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COMMENT

THE ART OF ECCLESIASTICAL WAR: USING THE LEGAL SYSTEM TO RESOLVE CHURCH DISPUTES

Mark A. Hicks†

I. INTRODUCTION

"Greetings in the powerful and unchanging name of Jesus Christ." This was the salutation of a letter in which a church defamed its Pastor.[1] In the letter, which was read aloud to the church congregation, the church falsely accused the Pastor of misappropriating church funds, and then closed by saying, "[w]here it is not the intention of the district [church] to harm anyone's personal reputation, it is sometimes important to bring difficult issues to the light, so that nothing will hinder the future work of the church."[2] The Pastor was further defamed in an email sent from a leader of the denomination with which the church was affiliated to a Church secretary: "[The Pastor] may just be wanting to stir up trouble . . . [h]e has already demonstrated a willingness to lie and steal, and to purposely sow discord among the division."[3] According to the Pastor, the Church's defamation "ruined his reputation and left him nearly destitute."[4] An Oregon jury agreed with the Pastor, and awarded him $355,000 in damages for his defamation claim.[5] The Pastor's case is indicative of a growing number of cases in the legal system that revolve around church disputes.

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† Editor-in-Chief, LIBERTY UNIVERSITY LAW REVIEW, Volume 6; Juris Doctor, Liberty University School of Law, 2012; B.S. Government, Liberty University, 2009. I thank my Dad for being an example of Godly leadership, taking a stand for truth in the face of hatred, and standing by me. I thank my Mom for her unwavering love and support. I thank my brother for being my best friend and being there for me when I need it the most. I thank my sister for her unique way of making me laugh and for calling me out when it is needed. I thank the staff of the Law Review for their hard work and attention to detail. I thank Dan Schmid, Phillip Marbuy, and Jennifer Gregorin for their friendship and for putting up with me for three years. Finally, I thank my Lord and Savior Jesus Christ. I hope this Comment awakens the Church—we must be a light in the darkness, not a cancer that destroys.

1. John Gibeaut, *First Amendment Rites*, ABA JOURNAL, (June 1, 2010, 1:40 AM), http://www.abajournal.com/magazine/article/first_amendment_rites/.
2. Tubra v. Cooke, 225 P.3d 862, 866 (Or. Ct. App. 2010).
3. Gibeaut, *supra* note 1.
4. *Id.*
5. *Id.*

Christians, Muslims, Buddhists, and Jews all have one thing in common: they are all members of an organized religion.[6] Within organized religion, there are churches, which, in the broadest sense, consist of groups of individual adherants gathering together for the purpose of their faith. This Comment focuses on church disputes within the religion of Christianity. Church disputes are a type of war.[7] This type of war does not involve armed conflict with guns, tanks, warships, and airplanes; instead, the weapons of this war are words. In church disputes, the tongue—or pen—is truly mightier than the sword.[8]

This Comment proposes that the legal system should be used to objectively resolve church disputes. This Comment's basic thesis will be developed in three subsequent parts. Part II lays the foundation for the thesis by examining the Religion Clauses of the First Amendment, and the Supreme Court's jurisprudence interpreting those Clauses. Part III examines and defines the problem of church disputes. Finally, Part IV proposes a new approach to biblical dispute resolution, a restatement of the Supreme Court's neutral principles of law test, and an alternative to the legal system for the resolution of church disputes.

II. BACKGROUND

To lay a proper foundation for the use of the legal system in church disputes, the background section of the article is divided into three sections. The first section examines the definitions of religion and church as used in the legal system. The second section briefly discusses the history of the First Amendment. The third section analyzes the Supreme Court's church dispute jurisprudence.

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6. These four religions represent the largest percentage of religions in the United States. The percentages break down as follows: "Protestant 51.3%, Roman Catholic 23.9%, Mormon 1.7%, other Christian 1.6%, Jewish 1.7%, Buddhist 0.7%, Muslim 0.6%, other or unspecified 2.5%, unaffiliated 12.1%, none 4%." *The World Factbook: North America, United States*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last updated April 4, 2012).

7. War is defined as "[a] dispute or competition between adversaries." BLACK'S LAW DICTIONARY 1720 (Deluxe 9th ed. 2009).

8. In the words of Rosencrantz: "[M]any wearing rapiers are afraid of goosequils." WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET 49 (Cambridge Univ. Press ed. 1904).

A. *Defining "Religion" and "Church"*

Courts frequently use the terms religion and church in their opinions. However, the terms are not easily defined.[9] The Supreme Court's definition of religion has evolved over the past two hundred years, and no clear definition of church has yet been pronounced.[10] The First Amendment includes the term religion.[11] To properly interpret the First Amendment—specifically, the Establishment Clause and the Free Exercise Clause—religion must be defined.[12] Many state and federal laws use the term church.[13] To properly interpret and understand the state and federal laws, as well as court decisions interpreting the laws, church must also be defined.[14]

1. The Definition of Religion

Religion is a broad category that is defined as "[a] system of faith and worship usu. involving belief in a supreme being and usu. containing a moral or ethical code; esp., such a system recognized and practiced by a particular church, sect, or denomination."[15] Church disputes have provided our legal system ample opportunity to refine the way we define religion and have even given the Supreme Court a chance to evaluate and qualify a variety of viewpoints as religions.

In *Davis v. Beason*,[16] the Supreme Court stated that religion "has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of

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9. For a discussion of the difficulty of defining religion, *see generally* Stephen A. Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Jesse H. Choper, *Defining Religion in the First Amendment*, 1982 U. ILL. L. REV. 579; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

10. *See infra* Part II.A.1.

11. U.S. CONST. amend. I; *see also infra* Part II.B.

12. Usually, a term has a generally accepted meaning. This is not the case with the term religion. Therefore, the Supreme Court's definition of religion, as developed over the past two hundred years, must be discussed in order to properly interpret the Religion Clauses of the First Amendment.

13. Specifically, the Internal Revenue Code frequently uses the term church. *See, e.g.*, 26 U.S.C. § 170(b)(1)(A)(i) (2010) (charitable giving limitations); *id.* at § 403(b)(9) (church retirement income accounts); *id.* at § 512 (unrelated business taxable income); *id.* at § 514 (unrelated debt-financed income).

14. In Guam Power Authority v. Bishop of Guam, the court discussed the definitional problem of the term church: "[church] can mean an organization for religious purposes. It can also have the more physical meaning of a place where persons regularly assemble for worship." 383 F. Supp. 476, 479 (D. Guam 1974) (internal citations omitted).

15. BLACK'S LAW DICTIONARY 1405 (Deluxe 9th ed. 2009).

16. Davis v. Beason, 133 U.S. 333 (1890).

obedience to his will."[17] After the *Davis* decision, numerous lower courts adopted the same—or a substantially similar—understanding of religion.[18] The term religion was eventually given a broader definition by Judge Hand in the Second Circuit case, *United States v. Kauten*:[19]

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men . . . . It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. . . .
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> . . . .
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> . . . [Conscientious objection] may justly be regarded as a response of the individual to an inward mentor, call it a conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.[20]

Judge Hand's expansion of the definition of religion to include beliefs of conscience as well as beliefs in God was adopted by the Supreme Court in *Torasco v. Watkins*.[21] Additionally, in *Torasco*, the Court explained that the definition of religion is not necessarily based upon a conception of God.[22] Finally, in *Welsh v. United States*,[23] the Supreme Court stated that moral and ethical beliefs are synonymous with religion:

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17. *Id* at 342.

18. *See, e.g.*, Borchert v. City of Ranger, 42 F. Supp. 577, 580 (N.D. Tex. 1941) (referencing Webster's Dictionary and defining religion as "[d]evotion or fidelity, as to a principle or practice; scrupulous conformity; conscientiousness; deep attachment like that felt for an object of worship"); Gabrielli v. Knickerbocker, 82 P.2d 391, 393 (Cal. App. 1938) (citing to and incorporating the exact language of *Beason*); Sunday Sch. Bd. of the S. Baptist Convention v. McCue, 293 P.2d 234, 237 (Kan. 1956) (referencing Webster's Dictionary and defining religion as "an apprehension, awareness or conviction of the existence of a supreme being controlling one's destiny"); Nicholls v. Mayor of Lynn, 7 N.E.2d 577, 580 (Mass. 1937) (citing to and incorporating the exact language of *Beason*); Taylor v. State, 11 So. 2d 663, 673 (Miss. 1943) (citing to and incorporating the exact language of *Beason*); Kolbeck v. Kramer, 202 A.2d 889, 891 (N.J. Super. 1964) (citing to and incorporating the exact language of *Beason*); Drozda v. Bassos, 23 N.Y.S.2d 544, 546 (1940) (citing to and incorporating the exact language of *Beason*).

19. United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).

20. *Id.*

21. *See* Torasco v. Watkins, 367 U.S. 488, 495 (1961).

22. *Id.* at 495 & n.11 (explaining that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others").

23. Welsh v. United States, 398 U.S. 333 (1970).

> Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality —a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.[24]

2. The Definition of Church

Church can best be described as a religious corporation, which, according to Black's Law Dictionary, is "created to carry out some ecclesiastical or religious purpose."[25] Congress, however, has not defined the term church.[26] Congress consistently uses the term church in legislation, but it leaves the interpretation of the term to administrative agencies such as the Internal Revenue Service.[27]

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24. *Id.* at 340.

25. BLACK'S LAW DICTIONARY 394 (Deluxe 9th ed. 2009).

26. For a discussion of Congress and its decision not to define church, *see* Charles M. Whelan, *Church in the Internal Revenue Code*, 45 FORDHAM L. REV. 885 (1977).

27. *Id.* Additionally, since Congress has not defined church, the courts have been left free to develop their own definitions. *See, e.g.*, Twin-City Bible Church v. Zoning Bd. of App., 365 N.E.2d 1381, 1382, 1384 (Ill. 1977) (holding that the term "church" includes the use of a residential home for meetings and religious education classes); Synod of Chesapeake, Inc. v. Newark, 254 A.2d 611, 612-14 (Del. 1969) (holding that a residential home could be used for religious gathering, and, under those circumstances, constituted a "church"); Bd. of Zoning App. v. Wheaton, 76 N.E.2d 597, 601 (Ind. 1948) (holding that a priest's home and the living quarters for nuns were "an integral part of any Roman Catholic church project"); Cmty. Synagogue v. Bates, 136 N.E.2d 488, 488-89 (1956) (holding a large piece of land with a home used for youth activities and as a synagogue qualified as a church); City of Concord v. New Testament Baptist Church, 382 A.2d 377, 380 (N.H. 1978) (holding that "a school may be considered as an integral and inseparable part of a church").

The Internal Revenue Service created a list of criteria that must be examined to determine whether an organization is a church.[28] These criteria are:

1. A distinct legal existence;
2. A recognized creed and form of worship;
3. A definite and distinct ecclesiastical government;
4. A formal code of doctrine and discipline;
5. A distinct religious history;
6. A membership not associated with any other church or denomination;
7. An organization of ordained ministers;
8. Ordained ministers selected after completing prescribed duties;
9. A literature of its own;
10. Established places of worship;
11. Regular congregations;
12. Regular religious services;
13. Sunday schools for religious instruction of the young;
14. Schools for the preparation of its ministers.[29]

In *American Guidance Foundation v. United States*,[30] a federal district court adopted the IRS criteria.[31] However, it is important to note that the tax code does not have a definition of church—the criteria are only used as a guide to determine whether the organization is a church.[32]

A church can function under one of two organizational patterns: a corporation or an unincorporated association.[33] An unincorporated association is defined in *Barr v. United Methodist Church*[34] as "(1) a group whose members share a common purpose, and (2) who function under a common name under circumstances where fairness requires the group be recognized as a legal entity."[35] Unincorporated churches do not have a legal existence; thus, they cannot own or transfer property, cannot make or enter

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28. *See* Speech of Jerome Kurtz, IRS Commissioner, at PLI Seventh Biennial Conference on Tax Planning, Jan. 9, 1978, *reprinted in* 9 FEDERAL TAXES (P-H) ¶ 54,820 (1978).

29. Am. Guidance Found. v. United States, 490 F. Supp. 304, 306 n.2 (D.D.C. 1980).

30. *Am. Guidance Found.*, 490 F. Supp. 304.

31. *Id.* at 306 n.2.

32. *See* Whelan, *supra* note 26, at 887.

33. 2 RICHARD R. HAMMAR, PASTOR, CHURCH, & LAW § 6, at 51 (2007).

34. Barr v. United Methodist Church, 153 Cal. Rptr. 322 (Cal. Ct. App. 1979).

35. *Id.* at 328.

into contracts, and are not able to sue or be sued.[36] Additionally, the members of the organization are held personally liable for acts committed during the course of the organization's business.[37] Many states have created laws that counteract these "unincorporated disabilities."[38] Nevertheless, in states where the disability still exists, the organization may "act only through its membership."[39]

For a church to properly exist as a legal organization without the disabilities of being unincorporated, it must incorporate.[40] The procedures for incorporation can vary from state to state.[41] The most common model for church incorporation, adopted by many states, is the Model Nonprofit Corporation Act.[42] The Model Nonprofit Corporation Act sets forth the procedures for incorporation.[43] The procedures require application to the secretary of state, who reviews the articles of incorporation to ensure compliance, and then issues a certificate of incorporation to the church.[44] Another method of incorporation for churches is through special state statutes.[45] Most state statutes apply only to the large ecclesiastical bodies such as the Roman Catholic Church.[46] However, New York, Michigan, and New Jersey have statutes that include multiple denominational churches.[47]

Another method of incorporation is through the court.[48] Some states allow incorporation through submitting incorporation documents—such as articles of incorporation and articles of agreement—to a local court.[49] The court then determines the validity of the request and issues incorporation documents.[50] Finally, even if a church does not comply with the technical requirements of incorporation, it may be considered a "de facto" corporation.[51] In order for a church to be a "de facto" corporation, it must

36. 2 HAMMAR, *supra* note 33, § 6-01, at 52.

37. Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1506 (1973).

38. *Id.* at 1510.

39. 2 HAMMAR, *supra* note 33, § 6-01, at 54.

40. *Id.* § 6-02, at 62.

41. *Id.* § 6-02, at 64.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* § 6-02.1, at 72.

46. *Id.*

47. *See* Kauper, *supra* note 37, at 1534 & n.175.

48. 2 HAMMAR, *supra* note 33, § 6-02.1, at 73.

49. *Id.*

50. *Id.*

51. *Id.* § 6-02.1, at 76.

comply with the following three requirements: "(1) A special act or general law under which a corporation may lawfully exist, (2) a *bona fide* attempt to organize under the law and colorable compliance with the statutory requirements, and (3) actual user or exercise of corporate powers in pursuance of such law or attempted organization."[52]

Once incorporated, the church must develop rules for its internal operation.[53] One court stated, "It has been uniformly held that religious organizations have the right to prescribe such rules and regulations as to the conduct of their own affairs as they may think proper, so long as the same are not inconsistent with the Constitution and the law of the land."[54] The best form of organization is for the church to have a corporate charter that states the purposes and beliefs of the church and then to create rules for internal operation known as bylaws.[55] A court has held, "Religious and quasi-religious societies may adopt a constitution and laws for the regulation of their affairs, if conformable and subordinate to the charter and not repugnant to the law of the land . . . ."[56] Bylaws play a very important role in the development of a church, and they must be adopted to protect the church's operation.[57] In *Fellowship Tabernacle, Inc. v. Baker*,[58] the court ruled that the church's bylaws played an important role in its decision.[59] The court said,

> [T]he jury was asked to determine if the reasons the board listed were, in fact, why the church fired Baker and whether that action was proper under the church's own bylaws. The bylaws were not simply church rules governing religious doctrine and policy, but were, rather, the bylaws of an Idaho non-profit corporation governing its corporate affairs.[60]

Now that the church has been defined, and the organization and structure of the church has been set forth, it is necessary to look at the development of the First Amendment's Religion Clauses.

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52. *See* Tr. of Peninsular Annual Conference of the Methodist Church, Inc. v. Spencer, 183 A.2d 588, 592 (Del. 1962).

53. 2 HAMMAR, *supra* note 33, at § 6-02.2, 76.

54. Ohio Se. Conference of Evangelical United Brethren Church v. Kruger, 243 N.E.2d 781, 787 (Ct. Com. Pl. of Ohio 1968).

55. 2 HAMMAR, *supra* note 33, § 6-02.1, at 79-80.

56. Leeds v. Harrison, 87 A.2d 713, 720 (N.J. 1952).

57. *See* 2 HAMMAR, *supra* note 33, § 6-02.1, at 80.

58. Fellowship Tabernacle, Inc. v. Baker, 869 P.2d 578 (Idaho Ct. App. 1994).

59. *Id.* at 583.

60. *Id.*

B. *The Religion Clauses of the First Amendment*

The Constitution of the United States does not address religions or churches.[61] Nevertheless, the last sentence of the last clause in Article VI says, "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[62] This no-religious test clause became the subject for debate in the various state conventions because of the concern that it was tantamount to a declaration of a purely secular society.[63] The greater concern, however, was that the Constitution did not protect the rights of citizens from infringement by the federal government.[64]

After the ratification of the Constitution, the first Congress created a list of various drafts of the First Amendment on June 8, 1789.[65] These drafts help to discern Congress's purpose for the First Amendment.[66] After

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61. This is not to say that the word "religion" does not appear in the Constitution. Instead, it demonstrates that religion was not a major concern of the Founding Fathers at the Constitutional Convention. In fact, the Constitution has been referred to as a "Godless Constitution." ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE 26-45 (2005).

62. U.S. CONST. art. VI, § 3, cl. 2.

63. RONALD B. FLOWERS ET AL., RELIGIOUS FREEDOM AND THE SUPREME COURT 22 (2008).

64. *Id.*

65. *Id.* at 23.

66. *Id.*;

> House Drafts[:] 1. The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience in any manner or on any pretext infringed. 2. No religion shall be established by law, nor shall the equal rights of conscience be infringed. 3. Congress shall make no laws touching upon religion, or infringing the rights of conscience. 4. Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe on the rights of conscience. 5. Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed. Senate Drafts[:] 6. Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed. 7. Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society. 8. Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting free exercise thereof, nor shall the rights of conscience be infringed. 9. Congress shall make no law establishing religion, or prohibiting the free exercise thereof. 10. Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.

receiving the various drafts, Congress formed a House-Senate conference committee to decide on the final language of the First Amendment.[67] The final version of the First Amendment's Religion Clauses says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[68]

As evidenced by the language of the drafts, "the framers appeared to have consciously rejected efforts to adopt a narrow prohibition on religious establishments."[69] Thus, the purpose of the First Amendment's Religion Clauses was to "guard against any establishment at a national level."[70] Supreme Court Justice Clarence Thomas wrote that "an important function of the [Establishment] Clause was to 'make clear that Congress could not interfere with state establishments.' The Clause, then, 'is best understood as a federalism provision' that 'protects state establishments from federal interference.'"[71] John Eidsmoe believes that the Religion Clauses of the First Amendment were designed to prevent the government from establishing a national church and to protect the free exercise of religion within the states.[72] According to Greg Bahnsen, the Religion Clauses of the First Amendment simply "prohibited the establishment of one denomination as the state church."[73] Initially, the First Amendment limited the jurisdiction of the federal government, but it did not limit the jurisdiction of the states in religious matters.[74] Before the Revolutionary War, eight of the thirteen colonies established churches, and out of the remaining five colonies, four established religions.[75] Because of the inconsistencies among federal and state laws concerning the establishment of religion, the Supreme Court applied the First Amendment Free Exercise Clause to the states in *Cantwell v. Connecticut*.[76] The Supreme Court then applied the First Amendment Establishment Clause to the states in *Everson v. Board of Education*.[77]

THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 1-10 (Neil H. Cogan ed., 1997).

67. FLOWERS, *supra* note 63, at 23.

68. U.S. CONST. amend. I.

69. FLOWERS, *supra* note 63, at 23.

70. *Id.* at 24.

71. Cutter v. Wilkinson, 544 U.S. 709, 727-28 (2005) (quoting Elk Grove United Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004)(Thomas, J., concurring)).

72. JOHN EIDSMOE, THE CHRISTIAN LEGAL ADVISOR 134-35 (1984).

73. GREG BAHNSEN, BY THIS STANDARD 204 (2008).

74. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

75. Engle v. Vitale, 370 U.S. 421, 427-48 (1962).

76. *Cantwell*, 310 U.S. at 303-04.

77. Everson v. Bd. of Educ., 330 U.S. 1, 15-18 (1947).

C. *The Supreme Court's Church Dispute Jurisprudence*

In *Watson v. Jones*,[78] the Supreme Court heard its first church dispute case. The Court held that "whenever the questions of discipline, or of faith, of ecclesiastical rule, custom, or law have been decided by the highest church judicatory to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . . ."[79] The Court said that civil courts, if they tried to decide "matters of faith, discipline, and doctrine" . . . "would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals."[80]

Notably, in *Watson*, the Court did not base its decision upon the Free Exercise Clause; instead, it based its decision on jurisdictional grounds—courts do not have jurisdiction over religion.[81] However, in 1952, the

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78. Watson v. Jones, 80 U.S. 679 (1871).

79. *Id.* at 727. The Court explained this limitation:

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.
>
> Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage 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.

Id. at 729.

80. *Id.* at 732.

81. The Court explained:

> But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character, a matter over which the civil courts exercise no jurisdiction, a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members

Supreme Court held that *Watson* is also the standard for the Court's Free Exercise Clause jurisprudence.[82] In *Kedroff*, the Court clarified the *Watson* decision:

> The opinion radiates, however, a spirit of freedom for religious organizations, and independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. [Freedom from government interference] we think must now be said to have federal constitutional protection as a part of the free exercise of religion.[83]

The Court did not stop there: "the Supreme Court's basic constitutional approach, established in three cases decided between 1969 and 1979, is that secular courts must not determine questions of religious doctrine and practice."[84]

The first case, *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, involved local Georgia churches withdrawing from the national church organization under the claim that

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> of the church to the standard of morals required of them, becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

Id. at 733-34.

82. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115-16 (1952).

83. *Id.*

84. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998). The three cases are: Jones v. Wolf, 443 U.S. 595, 602 (1979); Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696, 708 (1976); and Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

the national organization departed from the doctrines of their affiliation.[85] Their withdrawal was because of a substantial dispute over doctrinal issues.[86] The Court held that the issue raised a problem "of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[87] The Court went on to say that neutral principles of law can be used to resolve disputes, but they must not "resolve underlying controversies over religious doctrine."[88]

Seven years later, the Supreme Court heard another Free Exercise Clause church dispute case.[89] *Milivojevich* involved a hierarchical church, and the dispute was over the dismissal of the Bishop of the church.[90] The Bishop argued that his dismissal was arbitrary and contrary to church procedures.[91] The Supreme Court disagreed and applied the neutral principles of law approach.[92] Justice Brennan wrote that the neutral principles of law approach applies to matters of church government as well as doctrine.[93] Justice Brennan went on to say that courts cannot assess church rules or adjudicate between the different religious understandings.[94] Instead, resolution must be made without an extensive inquiry by the courts, and if it cannot be made without the inquiry, courts cannot rule against the decisions of the highest ecclesiastical tribunal within the hierarchical church.[95] Justice Rehnquist dissented and wrote that the Court's decision to defer to ecclesiastical decisions of religions that involve hierarchical organizations would create "far more serious problems under the Establishment Clause."[96]

In *Jones v. Wolf*,[97] decided in 1979, the Supreme Court heard a case involving a Presbyterian church that split.[98] The split resulted in two unique congregations.[99] The minority congregation sued to maintain control of the

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85. *Presbyterian Church*, 393 U.S. at 442.
86. *Id.*
87. *Id.* at 449.
88. *Id.*
89. *Milivojevich*, 426 U.S. at 705.
90. *Id.*
91. *Id.*
92. *Id.* at 698, 709-10.
93. *Id.* at 709-10.
94. *Id.* at 710-11.
95. *Id.* at 724-25.
96. *Id.* at 734.
97. Jones v. Wolf, 443 U.S. 595, 595 (1979).
98. *Id.* at 597.
99. *Id.* at 598.

church property.[100] The lower court used the neutral principles approach and found in favor of the majority congregation.[101] The Supreme Court upheld the Georgia court's application of the neutral principles standard.[102] However, the court stated that if the church had established appropriate provisions within the church's constitution or bylaws, then the court would have been prohibited from ruling on the issue because it would have involved "considerations of religious doctrine and polity."[103] In summation, courts cannot answer questions that involve purely religious matters; however, courts can answer questions that do not call for the interpretation of purely religious matters.

The cases discussed above allow state courts a large variety of options when adjudicating church disputes, and the Supreme Court, in all of the cases, was split.[104] Additionally, the Supreme Court has not revisited its Free Exercise Clause church dispute jurisprudence in more than thirty years since its decision in *Wolf*.[105] But the Supreme Court has revisited its Free Exercise Clause jurisprudence in two significant cases decided in 1990 and 2012: *Employment Division v. Smith*[106] and *Hosanna-Tabor*.[107]

D. Employment Division v. Smith: Neutral Principles of Law Redux

In *Smith*, the Supreme Court interpreted the Free Exercise Clause in light of government regulation of religious practices.[108] The petitioners were Native Americans who were denied unemployment benefits because they were fired from their jobs for ingesting peyote during a religious ceremony.[109] The Court held that the Free Exercise Clause was not violated.[110] The Court ruled that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[111]

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100. *Id.* at 598-99.
101. *Id.* at 599.
102. *Id.* at 604-06.
103. *Id.* at 608.
104. *See* Greenawalt, *supra* note 84, at 1860.
105. *See* 4 HAMMAR, *supra* note 33, at § 9-07, 105. ("The most recent decision of the Supreme Court came in 1979.").
106. Emp't Div., Dept. of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990).
107. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).
108. *Smith*, 494 U.S. at 879.
109. *Id.* at 874.
110. *Id.* at 890.
111. *Id.* at 879 (internal quotations marks omitted).

Although *Smith* stands for the proposition that neutral laws of general applicability cannot be avoided on free exercise grounds, it does not necessarily apply to church dispute cases. The Court specifically distinguished a government regulation of "physical acts"—such as the regulation in *Smith*—from a government regulation that "lend[s] its power to one or the other side in controversies over religious authority or dogma."[112] But *Smith* does demonstrate the Supreme Court's continued use of the neutral principles of law approach to Free Exercise Clause jurisprudence.

E. Hosanna-Tabor: The Ministerial Exception

Hosanna-Tabor represents the Supreme Court's most recent Free Exercise Clause decision.[113] The case revolved around a church-operated school's decision to terminate the employment of a teacher at the school.[114] The teacher alleged that her employment was terminated in violation of the anti-discrimination provisions of the Americans with Disability Act.[115] The question before the court was "whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group's ministers."[116] The court held that the First Amendment did bar such an action.[117]

In reaching its holding, the Supreme Court acknowledged, for the first time, the existence of a "ministerial exception"[118] to employment

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112. *Id.* at 877.

113. Hosanna-Tabor Evangelical Lutheran Church & Sch. V. EEOC, 132 S. Ct. 694, 694 (2012).

114. *Id.* at 699.

115. *Id.* at 701. The teacher, Cheryl Perich, was a "called teacher," which meant that she was a commissioned minister. *Id.* at 700. Perich worked as a called teacher from 1999 to 2004. *Id.* In 2004, Perich was diagnosed with narcolepsy. *Id.* As a result of her illness, Perich was put on disability leave at the beginning of the 2004-2005 school year. *Id.* However, in January 2005, Perich informed the school that she could return to work. *Id.* The school informed Perich that her teaching position had been filled by a lay teacher. *Id.* Further, the school voted to release Perich from her called teacher position and asked her to resign. *Id.* Perich refused to resign. *Id.* As a result, the school voted to terminate Perich's employment. *Id.* In response, Perich filed a claim with the Equal Employment Opportunity Commission alleging that the school violated the discrimination provisions of the Americans with Disability Act by firing her. *Id.* at 701. The EEOC brought suit, and Perich intervened. *Id.*

116. *Id.* at 699.

117. *Id.* at 707.

118. The Court noted that the ministerial exception is not a jurisdictional bar; instead, it is a defense on the merits. *Id.* at 709 n.4 ("We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.").

discrimination laws.[119] The court said that members of religious organizations put their faith in their ministers' hands.[120] As such, in the words of Chief Justice Roberts,

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[121]

The court also disagreed with the EEOC's contention that *Smith*'s neutral principles of law approach governed the case.[122] In so disagreeing, the Court recognized a distinction between the government's regulation of an individual's outward physical acts—such as the ingestion of peyote in *Smith*—and a church's selection of its ministers.[123] The Court said that *Hosanna-Tabor* involved "government interference with an internal church decision that affects the faith and mission of the church itself."[124] Therefore, the First Amendment barred the government's intereference.[125]

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119. *Id.* at 705. The Circuit Courts of Appeal have long recognized a ministerial exception. *Id.* at 705 n.2 (citing Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989); Rweyemamu v. Cote, 520 F.3d 198, 204–09 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303–07 (3d Cir. 2006); EEOC v. Roman Catholic Diocese, 213 F.3d 795, 800–01 (4th Cir. 2000); Combs v. Central Tex. Annual Conference, 173 F.3d 343, 345–50 (5th Cir. 1999); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225–27 (6th Cir. 2007); Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362–63 (8th Cir. 1991); Werft v. Desert Southwest Annual Conference, 377 F.3d 1099, 1100–04 (9th Cir. 2004); Bryce v. Episcopal Church, 289 F.3d 648, 655–57 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1301–04 (11th Cir. 2000); EEOC v. Catholic Univ., 83 F.3d 455, 460–63 (D.C. Cir. 1996)).

120. *Hosanna-Tabor*, 132 S. Ct. at 706.

121. *Id.*

122. *Id.* at 707.

123. *Id.*

124. *Id.*

125. *Id.*

Finally, and important to the church dispute context of this Comment, the Court said that the ministerial exception—at this time—applies only in an employment discrimination lawsuit.[126] Specifically, the Court stated, "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise."[127] This language suggests that the Supreme Court's church dispute jurisprudence discussed in Part II.C *supra*, which takes the neutral principles of law approach, has not been overruled and is still applicable to church disputes.

III. THE PROBLEM OF CHURCH DISPUTES

This section of the Comment will examine three types of church disputes: pastoral, membership, and property.[128] The pastoral disputes section examines the legal liabilities for misconduct by the pastor and the termination of the pastor. The membership disputes section examines the rights and authority of members of a church and the legal ramifications of church discipline. The property disputes section examines property disputes and the differing court remedies. An overarching problem with church disputes is the proper role of the courts in presiding over predominately religious questions; this problem is examined by looking at

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126. *Id.* at 710 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit.").

127. *Id.*

128. These types of church disputes were chosen because they are some of the most prevalent church disputes. There are many other types of church disputes; however, it is outside of the scope of this comment to fully discuss each type. This chart ranks the most prevalent church disputes—filed in court—from 2000 to 2007:

	2000	2001	2002	2003	2004	2005	2006	2007
1	Employment	Employment	Employment	Property	Employment	Sexual Acts	Sexual Acts	Property
	Personal Injury	Personal Injury	Zoning	Employment	Property	Employment	Employment	Sexual Acts
3	Property	Property	Personal Injury	Personal Injury	Zoning	Property	Zoning	Employment
4	Zoning	Sexual Acts	Sexual Acts	Sexual Acts	Sexual Acts	Zoning	Property	Zoning
5	Sexual Acts	Zoning	Property	Zoning	Personal Injury	Personal Injury	Personal Injury	Personal Injury

This chart is adopted, in whole, from: 4 HAMMAR, *supra* note 32, at § 10, 130 tbl.10-2.

two different approaches courts have taken in light of the Supreme Court's Free Exercise jurisprudence.

A. *Pastoral Disputes*

The pastor is the spiritual leader of a church and can be compared to the president of a non-religious organization. He is selected by the members of the church and presides over the church's organization. Within this duty is the potential for conflict and disputes.

1. Clergy Malpractice

One of the most prevalent claims against the pastor is the claim of clergy malpractice.[129] This concept has gained national attention through the sexual misconduct of some Catholic priests.[130] According to the court in *Byrd v. Faber*,[131] clergy malpractice is the "failure to exercise the degree of care and skill normally exercised by members of the clergy in carrying out their professional duties."[132] Because clergy malpractice is such a new concept, few courts have addressed the issue.[133] Courts that have decided clergy malpractice claims have found that the "principle problem courts face with clergy malpractice is defining suitable conduct without interfering with the religious institution's free exercise rights."[134] In the case of *Schmidt v. Bishop*,[135] the court stated that "[i]t would be impossible for a court or jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric . . . performed within the level of expertise expected of a similar professional."[136] However, another court held that as long as the court does not consider the religious beliefs and remains neutral, it can properly decide cases that involve clergy misconduct.[137] The court went on to say that because of the "differing theological views espoused by the myriad of religions in our state . . . it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral

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129. John P. Hamm, *In Defense of the Church*, 33 U. OF LOUISVILLE J. OF FAM. L. 705, 706 (1995).

130. *Id.* at 707; *see, e.g.*, Rita M. v. Roman Catholic Archbishop, 232 Cal. Rptr. 685 (Ca. Ct. App. 1986); Schultz v. Roman Catholic Archdiocese, 472 A.2d 531 (N.J. 1984).

131. Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991).

132. *Id.* at 586.

133. *See* Hamm, *supra* note 129, at 716-17.

134. *Id.* at 717.

135. Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991).

136. *Id.* at 327.

137. Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 960-61 (Cal. 1988), *cert. denied*, 490 U.S. 1007 (1989).

counselors."[138] This does not require the court to disregard the illegal actions of clergy misconduct.[139] Ultimately, the First Amendment is a defense against clergy malpractice suits that do not involve illegal activity because the courts would have to decide the legitimacy of pastoral counseling advice.[140] The Supreme Court has stated that "[men] may not be put to the proof of their religious doctrines or beliefs . . . . If one could be sent to jail because a jury . . . found those teaching false, little indeed would be left of religious freedom."[141]

2. Employment Disputes

Churches can terminate a pastor's employment at any time and without cause as long as the pastor is not under contract and the church follows set procedures.[142] The Supreme Court's decision in *Hosanna-Tabor* suggests that a church's hiring and firing decisions cannot be reviewed by a court because of the ministerial exception.[143] But, in the case of an employment contract, the church may not discharge the pastor without good cause;[144] the Court expressly declined to apply the ministerial exception to employment contracts in *Hosanna-Tabor.*

If the church votes to terminate the employment of a pastor and they do not have good cause, they will be held legally liable and the discharge is not viable.[145] For good cause to be proved, the church must be able to produce "competent and convincing evidence."[146] The *Serbian* case is an example of a church dismissing the bishop of the church without good cause; the church was held legally liable because the dismissal was arbitrary.[147]

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138. *Id.* at 960.

139. *See* Hamm, *supra* note 129, at 709.

140. 1 HAMMAR, *supra* note 33, at § 4-05, 256.

141. United States v. Ballard, 322 U.S. 78, 86-87 (1944).

142. Watts v. Greater Bethesda Missionary Baptist Church, 154 N.E.2d 875 (Ill. 1958).

143. The Court stated,

> The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical"—is the church's alone.

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694, 709 (2012) (citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 119 (1952))(internal citations omitted).

144. *See* 1 HAMMAR, *supra* note 33, at § 2-02, 61-62.

145. *Id.*

146. *Id.* at § 2-02, 61.

147. Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976).

B. Member Disputes

Because church members are vested with considerable power within the church, membership must be clearly defined. Courts have found that members of a church enter into an agreement with the church, give a profession of faith in the church's beliefs, adhere to the doctrines set forth by the church, and submit to the church's form of government.[148] Membership is determined by the church's bylaws.[149] Churches are permitted to determine the standing of members within the church in relation to church discipline, and the church's decision is binding on the courts.[150]

Church discipline is used by churches to deter adverse moral behavior that is undertaken by a member of the church. Guidelines for church discipline are set forth in the bylaws of the church and should be followed to prevent any possible legal action. Courts have viewed church membership as a matter of contract, and because of this, the church members are under the discipline of the church.[151] The court in *Hester v. Barnett*[152] stated, "The consent to submit to the discipline of the church . . . is one of contract, therefore, between the member and the religious body."[153] Church discipline also involves the removal of members from the church.

According to *Bagley v. Carter*, a church may develop rules that govern the removal of members, and the rules are binding on the church's members.[154] Some state courts have ruled that the removal of church members falls within the authority of ecclesiastical beliefs, and the courts cannot review the decision.[155] By joining a church, the member is consenting to an implied contract that binds him to the authority of the

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148. *See* Freshour v. King, 345 P.2d 689, 696 (Kan. 1959); Henson v. Payne, 302 S.W.2d 44, 51 (Mo. 1956); Second Baptist Church v. Mount Zion Baptist Church, 466 P.2d 212, 216 (Nev. 1970); W. Conference of Original Free Will Baptists v. Creech, 123 S.E.2d 619, 627 (N.C. 1962).

149. 2 HAMMAR, *supra* note 33, § 6-02.2, at 80.

150. *Id.* § 6-09.1, at 202; *see also* Rodyk v. Ukranian Autocephalic Orthodox Church, 296 N.Y.S.2d 496, 497 (N.Y. App. Div. 1968); Stewart v. Jarriel, 59 S.E.2d 368, 370 (Ga. 1950); Fast v. Smyth, 527 S.W.2d 673, 676 (Mo. 1975); Eisenberg v. Fauer, 200 N.Y.S.2d 749, 751 (N.Y. App. Div. 1960).

151. Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 795 (Ok. 1989).

152. Hester v. Barnett, 723 S.W.2d 544 (Mo. 1987).

153. *Id.* at 559.

154. Bagley v. Carter, 220 S.E.2d 919, 920 (Ga. 1975).

155. *See* 2 HAMMAR, *supra* note 33, § 6-09.1, at 202-03.

church, and he is held to the authority of the church's decisions.[156] In the majority of states, courts can review the removal of a member if it interferes with civil, contract, or property rights; if it does not comply with church bylaws; and if it is based upon fraud.[157]

C. Property Disputes

Church property disputes most often arise when there is a church dispute that results in the church splitting into two separate groups.[158] As a result, each group claims to be the rightful possessor of the Church's property, which usually results in a lawsuit to determine the rightful owner of the property.[159] These disputes can arise "between either local and national organizations, or local factions, one of which may be allied to a national group."[160] These organizations are usually one of two types of religious bodies: hierarchical or congregational.[161] The Roman Catholic Church is an example of a hierarchical church organization, which centralizes church government in a hierarchical system.[162] Congregational churches, on the other hand, do not have a hierarchical organizational structure.[163]

The type of church organization is important because the Supreme Court has put forth two differing standards regarding church property disputes: the hierarchical deference approach and the neutral principles of law approach.[164] The hierarchical deference approach, which was created by the

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156. *Id.* § 6-10.1, at 210.

157. *Id.* § 6-09.1, at 204.

158. *See* Greenawalt, *supra* note 84, at 1843.

159. *Id.* at 1843-44.

160. *Id.* at 1844.

161. A GUIDE TO CHURCH PROPERTY LAW 28 n.1 (Lloyd J. Lunceford gen. ed., 2006); *see, e.g.*, Jones v. Wolf, 443 U.S. 595, 597 (1979).

162. *Id.* at 28 n.1.

163. *Id.*

164. The Supreme Court's two differing tests are important for more than church property disputes. In fact, these two standards are used to resolve all church disputes; the Court either recognizes that the dispute involves a religious question and *defers* to the religious organization's judgment, or the Court applies the neutral principles of law approach. *Compare* Watson v. Jones, 80 U.S. 679, 733 (1871) (stating that civil courts should not decide matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them . . . ."), *with* Jones v. Wolf, 443 U.S. 595, 607 (1979) (neutral principles of law).

Supreme Court in *Watson v. Jones*,[165] requires courts to defer to hierarchical organizations in respect to religious matters. The *Watson* Court said,

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.[166]

The Court further reasoned that permitting courts to make decisions regarding religious matters already decided by hierarchical church government would undermine religious autonomy.[167]

In contrast to the hierarchical deference approach, the neutral principles of law approach is the same standard discussed in *supra* Part II.C. As a result of the Supreme Court's lack of a bright-line test for church property disputes—or any church dispute for that matter—the state courts have either adopted the deference test, the neutral principles of law test, or a hybrid test.[168]

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165. *Watson*, 80 U.S. 679.

166. *Id.* at 728-29.

167. *Id.* at 729 ("But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.").

168. Mark Strasser, *When Churches Divide: On Neutrality, Deference, and Unpredictability*, 32 HAMLINE L. REV. 427, 454 (2009)

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

Id.

IV. THE BIBLE, THE COURTS, AND ALTERNATIVE DISPUTE RESOLUTION

Now that the history, background, and current issues of church disputes have been examined, it is necessary to analyze the use of the court system in the resolution of church disputes. This section proposes: (1) a new approach to biblical dispute resolution; (2) a restatement of the Supreme Court's neutral principles of law test; and (3) an alternative to the legal system for the resolution of church disputes.

A. *Biblical Perspective*

For Christians, a problem arises when the legal system is advocated to resolve church disputes. This problem is set out in I Corinthians 6:1-8:

> Does any one of you, when he has a case against his neighbor, dare to go to law before the unrighteous and not before the saints? Or do you not know that the saints will judge the world? If the world is judged by you, are you not competent to constitute the smallest law courts? Do you not know that we will judge angels? How much more matters of this life? So if you have law courts dealing with matters of this life, do you appoint them as judges who are of no account in the church? I say this to your shame. Is it so, that there is not among you one wise man who will be able to decide between his brethren, but brother goes to law with brother, and that before unbelievers?
>
> Actually, then, it is already a defeat for you, that you have lawsuits with one another. Why not rather be wronged? Why not rather be defrauded? On the contrary, you yourselves wrong and defraud. You do this even to your brethren.[169]

The text of I Corinthians 6:1-8 does not give commands. Instead, Paul poses a series of questions to the church on the topic of lawsuits against fellow believers. The text, on its face, however, does not affirmatively forbid believers from suing one another.

Paul wrote the letter of I Corinthians to the church in Corinth, Greece.[170] The church at Corinth was "[u]nable to fully break with the culture from which it came . . . was exceptionally factional, showing its carnality and immaturity."[171] The church developed factions that were loyal to different

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169. 1 *Corinthians* 6:1-8 (NASB95).

170. JOHN MACARTHUR, MACARTHUR STUDY BIBLE 1694 (2006).

171. *Id.* at 1694-95.

church leaders, and this caused a great amount of disunity.[172] Paul expressed his discontent with the members of the Corinthian Church because they were using the secular courts to resolve their disputes, instead of taking their disputes before the church.[173] Paul's primary concern was that the church members were taking each other to secular courts over trivial matters.[174] Paul said that they should suffer wrongs that are trivial rather than resort to secular courts.[175]

John Calvin, in his interpretation of I Corinthians 6:1-8, wrote that Christians should use the legal system as a last resort, but he did not discount its usage altogether.[176] Calvin believed that the legal system can and should be used as long as its usage does not violate the words of Jesus—to love God and your neighbor.[177] Matthew Henry, in his interpretation of I Corinthians 6:1-8, wrote that when the dispute is over something more than a mere trivial matter, the legal system may be used:

> In matters of great damage to ourselves or families, we may use lawful means to right ourselves. We are not bound to sit down and suffer the injury tamely, without stirring for our own relief; but, in matters of small consequence, it is better to put up with the wrong.[178]

The viewpoint espoused by many Christians, as a result of their misunderstanding of I Corinthians 6:1-8, is that believers should *never* sue one another. The text of I Corinthians 6:1-8, and the Scripture, as a whole, does not support this viewpoint.[179] This viewpoint is inconsistent with the biblical understanding of authority: "God has established civil courts and expects his people to respect their authority and cooperate with them in appropriate situations."[180] Therefore, the legal system's usage is not

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172. *Id.* at 1695.

173. KEN SANDE, THE PEACEMAKER 53 (3d ed. 2004).

174. MATTHEW HENRY, MATTHEW HENRY'S COMMENTARY ON THE WHOLE BIBLE 429 (1991).

175. *Id.*

176. Joseph Allegretti, *"In All This Love Will Be The Best Guide": John Calvin on the Christian's Resort to the Secular Legal System*, 9 J.L. & RELIGION 1, 10 (1991).

177. *Id.* at 12; *see Luke* 10:27.

178. HENRY, *supra* note 174, at 429.

179. *See* 1 *Corinithians* 6:1-8 (NASB95); *Matthew* 18:17 (NASB95); *Romans* 13:1-7 (NASB95).

180. *See* SANDE, *supra* note 173, at 281; *see, e.g.*, *Romans* 13:1-7:

> Every person is to be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God. Therefore whoever resists authority has opposed the ordinance of God; and

altogether forbidden by the Bible *as long as* the biblical dispute resolution framework is followed.

The Bible provides a step-by-step framework for the resolution of church disputes. The framework is set forth in Matthew 18:15-17, which says,

> If your brother sins, go and show him his fault in private; if he listens to you, you have won your brother. But if he does not listen *to you*, take one or two more with you, so that BY THE MOUTH OF TWO OR THREE WITNESSES EVERY FACT MAY BE CONFIRMED. If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector.[181]

Therefore, Matthew 18:15-17 presents a four-step process that should be completed to properly resolve church disputes. The first step is for the wronged to speak privately with the wrongdoer. If this does not resolve the dispute, the second step is for the wronged to bring one or two objective people along with him to confront the wrongdoer. If this does not resolve the dispute, the third step is for the wronged to bring the dispute before the

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> they who have opposed will receive condemnation upon themselves. For rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise from the same; for it is a minister of God to you for good. But if you do what is evil, be afraid; for it does not bear the sword for nothing; for it is a minister of God, an avenger who brings wrath on the one who practices evil. Therefore it is necessary to be in subjection, not only because of wrath, but also for conscience' sake. For because of this you also pay taxes, for *rulers* are servants of God, devoting themselves to this very thing. Render to all what is due them: tax to whom tax *is due;* custom to whom custom; fear to whom fear; honor to whom honor."

(NASB95); 1 *Peter* 2:13-14 ("Submit yourselves for the Lord's sake to every human institution, whether to a king as the one in authority, or to governors as sent by him for the punishment of evildoers and the praise of those who do right.") (NASB95). In *Acts* 24:2-4, Paul submits to the secular legal system, and the verse says:

> After *Paul* had been summoned, Tertullus began to accuse him, saying *to the governor,* "Since we have through you attained much peace, and since by your providence reforms are being carried out for this nation, we acknowledge *this* in every way and everywhere, most excellent Felix, with all thankfulness."

(NASB95); *Acts* 25:10-11:

> But Paul said, "I am standing before Caesar's tribunal, where I ought to be tried. I have done no wrong to *the* Jews, as you also very well know. If, then, I am a wrongdoer and have committed anything worthy of death, I do not refuse to die; but if none of those things is *true* of which these men accuse me, no one can hand me over to them. I appeal to Caesar." (NASB95).

181. *Matthew* 18:15-17 (NASB95).

Church for resolution. If this does not resolve the dispute, the wrongdoer is to be removed from the Church and is to be treated as a non-believer: "[A]s indicated in I Corinthians 5:1-13 . . . a person should not be considered to be part of the church if he or she has been removed from the fellowship through official church discipline."[182] As a result, the wrongdoer is no longer a "believer" as used in I Corinthians 6:1-8, I Corinthians 6:1-8 does not apply to him, and the wronged may seek a resolution of the dispute in the secular court system.[183]

The biblical framework is not only applicable to church disputes involving church members, but it should also be used for church disputes where the church is the wrongdoer. Church organizations should not be shielded from liability for their harmful conduct simply because they are an organized body of Christians. Instead, the church organization should be taken through the same biblical framework if it has caused harm. For example, if a pastor defrauds church members, the church cannot be allowed to act as a liability shield—the church, as well as the pastor, must be held accountable for the harm caused. If the church refuses to follow the biblical dispute resolution framework, it must be treated "as a Gentile and a tax collector."[184] In accord with this, a church that refuses the Matthew 18 mandate can—and should—be sued for its harmful conduct.

B. Why, and When to, Use the Courts?

The main problem in advocating the use of the court system for the resolution of certain types of church disputes is deciding when it is appropriate. The use of the court system is not appropriate in all cases of church disputes. When the matter that needs to be resolved is a matter of biblical morality within the church—adultery, alcohol, relationships—the legal system is not needed; these matters can be handled through ordinary church discipline. However, the legal system should be used when the dispute involves, in the words of the Supreme Court, "neutral principles of law."[185] As mentioned in *supra* Part IV.A, the government, in the Bible, is given jurisdiction in appropriate situations.[186] Unfortunately, the Supreme Court has not set forth a clear standard; therefore, a bright line rule needs to be developed to determine when courts can intervene.[187]

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182. *See* SANDE, *supra* note 173, at 281.
183. *Id.*
184. *Matthew* 18:15-17 (NASB95).
185. Jones v. Wolf, 443 U.S. 595 (1979).
186. *See supra* Part IV.A.
187. *See supra* Part III.C.

1. Redefining Neutral Principles of Law

The Supreme Court has not decided a church dispute case since *Jones v. Wolf*[188] in 1979. The Supreme Court's jurisprudence is not clear about the appropriate standard to apply to a church dispute case, and the state courts have split on the appropriate standard to apply in any given case.[189] This ambiguity in church dispute jurisprudence precipitates the need for a clarification of the existing neutral principles of law test.[190] The Supreme Court's neutral principles of law test is the appropriate test to apply to church disputes; however, the test needs to be clarified and consistently applied.

To clarify the neutral principles of law test, neutral principles must be defined. Neutral principles can be defined quite simply as *any matter that does not ask the court to decide a question of religious doctrine.* Unfortunately, this definition, by its very nature, is ambiguous. To counteract the ambiguity, neutral principles includes any legitimate, legal cause of action. Therefore, neutral principles, in tort law, would include a claim for: assault, battery, false imprisonment, defamation, intentional infliction of emotional distress, etc. The underlying premise of this proposal is that a church should not be able to escape liability for a social harm merely because it claims that the harm it caused was a result of its exercise of religion. Simply put, an intentional tort is not an exercise of religion.

The operating premise of courts that refuse to decide cases involving religion is that no matter the underlying claim—a claim for defamation, for example—the court must decide a matter of religion. This is simply not true. While the claim may involve religious actors—the church, pastor, and parishoners—the claim itself is not religious in nature. Returning to the case in the introduction section of this Comment, one can see that the claim, defamation, was not religious. The defamation claim was a secular cause of action. Therefore, a court can adjudicate the claim. On the other hand, if the party asked the court to decide a matter of religion—whether Jesus is the Son of God—then the court clearly cannot adjudicate that claim.

Courts are confused on this essential question: where do questions of religious doctrine end, and where do neutral principles of law begin? This question must be answered by the church itself. Church bylaws can be used in this regard. If a church wants to protect something as a matter of

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188. *Jones*, 443 U.S. 595.

189. *See supra* Part III.C.

190. See *supra* Part III.C for an example of the ambiguity of the Supreme Court's current test.

religion, then it must include that item in its governing documents.[191] However, the protection granted by this method cannot exclude legitimate, secular causes of action. A church should not be granted blanket immunity from civil prosecution simply because it asserts that a claim touches upon a question of religion. This is where the proposed test shines. As long as the claim does not require a court to answer a question of religious doctrine, the court can hear the case. The proposed test is best demonstrated by a hypothetical case study.

2. The Art of Ecclesiastical War: A Hypothetical Case Study

First Baptist Church of Illian (hereinafter "FBC") hired Rand to be its pastor. In traditional Baptist fashion, the church body voted on whether to hire Rand. Three-fourths of the church membership voted for Rand. Rand did not sign an employment contract; however, the nature of the relationship created an implied employment contract.[192] Rand and FBC agreed on an initial employment term of five years. Rand would be paid $50,000 per year.

In the first two years of Rand's employment, FBC's membership increased from 250 to 1,000. The church budget, which operated in the negative for the five years preceeding Rand's employment, was balanced, and a building expansion project was underway. Unfortunately, change often breeds contempt from the "old guard."[193]

Some of the members that voted against Rand's hiring as pastor were not happy with the changes at FBC (hereinafter "the coterie"). The coterie met in secret and formulated a plan to halt, and reverse, the change. Eventually, the coterie convinced the Chairman of the Deacons, Perrin, of their plan. Perrin met with Rand and presented him with his options: Rand could

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191. The church governing documents include constitution, bylaws, covenants, the Bible, etc. These documents establish matters of religion. Anything that falls outside of these documents cannot be considered a matter of religion.

192. Unfortunately, most Pastors do not sign written employment contracts. According to Richard Hammar, "[o]ften, a contract of employment will be implied between a church and its minister if no written agreement was signed." 1 HAMMAR, *supra* note 31, at § 2-02, 58. Additionally, "the absence of a written contract is completely immaterial; the conduct of the parties clearly indicates an agreement to retain [the] plaintiff as pastor until his dismissal by the church." Vincent v. Raglin, 318 N.W.2d 629, 632 (Mich. 1982).

193. New pastors bring change. Some church members expect the new pastor to keep the status quo. Perhaps Shaw said it best: "[t]he only man who behaved sensibly was my tailor: he took my measure anew every time he saw me, whilst all therest went on with their old measurements and expected them to fit me." GEORGE BERNARD SHAW, MAN AND SUPERMAN; A COMEDY AND A PHILOSOPHY 37 (1922).

either conform to their plans—preach only on approved topics, cancel the expansion plan, and not accept certain people into the church—or he would be fired. In essence, Rand could either sit beneath the Sword of Damocles[194] or be cast adrift in the sea of unemployment.

Rand discussed the situation with some of his closest friends in the church. The friends gathered supporters. Thus, two competing groups were formed. The coterie changed tactics; they spread false rumors about Rand. The rumors said that Rand cheated on his wife and embezzled money from the church. A majority of the church members believed the false rumors and voted to terminate Rand's employment. The church split. Rand decided to sue FBC. Rand's claims included breach of contract, defamation, and intentional infliction of emotional distress.

Because of the ambiguity of the Supreme Court's traditional neutral principles approach, a lower court probably would not decide the claim because it involves a religious dispute.[195] The proposed restatement of the neutral principles test would allow courts to hear this case because it is a *matter that does not ask the court to decide a question of religious doctrine.*

Rand's breach of contract claim involves an ecclesiastical matter—a church's decision to fire one of its employees. However, ecclesiastical matters are not synonymous with questions of religious doctrine. This is where the courts have introduced ambiguity into the Supreme Court's neutral principles test. Even though a claim involves an ecclesiastical matter, a court can still hear that claim as long as the court does not decide a question of religious doctrine. Rand's breach of contract claim is based upon his employment termination. Without getting into the legal issues surrounding a breach of contract claim, it is fairly obvious that the claim does not involve a question of religious doctrine. The court is not being asked to decide whether Rand's preaching accords with the church's beliefs; instead, it is being asked to adjudicate a secular cause of action. A judge deciding this case will not have to answer a question of religious doctrine—the only question the judge has to answer is whether there was a breach of contract.

If the court is confronted with the issue of Perrin asking Rand to preach only on approved topics, the court can still hear the case without deciding a

194. This phrase is derived from MARCUS TULLIUS CICERO, CICERO'S TUSCULAN DISPUTATIONS 185 (C.D. Yonge trans., Harper & Brothers 1877).

195. "The vast majority of lower federal courts and state courts have followed the general rule of judicial noninterference in ecclesiastical disputes involving the dismissal of clergy, and accordingly have ruled that the expulsion of a minister is an ecclesiastical matter that is not reviewable by the civil courts." 1 HAMMAR, *supra* note 33, at § 2-04.1, 80.

question of religious doctrine. The court does not have to examine the preaching topics and decide which are appropriate—that would not be allowed under either test. The court can decide whether Rand's failure to agree to the coterie's review of the preaching topics is grounds for dismissal. Once again, the claim touches upon an ecclesiastical matter, but it does not require a court to decide a question of religious doctrine.

Finally, the defamation and IIED claims do not require the court to decide a question of religious doctrine. The same analysis in the breach of contract claim should be applied to these claims. The court is not being asked to decide a question of religious doctrine. The only time a court should refuse to hear a church dispute claim is if the claim involves an interpretation of religious doctrine.

As evidenced by this hypothetical, church disputes do not result in a clear victor. When there is litigation, no one truly wins. FBC and Rand's church dispute resulted in the split of a large church and costly litigation. Church dispute litigation can be avoided with proper safeguards—specifically, the implementation of an alternative dispute resolution framework in a church's bylaws.

C. *Alternative Dispute Resolution*

Alternative dispute resolution has two main subparts: mediation and arbitration. Mediation consists of the involvement of one or more persons who facilitate communication and reconciliation between two parties in conflict.[196] The mediator is a neutral party who brings the parties together and controls the communication. The mediator helps the parties explore possible solutions to the dispute, but the parties are not obligated to follow the results of the meeting or to follow the advice given by the mediator.[197] The process of mediation is voluntary and is less confrontational than litigation, which results in the relationship between the parties having a higher likelihood of being reconciled.[198] The major problem with mediation is that the results of the process are not legally enforceable unless the parties consent to it.[199] The other alternative is arbitration.

Arbitration is the process by which each party presents their case to a neutral arbitrator, and each party is then legally bound to the decision of the

196. *See* SANDE, *supra* note 173, at 271.
197. *Id.*
198. *Id.*
199. *Id.*

arbitrator.[200] Arbitrators act like judges in that they listen to the evidence and then make a decision based upon it. Arbitration always produces a decision that is legally enforceable, usually cannot be disputed based upon state statutes, and is a much quicker process than litigation.[201] However, arbitration ignores the relationship of the parties involved and often aggravates the problem to the point that the two parties become further estranged.[202]

This Comment proposes, as an alternative to using the court system, that churches should implement a biblical approach to dispute resolution, which incorporates the framework of Matthew 18:15-17 into an alternative dispute resolution clause and includes mediation and arbitration. The problem with this proposal is that it must be included in the church's charter, bylaws, or constitution in order to be effective.[203] In reality, the proposed ADR clause, in the church's charter, bylaws, or constitution would prevent courts from becoming involved in church disputes.[204]

To prevent court involvement in church disputes, the following ADR Clause should be incorporated into a church's charter, bylaws, or constitution:

Dispute Resolution Provision

> Introduction. Any dispute arising out of the Church charter, bylaws, or constitution; or any dispute between the Church and Church Employees; or any dispute between the Church and Church Members;[205] or any dispute between Church Members, shall be resolved according to the procedures set forth in Parts A-E.
>
> (A) Biblical Injunctions. The Members of this Church are Christians that affirm the Biblical injunctions set forth in Matthew 18:15-20 and 1 Corinthians 6:1-8. Therefore, any Church dispute or claim, including claims under local law, state law, federal law, common law, or statutory law, shall be settled

200. *Id.*
201. *Id.* at 272.
202. *Id.*
203. *Id.*
204. *Id.*
205. Whether a person is a Church Member is determined by the membership provisions of the Church's Constitution and bylaws.

based upon biblical dispute resolution standards, as set forth in Parts B-E.

(B) Negotiation. The first step of dispute resolution shall be a meeting with the parties involved in the presence of Church leadership.[206] If the dispute is not resolved in the meeting with Church leadership, the dispute shall be submitted to Mediation in accordance with Part C.

(C) Mediation. If the dispute is not resolved by Negotiation, then the dispute shall be submitted to Mediation. The Church shall provide a non-Church affiliated mediator to resolve the dispute. The rules for the mediation process shall be conducted in accordance with [insert preferred rulebook here].[207] If the dispute is not resolved by Mediation, then the dispute shall be submitted to Arbitration in accordance with Part D.

(D) Arbitration. If the dispute if not resolved by Mediation, then the dispute shall be submitted to binding Arbitration. The Church shall provide a panel of three non-Church affiliated, independent, and objective, arbitrators.[208] The rules for the arbitration process shall be conducted in accordance with [insert preferred rulebook here].[209]

(E) Exclusive Remedy. All Church Members agree that the process set forth in this provision shall be the sole remedy for any dispute or claim. Additionally, all Church Members hereby expressly waive any right to file a lawsuit in civil court, except to enforce a legally binding arbitration provision, for any Church dispute or claim, including claims under local law, state law, federal law, and common law or statutory law.

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206. Church leadership is to be determined by the specific Church's organizational structure and should be inserted here.

207. Peacemakers, a Christian legal organization, has rules available for the mediation process, which can be located in GUIDELINES FOR CHRISTIAN CONCILIATION, ver. 4.5 (03/05).

208. Preferably, this panel should consist of layperson lawyers, judges, or someone with experience in the legal field in which the dispute takes place. In fact, a Christian arbitration organization, which consists of lawyers and retired judges, should be created—if not already in existence—and utilized in all church arbitration proceedings.

209. Peacemakers also has rules available for the arbitration process, which can be located in GUIDELINES FOR CHRISTIAN CONCILIATION, ver. 4.5 (03/05).

V. CONCLUSION

This Comment has put forth a restatement of the Supreme Court's neutral principles test in order to provide courts with a clearer guidepost when deciding church disputes. Additionally, this Comment has provided an alternative to the courts with the alternative dispute resolution clause to be inserted in church bylaws. The legal system is an objective arbiter of disputes, and it should be used in order to remediate social harm caused by churches. Under the proposed test, churches can no longer hide behind the cloak of Free Exercise immunity.