higher PCUS tribunal.[120] The majority had already repudiated the PCUS, and the decision of any PCUS judicatory was therefore a foregone conclusion. The local majority could only compromise its legal position by participation. Predictably, the commission concluded that the local minority who remained loyal to the denomination were the "true congregation."[121]

Thereafter, the minority's representatives sued in state court for declaratory and injunctive relief to establish their right, as a PCUS affiliate, to exclusive use of the local property.[122] The trial court, utilizing Georgia's post-*Hull Church* neutral principles method, found that the deed was to the local church without mention of any other beneficial interests.[123]

---

[110] 393 U.S. at 449.

[111] *Id.*

[112] Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied*, 396 U.S. 1041 (1970).

[113] *Id.* at 260-61, 167 S.E.2d at 659-60.

[114] *Id.* at 261, 167 S.E.2d at 660.

[115] *See* 45 FORDHAM L. REV. 992, 1001 (1977).

[116] 443 U.S. 595 (1979).

[117] The Court vacated and remanded for clarification of the reason why the Georgia courts had awarded property to the local majority, rather than the minority. *Id.* at 606-10.

[118] *Id.* at 598. This was not the same PCUS as in *Watson*. *See* F. MEAD, *supra* note 3, at 207.

[119] 443 U.S. at 598.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 598-99.

[123] *Id.* at 599, 601.

Moreover, neither the state statutes regarding implied trusts nor the local church charter created any beneficial interest in the PCUS.[124] Finally, the PCUS constitution contained no language of trust or other restriction in favor of the denomination.[125] The trial court therefore granted judgment for the local church's majority, and the Georgia Supreme Court affirmed.[126]

By a narrow majority,[127] the United States Supreme Court held that the neutral principles method was consistent with constitutional principles.[128] In an opinion written by Justice Blackmun, the Court commented favorably on the method's flexibility[129] in accommodating all forms of polity: "Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or . . . in the event of a schism or doctrinal controversy."[130] The Court cautioned, however, that examination of religious documents for any language of trust or other limitation must be purely secular and not rely on any religious precepts.[131] The approved neutral principles method thus introduced the fiction that church property expectations are fully embodied in legal language,[132] which may be false in the rare case involving litigants who are fully aware either of their denomination's official doctrine and its logical consequence for property control, or of legal precedents under the deference approach. The Court vacated and remanded the case to the Georgia Supreme Court for clarification regarding what neutral principle under Georgia law justified its award of control to the local majority,[133] adding that a rebuttable presumption that the local majority is to control the property would be valid.[134]

Justice Powell, dissenting, maintained that only *Watson*'s deference method should be permitted in church property disputes.[135] Characterizing the neutral principles method as a "new and complex, two-stage

---

[124] *Id.* at 601.

[125] *Id.*

[126] *Id.* at 599; Jones v. Wolf, 241 Ga. 208, 243 S.E.2d 860 (1978).

[127] Jones v. Wolf, 443 U.S. 595 (1979) (Blackmun, J., joined by Brennan, Marshall, Rehnquist, and Stevens, JJ.); *id.* at 610-21 (Powell, J., dissenting, joined by Burger, C.J., and Stewart and White, JJ.).

[128] *Id.* at 602-04 (majority opinion).

[129] *Id.* at 603-04.

[130] *Id.* at 603. *See also* Comment, *Enforcing Conditions Placed on Gifts to Religious Institutions—Judicial Interference with the Free Exercise of Religion,* 49 B.U.L. REV. 742, 753-54 (1969).

[131] 443 U.S. at 604.

[132] *See* Sirico, *supra* note 15, at 58. *But see* 443 U.S. at 603-04 (noting the ease with which expectations regarding property may be expressed through the neutral principles approach, and suggesting that problems associated with it will diminish over time).

[133] 443 U.S. at 606-10.

[134] *Id.* at 607-08. On remand the Georgia Supreme Court establish such a presumption. Jones v. Wolf, 244 Ga. 388, 260 S.E.2d 84 (1979), *cert. denied,* 444 U.S. 1080 (1980).

[135] 443 U.S. at 617 (Powell, J., dissenting).

analysis,"[136] he insisted that it would increase judicial involvement in church controversies and depart from long-established precedent.[137] Underlying his particular concerns were an assumption that church members know and consent to the implications of a denomination's constitution,[138] and a construction of the PCUS constitution strongly in favor of its drafter[139]—contrary to normal contract law.[140] In short, Justice Powell begged the question of whether general provisions of a denomination's constitution, viewed in the light of the denomination's hierarchical gestalt, yield a more accurate picture of prior property-control expectations than do particular property-control provisions or their absence.[141]

APPLYING THE UNDERLYING CONSTITUTIONAL PRINCIPLES

There remain, then, two constitutionally permissible methods for resolving church property disputes—deference, based on implied consent or some other rationale not yet fully developed,[142] and neutral principles of law. The validity of each method must be weighed by two underlying principles derived from the first amendment's religion clauses. First, courts must avoid entanglement in religious issues.[143] Second, courts must allow churches to govern themselves as they see fit.[144] Although both methods meet the constitutional minimums of these principles, it is appropriate to prefer one method if it better serves the principles.[145] The two current methods must therefore be evaluated by the principles of judicial nonentanglement in religious matters and flexibility toward the needs of churches for self-government.[146]

Deference requires judicial knowledge of to whom to defer.[147] This, in *Watson*—type deference, in turn requires a judicial inquiry into the applicable denominational polity.[148] Such an inquiry entangles courts in

---

[136] *Id.* at 610.
[137] *Id.* at 611.
[138] *See id.* at 614, 617-19.
[139] *See id.* at 615, 619-21.
[140] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979).
[141] *See* Sirico, *supra* note 15, at 48.
[142] *See* note 109 & accompanying text *supra*.
[143] *E.g.*, Jones v. Wolf, 443 U.S. at 602.
[144] *See* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952) ("New York's [statute] directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy."); Northside Bible Church v. Goodson, 387 F.2d 534, 537-38 (5th Cir. 1967); 45 MO. L. REV. 518, 523 (1980); 10 WAKE FOREST L. REV. 642, 647 (1974); *cf.* Jones v. Wolf, 443 U.S. at 603 (praising neutral principles approach as able "to accommodate all forms of religious organization and polity").
[145] *See generally* Sirico, *supra* note 15, at 68; 45 MO. L. REV. 518, 527 (1980).
[146] Based on such an analysis, it is possible to conclude, contrary to legal precedent, that deference is unconstitutional. Adams & Hanlon, *supra* note 68, at 1297, 1337-38.
[147] *See, e.g.*, Jones v. Wolf, 443 U.S. at 614, 618-19 (Powell, J., dissenting).
[148] *See, e.g., id.* at 619-21; Casad, *supra* note 66, at 440; Kauper, *supra* note 25, at 370-71.

delicate religious questions, both because the courts' criterion of polity requires recourse to religious documents[149] and because the roots of polity go deeply into doctrinal matters,[150] such as the authority given the church by Christ.[151] Although the modern trend in church practice is toward a pragmatic polity,[152] theologians still find it necessary to justify either a particular polity or the principle of pragmatism from other doctrines.[153] Moreover, courts have chosen a criterion of polity—authority "more or less complete"[154]—more vague than the criteria of theology.[155] In brief, there is a sharp distinction between the representative or democratic polities—congregationalism and connectionalism—and the authoritarian polity of such clearly hierarchical churches as the Episcopal and Roman Catholic—that is, the episcopal polity.[156] Churches with connectional polities present the most difficult cases for courts[157] because litigants can—and too often do—argue plausibly that the church is either basically congregational[158] or basically hierarchical,[159] at least as regards property

---

Deference also may require inquiry into polity under a flexible implied trust rationale. In the words of one commentator, "[I]s it not arguable that one purpose of a trust to a congregationally organized church is that the congregation may decide the use of its property?" Duesenberg, *Jurisdiction of Civil Courts Over Religious Issues,* 20 OHIO ST. L.J. 508, 539-40 (1959).

[149] *See, e.g.,* Jones v. Wolf, 443 U.S. at 619-21 (Powell, J., dissenting).

[150] *E.g.,* R. PAUL, THE CHURCH IN SEARCH OF ITS SELF 30-33 (1972); Sirico, *supra* note 15, at 53; Stringfellow, *Law, Polity, and the Reunion of the Church: The Emerging Conflict Between Law and Theology in America,* 20 OHIO ST. L.J. 412, 419, 423-24 (1959). *But cf.* H.R. NIEBUHR, *supra* note 77, at vii, 14-15 (history, sociology, and political experience may be more relevant, albeit covertly, than doctrine in explaining denominational choice).

[151] *See* J. KENNEDY, *supra* note 83, at 24.

[152] *See* R. PAUL, *supra* note 150, at 34-35 ("[T]here are [Christians] who adhere to their view of church government not because they believe God laid down any specific rules on the matter, but because the polity of their church represents what in their view is the most practical way of administering the Church.").

[153] *See id.* at 35 (church leaders continue to "assert that the Church . . . traces its existence and its form to the will of God").

[154] Watson v. Jones, 80 U.S. (13 Wall.) at 722. Denominations with superior bodies possessing authority "more or less complete" are deemed hierarchical by courts, while those not recognizing such an authority are viewed as congregational. *See* note 3 *supra.*

[155] Theology sharply distinguishes basically democratic polities, including congregational and connectional polities, *see* note 3 *supra,* from autocratic polities, such as those of the Episcopal and Roman Catholic churches. *See* 1 J. SCHAVER, *supra* note 3. The democracy of connectional polities is illustrated by the choosing of Presbyterian elders from among the laity, so that church government is shared by clergy and laity. 1 J. MELTON, *supra* note 3, at 112.

[156] *See* 1 J. SCHAVER, *supra* note 3, at 22-23, 43-47, 56-60. This note follows Schaver's use of the word "episcopal" to describe the Roman Catholic polity, *id.* at 21, even though that polity "is not merely episcopal," *id.* at 33. The distinction is that "[i]n an episcopal form of government the highest authority is vested in a group of bishops," *id.,* but in the Roman Catholic Church "the bishops are subordinate to a still higher order, the papal order," *id.* at 34.

[157] *See* Watson v. Jones, 80 U.S. (13 Wall.) at 726; Sirico, *supra* note 15, at 12 n.52.

[158] *See* note 93 *supra.*

[159] *See* Jones v. Wolf, 443 U.S. at 620-21 (Powell, J., dissenting) (presenting view of loyal minority that hierarchical structure of PCUS compelled deference to denomination's decision).

control. Thus, the theologically eccentric polity dichotomy of the deference theory creates qualitative entanglement by trying to resolve the religious issue inherent in polity, and quantitative entanglement by encouraging repeated good faith litigation.

The polity dichotomy of deference is obviously inflexible as well.[160] Not only do connectional churches not fall clearly at one of the two poles—except in legal precedent[161]—but there are yet other polities falling into the theological interstices left open by purely congregational, connectional, and episcopal categories. Here even theology lacks a label and resorts to hybrid descriptions of the polities of some small denominations.[162] Thus, even if courts using the deference method somehow applied a third "connectional" category to ameliorate their present dichotomous approach to church property disputes,[163] the polities of many churches still would not be accommodated adequately. As matters now stand, deference arguably inhibits the free exercise of religion[164] by warning those church members who are knowledgeable about the law of church property disputes that their churches associate with a larger body at their own risk; deference-method courts will not bother looking for a connectional or hybrid polity, but will instead force any ensuing property dispute into one of their two eccentric polity categories.[165]

The neutral principles method by definition avoids direct entanglement in religious issues. Because deciding church property disputes on the basis of religious issues violates the religion clauses of the first amendment,[166] the method properly puts the onus on churches to provide for the resolution of such disputes by expressing their property relationships in judicially cognizable legal language.[167] Moreover, such legal language should suf-

---

[160] *See* Adams & Hanlon, *supra* note 68, at 1337.

[161] *See* Parker v. Harper, 295 Ky. 686, 688, 175 S.W.2d 361, 362 (1943) (citing legal precedents regarding a particular denomination's polity).

[162] *See* Adams & Hanlon, *supra* note 68, at 1292 n.6; Sirico, *supra* note 15, at 12-13. *See generally* F. MEAD, *supra* note 3; 1 J. MELTON, *supra* note 3.

[163] The Solomonic solutions of shared use or partition by sale appear to be rare, although such solutions would represent an alternative to either deference to the denomination's highest authority or recognition of majority rule within the local church.

[164] *See* Adams & Hanlon, *supra* note 68, at 1297, 1337; 1977 UTAH L. REV. 138, 146. *See also* Bernard, *Churches, Members and the Role of the Courts: Toward a Contractual Analysis*, 51 NOTRE DAME LAW. 545, 562-67 (1976); Sirico, *supra* note 15, at 5.

[165] Under the implied consent rationale, courts have even deferred to hierarchical decisions in the face of express reservations of property control by the local church, *e.g.*, Second Protestant Reformed Church v. Blankespoor, 350 Mich. 347, 86 N.W.2d 301 (1957), presumably under the precedent of "Julia, who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented,' " Everson v. Board of Educ., 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

[166] *E.g.*, Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447, 449 (1969).

[167] *Id.* at 449. The full text of this dictum states: "Hence, States, religious organizations, and *individuals* must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." *Id.* (emphasis added). In context,

fice to give constructive notice of a hierarchical polity to church members,[168] who may not be "canon lawyers"[169] capable of interpreting religious precepts whose religious significance, let alone legal significance, has never been demonstrated to them by precept or practice.[170] If the churches take no action to clarify property matters, then the neutral principles method steps in with justifiable presumptions in favor of the legal owner[171] and, if the legal owner is itself divided, its majority.[172] In putting the onus on churches, however, sound neutral principles methods, like Georgia's in *Jones v. Wolf*,[173] can and should provide flexibility by extending the scope of their neutral principles beyond documents of title to include applying the law of contracts to bylaws and denominational constitutions;[174] the "formal title" approach is simply unable to embody the full range of polity expectations.[175]

---

however, it seems reasonable to treat the dictum regarding individuals as applicable primarily to donors who wish to place religious conditions on their gifts. *See* Casad, *supra* note 3, at 61. *See also* Duesenberg, *supra* note 148, at 547; Comment, *supra* note 130, at 748.

[168] *See* Sirico, *supra* note 15, at 75. However, there seems to be no reason to limit constructive notice to legal provisions in *secular* documents, as does Professor Sirico, *id.* at 68-79. It seems to be no great burden to impute to church members an understanding of similar provisions in such fundamental documents as local church bylaws and denominational constitutions, *see* note 93 *supra*, so long as the provisions are expressed in secular terms whose significance does not require the willingness of clergy or hierarchies to explain them. *Cf.* Sampen, *supra* note 24, at 577 (ruling group within hierarchy may "arrogate powers over church assets that have not been reserved to it by clouding its action with the veil of doctrinal interpretation"); Sirico, *supra* note 15, at 58 ("To the ecclesiastical eye [religious] language may clearly imply where property control lies.").

[169] Sirico, *supra* note 15, at 75.

[170] *See* notes 80-93 & accompanying text *supra*. Moreover, particular beliefs of churches are rarely emphasized by disciplinary actions over erring members. 1 J. SCHAVER, *supra* note 3, at 193-94, 203; *cf.* Whipple v. Fehsenfeld, 173 Kan. 427, 431-33, 249 P.2d 638, 642-43 (1952) (advocating discipline of members, including their explusion, departed from the "traditions, customs, doctrines, and usages" of the church).

[171] *See* Jones v. Wolf, 443 U.S. at 600, 602-03 (approving awarding of church property, under neutral principles approach, on basis of legal title, where secularly oriented inquiry into relevant documents reveals no interest in favor of general church or denomination). Although neutral principles, by limiting inquiry to documents capable of a legal or secular interpretation, may be described as "a restrictive rule of evidence," *id.* at 611 (Powell, J., dissenting), such a restriction embodies the presumption that expectations regarding church property are adequately expressed in such documents. *See* note 132 & accompanying text *supra*. For the justification for such a presumption, see note 172 *infra*.

[172] *See* Jones v. Wolf, 443 U.S. at 607 ("[A rebuttable] presumptive rule of majority representation . . . would be consistent with both the neutral-principles analysis and the First Amendment."), *on remand*, 244 Ga. 388, 260 S.E.2d 84 (1979) (adopting same), *cert. denied*, 444 U.S. 1080 (1980).

Presumptions in favor of the title holder and majority representation are strongly supported by the rise of common-core Protestantism as a legislative fact, which establishes that most church members view their "church" to be the local church, and expect its polity to be democratic, despite theological or legal classifications (the latter arising from the implied consent theory of *Watson*) to the contrary. *See* notes 80-95 & accompanying text *supra*.

[173] 443 U.S. at 600-01, 603-04 (extending neutral principles inquiry to secular provisions in denomination's constitution).

[174] *See id.*; Bernard, *supra* note 164, at 557-59 (positing contractual basis for church affiliation). Because neutral principles would employ generally applicable legal principles to decide

EMBODYING POLITY EXPECTATIONS LEGALLY: THE TASK OF THE DENOMINATIONS

With property, trust, and contract law at their disposal, churches under a neutral principles method are afforded broad flexibility in embodying their polity expectations in a legally enforceable manner. The concern[176] that changing from deference to neutral principles may precipitate disputes by forcing churches to deal forthrightly with matters of property control is misplaced.[177] Such a concern assumes that courts interfere with religious rights by acting in an otherwise justifiable manner which strongly encourages candid dealing among members, local churches, and hierarchies. Moreover, it assumes that deference should be retained precisely because the "implied consent" to which deference alludes is absent in fact.

Most litigated church property disputes involve legal title in a local church or its trustees, a faction opposed to its former denomination and a faction loyal to the denomination which alleges either an implied or an explicit beneficial use by the denomination arising from the general polity or other religious precepts of the denomination's confessions or constitution.[178] Because a denomination is larger than are its constituent

---

the rights of parties as expressed in relevant documents, the implied consent rationale for deference becomes tenuous. After Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), a denomination may act arbitrarily toward its constituent churches and members, *id.* at 712-20, although perhaps not fraudulently or collusively, *id.* at 713 & n.7. Even if judicial review for ecclesiastical fraud and collusion is still permitted, *but see* text accompanying notes 106-07 *supra*, forbearance from fraud and collusion by definition cannot constitute consideration for a contract, *see* RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979), and it is unclear under the theory of implied consent what other consideration a denomination may be required legally to give. Hence, implied consent is tantamount to an agreement by one party, the local church, to be governed by the decisions of another, the denomination, where the latter remains essentially free to act as it wishes. *Cf.* 1977 UTAH L. REV. 138, 146 ("[T]he conditions of such unions [with hierarchical churches] are enforceable and meaningful only in so far as the hierarchical body chooses them to be." (footnote omitted)). The enforceability of such an agreement thus seems questionable when viewed under the neutral principles approach because of the lack of any consideration furnished by the denomination. It would appear to violate the establishment clause for civil courts to treat denominations in a preferential manner by enforcing agreements which would ordinarily be void for lack of consideration. *See generally* Note, *supra* note 99, at 1110 (courts may not act so as to become in effect the secular arm of the church).

[175] *See* note 93 *supra*. The formal title approach looks only to documents of title. *See* Sirico, *supra* note 15, at 58. It was a minority position even during the heyday of *Watson*-type deference. *See, e.g.*, Master v. Second Parish Church, 124 F.2d 622 (1st Cir. 1941); Evangelical Lutheran Synod v. First English Lutheran Church, 47 F. Supp. 954 (W.D. Okla. 1942), *rev'd on other grounds*, 135 F.2d 701 (10th Cir. 1943) (inadequate amount in controversy requisite to federal diversity jurisdiction), *cert. denied*, 320 U.S. 757 (1943).

[176] *E.g.*, Jones v. Wolf, 443 U.S. at 613 n.2 (Powell, J., dissenting).

[177] *See* Sirico, *supra* note 15, at 57-58; *cf.* 24 CHRISTIANITY TODAY 782-83 (1980) (exodus from United Presbyterian Church precipitated by denominational actions other than attempted property control); note 93 *supra* (United Presbyterian Church ratified constitutional amendment regarding control of property within one year of its proposal).

[178] *E.g.*, Jones v. Wolf, 443 U.S. 595 (1979).

congregations, and thus likely to be more aware of schisms and ensuing property disputes, and because a denomination is able to insist on affiliation on its own terms or not at all,[179] it seems proper that the burden of clarifying ambiguous provisions regarding property should fall primarily on the denomination. That average church members' expectations are congregational,[180] and thus comport with the legal title, reinforces the propriety of so allocating the primary burden. Neutral principles methodology effectively does so.

If a denomination is episcopal in polity[181] and, contrary to usual practice,[182] has left title in local churches, it should probably require a transfer of legal title to it, to one of its offices (such as a bishopric), or to trustees in trust for the entire denomination.[183] The choice among these options will depend on such presently irrelevant concerns as liability in tort or contract. The doctrines which commonly underlie episcopal polities make such a transfer logical[184] and thus easy to obtain.

A purely congregational[185] church need do little to effectuate its expectations if title is already in the local church or its trustees. It might, however, wish to clarify the disposition of property should a schism occur between the majority of its members and its officers. Its denomination likely is only minimally concerned with such local matters, so that here the onus must fall on the local congregation to clarify property matters. Because small local churches may be unaware of the need to do so, it is fortunate that circumstances probably will arise only rarely in which a neutral principles approach will yield a result contrary to prior expectations, such as awarding control to officers who disagree with the congregation's majority.

Most difficult to embody legally are connectional and hybrid polities.[186] If the expectation is that the denomination controls such local matters as it sees fit unless the local congregation withdraws and ceases claiming any benefits of affiliation, then embodiment of expectations is relatively easy and analogous to the actions needed by purely congregational churches. If the expectation is that the polity be fully hierarchical, then embodiment of expectations would proceed as with episcopal polities.[187]

---

[179] *See* Comment, *Judicial Resolution of Church Property Disputes,* 31 ALA. L. REV. 307, 331 (1980).

[180] *See* notes 88-92 & accompanying text *supra.*

[181] For definitions of "episcopal" and "polity," see notes 3 & 156 *supra.*

[182] *See* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 529-46 (1964) (discussing forms of church property ownership).

[183] *See id.*

[184] *See, e.g.,* 1 J. MELTON, *supra* note 3, at 49-55; RELIGIOUS ISSUES IN AMERICAN HISTORY 46 (E. Gaustad ed. 1968); 1 J. SCHAVER, *supra* note 3, at 22-23.

[185] For a definition of "congregational," see notes 3 & 155 *supra.*

[186] *See* Sirico, *supra* note 15, at 12 n.52.

[187] *Cf.* note 93 *supra* (United Presbyterian property now in trust by virtue of change in denomination's constitution).

Connectional and hybrid polities, however, usually require something different than congregationalism or episcopalism.

If forced to consider and articulate expectations before a dispute, members might conclude that denominational affiliation arises from the unity of Christian believers[188] and their mutual interdependence for effectively accomplishing Christian work,[189] for admonishing errant members,[190] and for avoiding the scandal of Christian disunity.[191] Although none of these purposes survives apostasy or heresy, civil courts cannot determine what constitutes apostasy or heresy[192] and therefore cannot allow a congregation to leave with its property on such grounds.

Resolutions of this dilemma are suggested indirectly by commentary on the related topic of enforcing conditions on gifts to religious institutions.[193] In any case in which the action of the denomination is in issue, the dispute, by prior agreement, may be decided by an arbitration committee.[194] A yet more refined resolution has been suggested recently:[195] providing by agreement for mediation to resolve disputes and providing that, if mediation fails, binding arbitration shall follow.[196] This approach comports from a church perspective with Biblical admonitions to seek reconciliation[197] and from the court's viewpoint allows, without direct judicial entanglement, enforcement of implied or express prior religiously based conditions for the continuation of denominational affiliation. Moreover, it allows the parties to choose qualified mediators and arbitrators when the dispute arises, without relying on the partisan denominational councils. Refusal to arbitrate or to abide by the arbitrators' decision might result in forfeiture of property under a liquidated damages clause.[198]

It is unlikely that every eventuality can be foreseen and provided for, or that arbitrators can resolve perfectly every issue according to prior expectations, express or implied. However, neither can civil courts. The

---

[188] *E.g.*, 1 J. SCHAVER, *supra* note 3, at 57.

[189] *But cf.* S. AHLSTROM, *supra* note 3, at 422-28 (describing rise of voluntary, interdenominational associations for cooperative Christian work); R. LEE, *supra* note 77, at 76 (*semble*).

[190] *See* 1 J. SCHAVER, *supra* note 3, at 191-99.

[191] *See generally* Casad, *supra* note 66; Stringfellow, *supra* note 150.

[192] *See, e.g.*, Jones v. Wolf, 443 U.S. at 602; Watson v. Jones, 80 U.S. (13 Wall.) at 728-29.

[193] Comment, *supra* note 130.

[194] *Id.* at 751-53. The other options suggested in the comment are creation of a conditional trust with appointment of a trustee with unlimited discretion, *id.* at 749-51, retention of unlimited discretion by the donor, *id.* at 751, and specification in secular terms of mandatory or prohibited religious acts with backup provisions for arbitration if courts will not decide even these objective matters, *id.* at 753-54.

[195] *See* CHRISTIAN LEGAL SOCIETY, MEDIATION/ARBITRATION (1980); CHRISTIAN LEGAL SOCIETY, THE RESOLUTION OF DISPUTES BETWEEN CHRISTIANS (1979).

[196] *See* sources cited note 195 *supra*.

[197] *E.g.*, 1 Corinthians 6:1-8.

[198] How present consent-based deference alone would justify property forfeiture for a breach of an arbitration agreement is problematic.

deference method declines even to try, speaking instead in terms of expectations which today are palpably fictitious.[199] Under neutral principles, at least, arbitrators' or mediators' best approximations of prior intent should be recognized by civil courts as at least equal, and perhaps even preferable, to their own approximations through the comparatively wooden language of property, trust, and contract law.[200]

CONCLUSION

Two methods for resolving church property disputes have been upheld as constitutional. The first method, judicial deference to the decision of church authorities, has been supported by assumptions about the expectations either of property donors—the implied trust rationale—or of church members—the implied consent rationale. The implied trust rationale probably was always a thinly veiled fiction, and was unwieldly in any event. It has been effectively paralyzed by the imposition of stringent restraints under the first amendment's religion clauses. The implied consent rationale has become a legal fiction even if it was not so at its inception; church members' expectations today simply are not as the rationale insists and courts should note the change as a legislative fact. Moreover, it, too, has been so limited as to deprive it of its ability even to approximate justice. That which remains of the implied consent rationale entangles courts in religious matters and affords churches too little flexibility in the enforceable ordering of their internal property affairs.

The other method, application of neutral principles of law to ascertain the locus of property control, began with a plausible fiction that legal documents adequately reflect church members' legal expectations. It was, however, a fiction which produced dispositions which were closer to general expectations than were the dispositions of the deference method. Moreover, its consistent application will encourage churches so to order their affairs that the method will cease relying on a fiction and instead will reflect legal expectations embodied in standard legal precepts. Denominations need only revise their constitutions or direct transfers of title to reflect the consensus which they claim already exists.

No method of resolving church property disputes will be perfect in every case; no method of resolving any type of case is always perfect. The neutral principles method, however, promises over time closely to approximate

---

[199] *See* notes 80-95 & accompanying text *supra*.

[200] *See generally* Sirico, *supra* note 15, at 58. If a state does not generally recognize binding arbitration, the Constitution may require that an exception be made for church property disputes. *See* Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972) (if general rule of law burdens the free exercise of religion, then only state interests of the highest order may justify withholding of a religious exemption).

expectations of church members and to avoid the constitutional evils of both civil court entanglement in religious affairs and the inflexibility of the law in accommodating the need of churches to govern themselves according to their doctrines and traditions. If the method can fulfill its promise it will largely lay to rest a continuing embarrassment to both churches and courts—the public airing of religious disputes before a constitutionally handicapped judiciary.

ROGER WM. BENNETT