ON RESOLVING CHURCH PROPERTY DISPUTES

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In recent decades, major religious denominations have experienced some of the largest schisms in our nation's history, resulting in a flood of church property disputes. Unfortunately, the law governing these disputes is in disarray. Some states treat church property disputes just like disputes within other voluntary associations—applying ordinary principles of trust and property law to the deeds and other written legal instruments. Other states resolve church property disputes by deferring to religious documents such as church constitutions—even when those documents would have no legal effect under ordinary principles of trust or property law.

We argue that both courts and churches are better served by relying on ordinary principles of trust and property law, and that only this approach is fully consistent with the church autonomy principles of the First Amendment. Only this approach preserves the right of churches to adopt any form of governance they wish, keeps courts from becoming entangled in religious questions, and promotes clear property rights. By contrast, deferring to internal religious documents unconstitutionally pressures churches toward more hierarchical governance, invites courts to resolve disputes over internal church rules and practices, and creates costly uncertainty.

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INTRODUCTION

In the past decade, several major religious denominations—prominent among them the mainline Presbyterian and Episcopal churches—have experienced upheaval and division over issues of Biblical authority, Christology, and sexuality. Hundreds of local congregations have voted to withdraw from these national denominations,[1] raising the question: Who owns the church property?

In many cases, the answer is clear. Sometimes the deed to the property states that it is held for the benefit of the denomination, as is common in the

1. *See, e.g.*, PRESBYTERIAN CHURCH (U.S.A.), SUMMARIES OF STATISTICS – COMPARATIVE SUMMARIES, http://www.pcusa.org/site_media/media/uploads/oga/pdf/2013_comparative_summaries.pdf (stating that from 2012–2014, 359 local churches left the Presbyterian Church (U.S.A.) ("PCUSA") for other denominations); THE EPISCOPAL CHURCH, EPISCOPAL DOMESTIC FAST FACTS TRENDS: 2010–2014, http://www.episcopalchurch.org/files/domestic_fast_facts_trends_2010-2014.pdf (stating that from 2010–2014, the Episcopal denomination experienced a net decrease of 241 domestic parishes and missions; it is unclear how many of these parishes and missions left for other denominations).

United Methodist Church; other times, the property is subject to an express trust agreement in favor of the denomination; still other times, title to the property is vested in a denominational officer such as a bishop, as is common in the Roman Catholic Church and the Church of Jesus Christ of Latter-day Saints. In these cases, there is little doubt that the denomination owns the property, and in all likelihood there will be no litigation.

In other cases, however, the deed to the church property names the local church congregation, with no mention of the denomination or a trust agreement. One might think the answer in these cases would be just as clear. But in fact, the answer depends on what state the property is in. Some denominations, such as the mainline Presbyterian and Episcopal churches, have adopted internal church rules at the national level purporting to declare that all local property is held in trust for the denomination.[2] About half the state supreme courts to consider this scenario have honored the deeds and awarded the property to the local congregation; about half have deferred to national church rules and awarded the property to the denomination.

To make matters more confusing, the courts reaching these disparate results all claim to be applying the same legal doctrine: the so-called "neutral principles" approach.[3] But some courts apply the neutral principles approach strictly—relying exclusively on ordinary principles of property, trust, and contract law. We call this the "strict approach."[4] And some meld the neutral principles approach with deference to church canons or denominational constitutions. We call this the "hybrid approach."[5] Some courts recognize that these are not the same, and offer explanations for choosing one or the other. Some courts seem not to have noticed the difference.

This uncertainty comes at great human price. Sometimes church assets are dissipated in expensive litigation;[6] sometimes the uncertainty cripples the

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2. *See, e.g.*, THE CONST. OF THE PRESBYTERIAN CHURCH (U.S.A.) PART II, BOOK OF ORDER 2015–2017, at 62, G-4.0203 (2015) [hereinafter PRESBYTERIAN CHURCH (U.S.A.) BOOK OF ORDER 2015–2017], http://www.mission-presbytery.org/pdf/964.pdf ("All property held by or for a congregation, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.) . . . is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.)."); CONST. & CANONS TOGETHER WITH THE RULES OF ORDER FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE U.S. OTHERWISE KNOWN AS THE EPISCOPAL CHURCH, tit. I, canon 7, § 4 (2012) [hereinafter CONST. & CANONS FOR THE GOVERNMENT OF THE EPISCOPAL CHURCH], https://extranet.generalconvention.org/staff/files/download/6994 ("All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located.").

3. *See infra* Part II.

4. *See infra* Section II.B.

5. *See infra* Section II.A.

6. J. Jon Bruno, *Los Angeles Bishop Calls for Unity as Property Litigation Ends*, EPISCOPAL CHURCH (May 7, 2014), http://www.episcopalchurch.org/library/article/los-angeles-bishop-calls-unity-property-

church's ability to raise funds, borrow money, or obtain insurance; sometimes congregations have paid millions to the denomination to be spared the risks of litigation;[7] and sometimes denominations take control over buildings without sufficient numbers of parishioners to support them.[8]

The blame for the uncertainty falls squarely on the United States Supreme Court. In its last major pronouncement on this subject, *Jones v. Wolf*,[9] the Court issued an opinion with some language stating that courts could follow the legal language of deeds and trusts, and some language suggesting that they may—and perhaps even must—look to internal church documents like denominational constitutions or canons. The Court has repeatedly denied certiorari to clear this up—twelve times in the last six years.[10]

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litigation-ends (noting "more than $8 million in costs incurred on behalf of the Diocese of Los Angeles and the Episcopal Church" as a result of property litigation).

7. *See, e.g.*, *Presbytery of San Francisco Gives OK for Menlo Parks Dismissal*, LAYMAN (Mar. 13, 2014), http://www.layman.org/presbytery-san-francisco-gives-ok-menlo-parks-dismissal/?utm_source=PLC+email+blast+3%2F13%2F14&utm_campaign=email+blast&utm_medium=email ("Menlo Park Presbyterian Church (MPPC) will pay $8.89 million to the presbytery" in order to leave the Presbyterian Church (USA).).

8. Michelle Boorstein, *Supreme Court Won't Hear Appeal of Dispute over Episcopal Church's Property in Va.*, WASH. POST (Mar. 10, 2014), https://www.washingtonpost.com/local/2014/03/10/8f22e72a-a886-11e3-8599-ce7295b6851c_story.html (following a breakaway, an Episcopal congregation is faced with "trying to grow its 200-person community into one worthy of the large and valuable property it now gets to keep").

9. 443 U.S. 595 (1979).

10. *See* Petition for Writ of Certiorari, Episcopal Church v. Episcopal Diocese of Fort Worth, 135 S. Ct. 435 (2014) (No. 13-1520), 2014 WL 6334170; Petition for Writ of Certiorari, Falls Church v. Protestant Episcopal Church in the U.S., 134 S. Ct. 1513 (2014) (No. 13-449), 2013 WL 5587932; Petition for Writ of Certiorari, Presbytery of Ohio Valley, Inc. v. OPC Inc., 133 S. Ct. 2022 (2013) (No. 12-907), 2013 WL 267397; Petition for Writ of Certiorari, Presbytery of S. La. v. Carrollton Presbyterian Church of New Orleans, 133 S. Ct. 150 (2012) (No. 11-1393), 2012 WL 1852056; Petition for Writ of Certiorari, Rector v. Episcopal Church, 132 S. Ct. 2439 (2012) (No. 11-1166), 2012 WL 991422; Petition for Writ of Certiorari, Gauss v. Protestant Episcopal Church in the U.S., 132 S. Ct. 2773 (2012) (No. 11-1139), 2012 WL 900636; Petition for Writ of Certiorari, Timberridge Presbyterian Church, Inc. v. Presbytery of Greater Atlanta, Inc., 132 S. Ct. 2772 (2012) (No. 11-1101), 2012 WL 755072; Petition for Writ of Certiorari, Green v. Campbell, 130 S. Ct. 2088 (2010) (No. 09-986), 2010 WL 619542; Petition for Writ of Certiorari, St. Luke's of the Mountains Anglican Church in La Crescenta v. Protestant Episcopal Church in the Diocese of L.A., 559 U.S. 971 (2009) (No. 09-708), 2009 WL 4882619; Petition for Writ of Certiorari, Rector, Wardens & Vestrymen of St. James Parish in Newport Beach, Cal. v. Protestant Episcopal Church in the Diocese of L.A., 558 U.S. 827 (2009) (No. 08-1579), 2009 WL 1817075; Petition for Writ of Certiorari, Kim v. Synod of S. Cal. & Haw., 558 U.S. 823 (2009) (No. 08-1508), 2009 WL 1604438; Petition for Writ of Certiorari, Ark. Annual Conference of the African Methodist Episcopal Church, Inc. v. New Direction Praise & Worship Ctr., Inc., 558 U.S. 818 (2009) (No. 08-1352), 2009 WL 1206643.

In this Article, we attempt to resolve this problem on the basis of the fundamental principles of church autonomy rather than the snippets of precedent that have confounded state courts. Everyone—and in this case we really mean everyone—agrees that churches are constitutionally entitled to determine their own doctrines and structures, and that civil courts may not interfere. But many courts, by adopting the hybrid approach and deferring to national church rules, have proceeded to do just that: to determine for themselves, based on conflicting evidence, what the church polity really is. The hybrid approach is based on deeply flawed assumptions about the nature of churches, and it has the unfortunate effect of pressuring churches toward a more hierarchical form, entangling courts in religious questions, and introducing costly uncertainty.

The better approach—and the only approach consistent with the free exercise and nonentanglement principles of the Religion Clauses—is the strict approach, which resolves church property disputes on the basis of ordinary principles of property, trust, and contract law. This approach makes no assumptions about how churches intend to hold their property, but instead relies on churches to communicate their intent through the traditional instruments of property, trust, and contract law. This ensures that all churches are free to organize as they wish, keeps courts from becoming entangled in religious questions, and produces clear, stable property rights.

I. DEVELOPMENT OF THE DOCTRINE

Church property disputes are as old as any church.[11] But the response of the legal system has changed dramatically over time.

For roughly 150 years, the dominant approach was the English rule, which required courts to award property to whichever faction of the church adhered to "the true standard of faith"—meaning the old established orthodoxy of that particular religious group.[12] Although this approach is now understood as

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11. *Cf. Genesis* 13:1–10 (describing a property dispute amicably resolved between Abraham and Lot); *Acts* 5:1–11 (describing a property issue in the first-century Christian church). Eusebius recounts a church property dispute that arose in Antioch around 269 A.D. The bishop of Antioch, Paul of Samosata, was unanimously condemned by a synod of bishops as a heretic, excommunicated from the Catholic Church, and removed from office:

> But Paul absolutely refused to hand over the church building; so the [Roman] Emperor Aurelian was appealed to, and he gave a perfectly just decision on the course to be followed: he ordered the building to be assigned to those to whom the bishops of the religion in Italy and Rome addressed a letter. In this way the man in question was thrown out of the church in the most ignominious manner by the secular authority.

EUSEBIUS, THE HISTORY OF THE CHURCH FROM CHRIST TO CONSTANTINE 245, 248 (Andrew Louth ed., G. A. Williamson trans., Penguin Classics 1990) (1965).

12. Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872).

plainly unconstitutional,[13] it had a sound logic that was based on a common-sense intuition about donor intent. Churches are supported by donors; donors give to a church that adheres to a particular religious doctrine; allowing a church to use that donated property to propagate a substantially different doctrine would do violence to the original donors' intent. In the leading English case, *Attorney-General v. Pearson*,[14] for example, a Protestant meetinghouse split into Trinitarian and Unitarian factions, both of which claimed a right to control the property.[15] Because the deed did not expressly limit the use of the property to any particular form of worship, Lord Eldon held that the duty of the court was to ascertain "the nature of the original institution,"[16] and award the property to "those adhering to the original system."[17] Any other result, he reasoned, "would be to allow a trust for the benefit of A. to be diverted to the benefit of B."[18] As he further explained: "it is the right of those who founded this meeting-house, and who gave their money and land for its establishment, to have the trusts continued as was at first intended."[19] In other words, donors to a church are presumed to wish to advance the doctrines of that church, and it is therefore the duty of the court in the event of a split to honor donor intent and award the property to the faction that continues to preach the "true standard of the faith" rather than a variant on it.

Despite the logic of donor intent, the English rule raised several difficult questions, which we now recognize as insuperable constitutional objections. First, it required civil courts to resolve disputes about church doctrine, and determine authoritatively which faction is correct. In *Watson v. Jones*, the Supreme Court speculated that perhaps English judges were more comfortable "grappling with the most abstruse problems of theological controversy" because England had an established church.[20] But on this side of the Atlantic, there is no established church, and "[i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of [church] bodies as the ablest men in each are in reference to their own."[21] Typically, the legal documents gave little guidance about theology, forcing courts to use their own judgment. In *Pearson*, for example, the deed simply stated that the property was intended "for a meeting-house for the worship and service of God."[22] How was a civil court to know whether Unitarians or Trinitarians best met that criterion?

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13. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

14. (1817) 36 Eng. Rep. 135; 3 Mer. 353.

15. *Id.* at 135–36; 3 Mer. at 353.

16. *Id.* at 150; 3 Mer. at 400.

17. *Id.* at 157; 3 Mer. at 419.

18. *Id.* at 150; 3 Mer. at 402.

19. *Id.* at 157; 3 Mer. at 419.

20. 80 U.S. (13 Wall.) 679, 727–28 (1872).

21. *Id.* at 729. Recent decisions of the United Kingdom Supreme Court continue to hold that courts "may have to adjudicate upon matters of religious doctrine and practice" to decide church property disputes. Shergill v. Khaira [2014] UKSC 33 [59] (appeal taken from EWCA Civ.), http://www.bailii.org/uk/cases/UKSC/2014/33.pdf.

22. *Pearson*, 36 Eng. Rep. at 138; 3 Mer. at 360.

Second, the English rule presumes that donors are focused on doctrine rather than something else. No doubt many donors are doctrinalists, but some may care more about music, liturgy, or connections to the community, to name a few possibilities. In some cases, churches are supported by a large number of donors over an extended period of time, not all of whom share the same theological beliefs. In other cases, there is no clear expression of intent to begin with. It is not clear that the best way to honor donor intent is to award property on the basis of doctrinal orthodoxy.

Perhaps the most serious objection is that, taken literally, the English rule would forbid any evolution of church doctrine, lest the church lose its property to a faction of traditionalists. To mitigate this problem, courts developed a distinction between "fundamental," and "immaterial" departures from doctrine.[23] In *Attorney-General v. Gould*,[24] for example, the court held that a Baptist dispute over the doctrines of strict and free communion was not fundamental, and therefore could be changed by a majority vote of the congregation. Not surprisingly, courts were unable to develop a principled distinction between "fundamental" and "immaterial" departures from doctrine. The results "largely depended upon the predilections of the judges."[25]

In 1872, the United States Supreme Court rejected the English rule as a matter of federal common law—but not constitutional law—in *Watson v. Jones*.[26] There, a Presbyterian church in Kentucky divided over the issue of slavery. A majority of members sided with the highest authority of the church, the General Assembly of the national church, which was anti-slavery. But a majority of trustees and elders sided with a rival presbytery and synod, which were pro-slavery.[27] The Court of Appeals of Kentucky ruled for the pro-slavery faction, reasoning that the national assembly had exceeded its authority under the church constitution by attempting to appoint local elders.[28] The anti-slavery faction, supported by the national assembly, then filed a separate diversity lawsuit in federal court,[29] which ultimately reached the U.S. Supreme Court.[30]

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23. Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1148 (1962) [hereinafter *Judicial Intervention*].

24. (1860) 54 Eng. Rep. 452; 28 Beav. 485.

25. *Judicial Intervention*, *supra* note 23, at 1148–49 (citing examples).

26. 80 U.S. (13 Wall.) 679 (1872).

27. *Id.* at 691–93.

28. Watson v. Avery, 65 Ky. (2 Bush) 332 (1867).

29. One might wonder why the federal courts would have jurisdiction over a lawsuit involving the same parties, property, and subject matter that had already been resolved in state court. Justices Clifford and Davis dissented on the ground that the court lacked jurisdiction. *Watson*, 80 U.S. at 735–36. A majority of the Court, however, concluded that the two actions involved "a different state of facts, different issues, and different relief sought." *Id.* at 717. That conclusion seems questionable.

30. For a discussion of the historical background of *Watson* and the decision's connection to Reconstruction-era political and religious commitments, see Eric G. Osborne & Michael D. Bush, Rethinking Deference: How the History of Church Property Disputes

The Supreme Court ruled in favor of the nationally supported, anti-slavery faction. According to the Court, the key question was "which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church"—the locally supported, pro-slavery faction or the nationally supported, anti-slavery faction.[31] This, the Court said, was an "ecclesiastical" question, which could only be decided by "the highest . . . church judicatories."[32] Because the highest authority within the Presbyterian Church was the national assembly, and it had recognized the anti-slavery faction as legitimate, the Court was bound to award the property to that faction.

The *Watson* Court assumed that all churches fall into one of two categories: (1) a "strictly congregational or independent organization," which "owes no fealty or obligation to any higher authority;" or (2) a congregation that "is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete . . . over the whole membership of that general organization."[33] Property disputes resulting from splits in the former category, which would include most Baptist, Independent, and Quaker congregations, are "determined by the ordinary principles which govern voluntary associations"[34]—usually either majority rule or governance by elected officers. Property disputes resulting from splits in hierarchical denominations must be resolved according to the decisions of "the highest of these church judicatories to which the matter has been carried."[35] The Court deemed the Presbyterian Church to fall in the latter category.

The Court based its policy of deference to the national church tribunal on two considerations. The first was its view that ecclesiastical courts are more competent than civil courts to resolve ecclesiastical questions. As the Court said: "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 [church] bodies as the ablest men in each are in reference to their own."[36] In our view, a civil court's lack of competence to decide ecclesiastical questions provides a good reason for jettisoning the English rule, but not for deferring to one religious body over another when they are at odds over questions of property ownership. To be sure, the national denomination and the local congregation likely disagree about ecclesiastical issues, but once we reject the English rule, the question of property ownership should not turn on those issues, but on mundane questions such as who holds title and whether the property is subject to a trust. Judges of civil courts are

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Calls into Question Long-Standing First Amendment Doctrine (2016) (unpublished law review article) (on file with authors).

31. *Watson*, 80 U.S. at 717.
32. *Id.* at 727.
33. *Id.* at 722–23.
34. *Id.* at 725.
35. *Id.* at 727.
36. *Id.* at 729.

at least as competent, and surely are more disinterested, with respect to that kind of question.

The second consideration was the Court's view that those who join a religious association do so with an "implied consent" to its ecclesiastical decisions.[37] According to the Court, such consent is "the essence" of religious bodies, and "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."[38] Thus, deference on ecclesiastical matters was necessary to respect the implied consent inherent in a religious association. But that, too, is an assumption, which might or might not be true. When a local church joins a larger religious association, all we can know for sure is that it consents to what it consents to. The precise scope of that consent is the question at issue.

Despite their obvious differences, *Watson* and the English rule have something important in common: both are based on a crucial *assumption* about what church donors and members regard as most important. The English rule assumes churches are primarily concerned with doctrinal continuity, so it awards the property to the faction that is the most orthodox. *Watson* assumes that the "essence" of membership in a hierarchical church is submission to the higher church authority, so it awards the property based on deference to the hierarchy. In our view, both assumptions are true in some cases but false in many others.

Because *Watson* was not a constitutional ruling, states remained free to follow other approaches, including the English rule.[39] In a series of five decisions in the twentieth century, however, the Supreme Court in different contexts affirmed *Watson*'s ban on civil courts deciding ecclesiastical questions, and ultimately held that the English rule is not a constitutionally permissible basis for resolving church property disputes:

- In *Gonzalez v. Roman Catholic Archbishop of Manila* (1929), it held that civil courts could not rule on an individual's qualifications to be appointed a Catholic chaplain.[40]
- In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America* (1952), it held that the New York legislature could not pass a law transferring control over a cathedral from one authority within a church to another.[41]

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37. *Id.*
38. *Id.*
39. *See* Permanent Comm. of Missions of Pac. Synod of Cumberland Presbyterian Church in U.S. v. Pac. Synod of the Presbyterian Church, U.S., 106 P. 395, 404 (Cal. 1909) (collecting cases).
40. 280 U.S. 1 (1929).
41. 344 U.S. 94 (1952).

- In *Kreshik v. Saint Nicholas Cathedral* (1960), it extended the rule of *Kedroff* from the New York legislature to the New York judiciary.[42]
- In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969), it rejected the English rule as unconstitutional.[43]
- And in *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich* (1976), it held that civil courts could not interfere in a church's decision to reorganize itself and remove a bishop.[44]

These were not close decisions. *Gonzalez*, *Kreshik*, and *Hull Church* were unanimous; *Kedroff* was 8-1, and *Serbian* was 7-2. In every case, the higher church authority prevailed against the lower.

These decisions constitutionalized two related principles: first, that civil courts should not decide ecclesiastical questions; and second, that churches have a First Amendment right to be free from state interference in their internal affairs. The first may be seen primarily as a principle of the Establishment Clause, barring civil "entanglement" in religious matters, and the second may be seen primarily as a principle of the Free Exercise Clause, protecting the right of believers and religious institutions to order their affairs in accordance with their own convictions. Significantly, the Court recognized that religious freedom is not merely individual but also institutional, and that the First Amendment protects the right of religious communities "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"[45]—what students of religion would call "ecclesiology" as well as "theology."

Having condemned the English rule as unconstitutional, however, the Supreme Court did not adopt any alternative approach as constitutionally required. Instead, in two cases in the 1970s, the Court approved an alternative approach (now called the "neutral principles" approach) without stating that it was the only constitutional one.

In *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*,[46] a majority in two congregations voted to withdraw from their parent denomination.[47] The parent denomination sued, claiming that the minority factions represented "the true congregation[s]," and that control of the property should be awarded to them.[48] Under the *Watson* approach of deference to

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42. 363 U.S. 190 (1960).
43. 393 U.S. 440 (1969).
44. 426 U.S. 696 (1976).
45. *Kedroff*, 344 U.S. at 116; *accord* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 704–06 (2012); *Presbyterian Church*, 393 U.S. at 447–48.
46. (*Md. & Va. Eldership*), 396 U.S. 367 (1970) (per curiam).
47. 241 A.2d 691, 693–94 (Md. 1968).
48. *Id.*

the highest church tribunal, the denomination should have won. The Maryland Court of Appeals, however, rejected the denomination's claim. It held that "the express language of the deeds" vested control in the "local church corporations," and no provision of state law, the corporate charters, or the church constitution created a right of the parent denomination to retain local church property.[49] In a short per curiam opinion, the Supreme Court affirmed. It held that the Maryland Court of Appeals properly relied "upon provisions of state statutory law governing the holding of property . . . , upon language in the deeds . . . , upon the terms of the [corporate] charters . . . , and upon provisions in the [church] constitution."[50] Because the lower court's decision "involved no inquiry into religious doctrine," the appeal was "dismissed for want of a substantial federal question."[51]

Justice Brennan, joined by Justices Douglas and Marshall, wrote an influential concurrence. He argued that, as long as states avoid the resolution of "doctrinal matters," they can adopt any of three approaches for settling church property disputes.[52] First, they can adopt "the approach of *Watson v. Jones*," which requires deference to the highest authority within the church.[53] This approach is permissible so long as it does not contradict the "'express terms' in the 'instrument by which the property is held,'" and does not involve the court in an "extensive inquiry into religious policy."[54] (This is an important and relatively narrow interpretation of *Watson* that is often overlooked.).

Second, states can resolve church property disputes by relying on "[n]eutral principles of law, developed for use in all property disputes."[55] Under this approach, "civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws."[56] Interestingly, Justice Brennan labeled this "the 'formal title' doctrine"[57]—not the "neutral principles approach," as it is commonly labeled today. "Formal title" seems a more precise description of the approach, because everyone claims their approach is neutral in some sense. And unlike most courts today, Justice Brennan made no mention of considering church canons or constitutions. In other words, he was describing the strict neutral principles approach, not the hybrid approach.

Third, states can pass "special statutes governing church property arrangements," so long as these statutes are "carefully drawn to leave control of ecclesiastical policy, as well as doctrine, to church governing bodies."[58] This third approach has not played a significant role in current controversies, and we therefore will not discuss it further.

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49. 254 A.2d 162, 166–68 (Md. 1969).
50. *Md. & Va. Eldership*, 396 U.S. at 367–68.
51. *Id.* at 368.
52. *Id.*
53. *Id.* at 368–69.
54. *Id.* at 369–70.
55. *Id.* at 370.
56. *Id.*
57. *Id.*
58. *Id.*

In its most recent major ruling on church property disputes, *Jones v. Wolf*,[59] the Court built on Justice Brennan's concurrence. There, the majority of a Presbyterian congregation voted to separate from one Presbyterian denomination and join another.[60] The original denomination declared the minority faction to constitute "the true congregation," and the minority then sued in state court to regain the property.[61]

The Georgia Supreme Court rejected the minority's claim. Applying what it called the "neutral principles of law" approach, the court first examined the deeds, finding that they conveyed the property to the local congregation. It then examined the congregation's corporate charter, the denomination's constitution, and Georgia's statutes governing implied trusts, finding that there was no trust in favor of the denomination.[62] Accordingly, it held that legal title was vested in the local congregation, and that the local congregation was represented by the majority faction.[63]

In a 5-4 decision, the Supreme Court upheld the constitutionality of the neutral principles approach in theory, but remanded for clarification of how it had been applied in practice. The Court identified two primary advantages of the neutral principles approach. First, "[t]he method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[64] Second, it is "flexible enough to accommodate all forms of religious organization and polity."[65] Churches may use "appropriate reversionary clauses and trust provisions" to "specify what is to happen to church property in the event of a particular contingency"[66]—thus enabling churches to adopt the form of property ownership appropriate to their ecclesiology. The first consideration corresponds to the Establishment Clause concern of avoiding entanglement; the second corresponds to the Free Exercise concern of allowing religious communities to determine their own institutional form. Although these would seem to be clear advantages of the "neutral principles" or "formal title" approach over the hierarchical deference approach of *Watson*, the Court stopped short of holding that this approach was constitutionally compelled.

Four Justices dissented. According to them, church property disputes arise "almost invariably out of disagreements regarding doctrine and practice."[67]

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59. 443 U.S. 595 (1979). Justices Brennan and Marshall, who wrote and joined the *Maryland & Virginia Eldership* concurrence, were in the majority in *Jones*. Justices Burger, Stewart, and White, who declined to join the concurrence, dissented in *Jones*.

60. *Id.* at 598.

61. *Id.*

62. *Id.* at 601.

63. *Id.*

64. *Id.* at 603.

65. *Id.*

66. *Id.*

67. *Id.* at 616.

Thus, "in all cases," civil courts must defer to "the decisions of the church government agreed upon by the members before the dispute arose."[68] Here, because the local congregation was originally part of a national denomination, and the denomination recognized the minority faction as the true congregation, the Court was required to defer to that decision.[69] Any other method, the dissenters argued, would "interfer[e] indirectly with the religious governance" of the church.[70] In other words, the dissenters would make the *Watson* rule constitutionally mandatory.

In addition to leaving the constitutional rule up in the air, *Jones* also contains ambiguous language (not present in Justice Brennan's admirably clear concurrence in the *Maryland & Virginia Eldership* case), describing how the "neutral principles" approach should be applied in practice. At one point, the opinion suggests that the neutral principles approach should be "completely secular in operation,"[71] meaning that courts should rely "exclusively on objective, well-established concepts of trust and property law," as applied to the deeds, corporate charters, and formal trust agreements.[72] According to this view, as long as courts avoid religious questions, church property disputes can be resolved just like other property disputes within a voluntary association.[73] We have called this the "strict" neutral principles approach.

Another passage in the opinion, however, suggests that in addition to legal documents establishing title, courts may "examine certain religious documents, such as a church constitution"[74] in reaching their decisions. Indeed, the opinion states that in some cases courts may be "bound to give effect to the result indicated" in those documents, apparently even if they otherwise would have no legal standing in trust or property law.[75] This is the "hybrid" approach.

In yet another passage, though, the *Jones* opinion appears to take back what it just said about church constitutions. In describing how churches could adopt any institutional form they wish under the neutral principles approach, the Court stated: "Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church . . . . And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form."[76] This suggests that church constitutions have legal effect only when they are embodied in "some legally

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68. *Id.* at 614.
69. *Id.* at 620–21.
70. *Id.* at 618.
71. *See id.* at 603.
72. *Id.* at 603–04.
73. This sounds much like Justice Brennan's concurrence in *Maryland & Virginia Eldership*, 396 U.S. 367, 370 (1970).
74. *Jones*, 443 U.S. at 604 (discussing the neutral-principles approach, "at least as it has evolved in Georgia").
75. *Id.* at 606.
76. *Id.*

cognizable form," such as a trust document or a deed. That returns to the strict approach.

II. THE INTERSECTION OF COURT SPLITS AND CHURCH SCHISMS

The ambiguity in *Jones* has produced a split over how the neutral principles approach should be applied in practice. In the wake of *Jones*, 29 states adopted some version of the "neutral principles" approach, while 9 retained the *Watson* approach, and 12 are unclear or undecided.[77] Of the 29 states that adopted the neutral principles approach, 9 apply the "strict" approach, 9 apply the "hybrid" approach, and 11 are unclear or undecided.[78]

This split has assumed far more practical importance than anyone could have imagined at the time of *Jones*, because several of the nation's oldest and largest religious denominations—Episcopalians, Presbyterians, and Methodists—quickly responded to *Jones*'s invitation to amend the "constitution of the general church . . . to recite an express trust in favor of the denominational church," and thereby attempt to resolve all property disputes with local congregations in one national move.

In 1979, the General Convention of Protestant Episcopal Church in the United States of America adopted Canon I.7.4, now known as the "Dennis Canon," which states that "[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located."[79] Significantly, the General Convention did not proceed by amending the denomination's constitution, which would have required notice to local congregations, a three-year waiting period, and stringent voting requirements.[80] Instead, the General Convention adopted this policy in the form of a canon, which requires no advanced notice to congregations, no waiting period, and a simple majority vote.[81] To make matters more confusing, the denomination's official commentary on the Dennis Canon suggested that it might have no legal force.[82]

The largest Presbyterian denominations, now united in what is called the Presbyterian Church (U.S.A.), followed suit. In 1983, its General Assembly amended the denomination's constitution to read:

> All property held by or for a congregation, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.),

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77. Jeffrey B. Hassler, Comment, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 PEPP. L. REV. 399, 457 (2008). Any precise count should be considered with caution, as the law in some states is ambiguous, inconsistent, or in flux.

78. *Id.*

79. CONST. & CANONS FOR THE GOVERNMENT OF THE EPISCOPAL CHURCH, *supra* note 2, at tit. I, canon 7, § 4.

80. *Id.* art. XII.

81. *Id.* tit. V, canon 1.

82. *See* Bjorkman v. Protestant Episcopal Church in the U.S. of the Diocese of Lexington, 759 S.W.2d 583, 586 (Ky. 1988).

> whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a congregation or of a higher council or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).[83]

The United Methodist Church took similar action, in the form of an amendment to its Book of Discipline:

> The United Methodist Church is organized as a connectional structure, and titles to all real and personal, tangible and intangible property held at general, jurisdictional, annual, or district conference levels, or by a local church or charge, or by an agency or institution of the Church, shall be held in trust for The United Methodist Church and subject to the provisions of its Discipline.[84]

One difference between the Methodist Church and the Episcopal and Presbyterian Churches is that the Methodist Church Book of Discipline set forth specific trust language that all local property deeds should contain,[85] and many local congregations actually incorporated that language into their deeds—something the Episcopalians and Presbyterians failed to do.

Moreover, these changes took place at a time of intense theological ferment and division. Within a few decades, all three denominations—but especially Episcopalians and Presbyterians—experienced one of the most widespread schisms in our nation's history, focusing on sexuality but extending to issues of scriptural interpretation, Christology, and ecclesiology. Hundreds of local congregations have voted to leave the mainline denomination, most of them to join more conservative denominations, leading to disputes over who owns the church property.[86]

These disputes often follow a common pattern. The dispute begins when a majority of a congregation votes to leave the denomination. Both sides then seek to assert legal control over the church property: the congregation argues that the deeds vest legal title in the congregation and there is no express trust agreement;

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83. PRESBYTERIAN CHURCH (U.S.A.) BOOK OF ORDER 2015–2017, *supra* note 2, at 62, G-4.0203. The PCUSA was formed by a merger of two prior denominations, one primarily northern and one primarily southern. Those two predecessor denominations amended their constitutions in similar form in 1981 and 1982. The southern church allowed local congregations a grace period to exit with their property before the new provision took force.

84. THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH 649, ¶ 2501 (Harriet Jane Olson et al. eds., 2000) [hereinafter UNITED METHODIST CHURCH BOOK OF DISCIPLINE].

85. *Id.* at ¶ 2503(2)–(3), (6).

86. *See, e.g.*, Leslie Scanlon, *Who's Joining the Exodus? Departure of PC(USA) Congregations to Other Denominations Accelerates*, PRESBYTERIAN CHURCH (USA) (Sept. 20, 2013), http://www.pcusa.org/news/2013/9/20/whos-joining-exodus/.

the denomination argues that the newly-adopted denominational provisions create a trust in favor of the denomination.[87] The key question is whether those provisions should be given civil legal effect. For convenience, we will call the denominational canons and church constitutions "internal church rules" to distinguish them from deeds, trusts, or other legal documents that would be recognized under state property and trust law.

In addition to arguing about the legal force, if any, of internal church rules, the parties also typically dispute the nature of their ecclesiastical relationships. The denomination emphasizes aspects of the relationship supporting denominational control—for example, that congregational officials swore to be bound by the rules of the denomination, received appointments of ministers by the denomination, used hymnals and prayer books supplied by the denomination, sent delegates to national conventions of the denomination, or received other benefits from the denomination.[88] Congregations, in turn, emphasize aspects of the relationships supporting local control—such as the fact that they funded, designed, built, maintained, and controlled the property, that they objected to denominational assertions of control over local property, or that they exercised a significant degree of local autonomy.[89] The key question is how these internal church rules and relationships should affect the ownership of church property.

A. The Hybrid Approach

Under the hybrid neutral principles approach, internal church rules and relationships are almost always dispositive. Although courts may discuss the ordinary requirements of property, trust, or contract law, they hold that internal church rules govern property ownership even when those rules do not comply with the necessary formalities of civil law.

Take, for example, the common scenario where the deeds place legal title in the local congregation, but the denomination claims that its internal church rules (such as canons or constitutions) have created a trust. Under black letter trust law, those internal church rules, standing alone, could not create a valid trust, because a trust can only be created by the legal titleholder, which in this scenario is the local congregation.[90] Denominations cannot create a trust in favor of themselves in property they did not previously own.

That does not render internal church rules a nullity; rather, those rules are understood as a species of *church law*, enforceable through the internal

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87. *See, e.g.*, Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530, 534 (Va. 2013); Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc., 719 S.E.2d 446, 449–50 (Ga. 2011).

88. *See, e.g.*, Brief of Appellee Protestant Episcopal Church in the Diocese of Virginia at 10–17, Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530 (Va. 2013) (No. 120919), 2013 WL 4548632, at *9–16.

89. *See, e.g.*, Brief for Appellant the Falls Church at 20–21, Falls Church v. Protestant Episcopal Church in U.S., 740 S.E.2d 530 (Va. 2013) (No. 120919), 2012 WL 8899588, at *20–21.

90. *See infra* Sections IV.B, C.

mechanisms of church authority, such as excommunication, refusal to ordain ministers unless the canon is obeyed, or other means. Church law is not ordinarily enforceable in court. For example, some church constitutions have required lay leaders to be "faithful in marriage, or celibate outside of marriage," but no one would think it possible to sue in court to enforce such a provision; enforcement would be entirely internal and ecclesiastical. Similarly, church canons might require the use of particular liturgy or the celebration of particular occasions. None of this is enforceable in civil court. Nevertheless, courts adopting the hybrid approach have held that *Jones v. Wolf* requires them to give legal effect to the internal church rules relating to property ownership.[91]

Other courts using the hybrid approach examine not only internal church rules, but also the course of dealings between the denomination and the local congregation, looking for any indication that the local congregation implicitly consented to denominational control over property. For example, some courts have looked at a congregation's decision to remain within a denomination, or the fact that the denomination appointed the congregation's pastor, or the fact that the congregation received benefits from the denomination—all of which have been deemed to show that the congregation consented to denominational control of local property.[92] Even when these actions would not rise to the level of an implied trust or contract under ordinary principles of state law, some courts have found them sufficient—either alone or in combination with internal church rules.

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91. *See, e.g.*, In re Episcopal Church Cases, 198 P.3d 66, 80–81 (Cal. 2009); Episcopal Church in the Diocese of Connecticut v. Gauss, 28 A.3d 302, 319 (Conn. 2011); Rector, Wardens, & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc., 718 S.E.2d 237, 253–54 (Ga. 2011); Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 818–19 (Iowa 1983); Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920, 924–25 (N.Y. 2008); *In re* Church of St. James The Less, 888 A.2d 795, 809 (Pa. 2005).

92. *See, e.g.*, E. Lake Methodist Episcopal Church, Inc. v. Trs. of the Peninsula-Del. Annual Conference of the United Methodist Church, Inc., 731 A.2d 798, 810 (Del. 1999) (relying on the congregation's "constant association with, and explicit recognition of, the parent church"); Presbytery of Ohio Valley, Inc. v. OPC, Inc., 973 N.E.2d 1099, 1113 (Ind. 2012) (relying in part on the fact that the congregation "continu[ed] as a member of the [denomination] from 1983 until 2006"); *Episcopal Diocese of Rochester*, 899 N.E.2d at 925 ("We find it significant, moreover, that [the congregation] never objected to the applicability or attempted to remove itself from the reach of the [National Church's canons] in the more than 20 years since the National Church adopted the express trust provision."); Green v. Lewis, 272 S.E.2d 181, 184–85 (Va. 1980) ("The general church supplied the ministers and provided the organization and structure which is necessary if a church is to function and to fulfill its mission. A Sunday School was organized, and its materials were furnished by the general church. Hymnals and other literature were provided. Baptisms, marriages, and funerals were conducted from the church's Discipline . . . . And the members of [the congregation], by payment of their assessments and in numerous other supportive ways, contributed to this state, national, and international ecclesiastical organization, and they presumably benefitted from the association, spiritually and otherwise.").

Still other courts have used the language of implied trust,[93] estoppel,[94] or contract[95] to find general control over local property. We will discuss these approaches in detail below. For now, the important point is that under the hybrid approach, courts look *not only* at standard legal documents, such as deeds, trust agreements, articles of incorporation, or contracts, which would conclusively govern the case if it involved a non-church entity; they also examine evidence of church law and practice, sometimes allowing those internal church rules or practices to trump legal title. The apparent theory is that church law and church practices are a more reliable indicator of the intention of the parties than the bare instruments of legal title.

The rationale for this broad approach to relevant evidence is the notion of implied consent. Courts using the hybrid approach typically assume that by joining and remaining within a hierarchical denomination, local churches implicitly consent to the denomination's rules. They presume that if they do not give legal weight to those rules, the court would be interfering in the internal operations of the church. This rationale is the same, in many ways, as the rationale for deference in *Watson*—namely, that "implied consent" is "the essence of [voluntary] religious unions," and that "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."[96]

A good example of the hybrid approach is *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*[97] There, the majority of a Presbyterian congregation voted to disaffiliate from the Presbyterian Church (U.S.A.).[98] Both the congregation and denomination then sued for control of the property.[99] The lower court ruled in favor of the congregation, based on the language of the deeds, which identified the local congregation as the owner, and state laws governing trusts. As the court explained, "the deeds are silent regarding any trust in favor of the [denomination]," and the denomination failed under ordinary principles of trust law to demonstrate "an intention on the part of [the congregation] to create a trust in its favor."[100]

The Georgia Supreme Court, however, reversed. Although it agreed that "[none of the] deeds show an intent by the grantors to create a trust,"[101] and that the denomination had failed to comply with Georgia's express trust statute,[102] it nevertheless held that complying with state trust law "is not the *only way*" for

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93. *See infra* Section IV.C.
94. *See infra* Section IV.D.
95. *See infra* Section IV.E.
96. Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872).
97. 719 S.E.2d 446 (Ga. 2011).
98. *Id.* at 449–50.
99. *Id.*
100. Timberridge Presbyterian Church, Inc. v. Presbytery of Greater Atlanta, Inc., 705 S.E.2d 262, 269–70 (Ga. Ct. App. 2010).
101. *Timberridge Presbyterian Church, Inc.*, 719 S.E.2d at 451.
102. *Id.* at 452.

churches to create a trust. Quoting *Jones v. Wolf*, the court held that "it may also be done through the national church's constitution, for example, by making it 'recite an express trust.'"[103]

Accordingly, the court looked to the denomination's constitution, which (as discussed above) included a provision, added in 1983, stating that all property held by local congregations was held in trust for the denomination.[104] Although the congregation had voted to opt out of this requirement when it was adopted, the court held that it had no right to opt out under the denomination's constitution.[105] In addition, the court relied on the conduct of the parties—concluding that the congregation's "act of affiliating with the [denomination] . . . demonstrated that [the congregation] assented to th[e] relinquishment of its property rights."[106]

B. The Strict Approach

Under the strict neutral principles approach, courts resolve church property disputes by applying ordinary principles of property, trust, or contract law to civil legal documents, such as deeds, trust agreements, or contracts. Internal church rules are not enforced by the court unless they have been legally incorporated through a trust or otherwise. In other words, church property disputes are resolved just like property disputes within other voluntary associations.

Depending on the nature of the dispute and the claims of the parties, different principles of civil law may apply. For example, if there is a dispute over the language of a deed or the validity of a conveyance, courts will apply state property law.[107] If there is a dispute over an express or implied trust, courts will apply state trust law.[108] And if there is a dispute over the validity of a contract or the locus of corporate control, courts will apply state contract or corporations law.[109]

Under this approach, church canons and constitutions are relevant only if they are "embodied in some legally cognizable form"[110]—that is, only if they comply with "the formalities" of property, trust, or contract law.[111] For example, a declaration of trust in church canons would be effective only if it met the ordinary requirements of state trust law—such as an intention by the settlor to create a trust, a reasonably ascertainable beneficiary, a trustee, and defined duties of the

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103. *Id.* at 453 (quoting Jones v. Wolf, 443 U.S. 595, 606 (1979)).

104. *Id.* at 448.

105. *Id.* at 455–56 ("[The congregation] plainly could not opt out of the property trust provision.") (emphasis omitted).

106. *Id.* at 456.

107. All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., 685 S.E.2d 163, 172–74 (S.C. 2009) (discussing property deeds and statute of uses).

108. *Id.* (applying state trust law to a trust deed and trust canon).

109. *Id.* at 174–75 (applying state corporations law to articles of incorporation).

110. Jones v. Wolf, 443 U.S. 595, 606 (1979).

111. Watson v. Jones, 80 U.S. (13 Wall.) 679, 723 (1872).

trustee.[112] Similarly, the course of conduct between the parties would be relevant only if it was made relevant under state law—such as when state law provides that an implied trust can be inferred from the conduct of the parties.[113] In short, internal church rules and relationships are not given any special weight; they are given the same weight as the internal rules and relationships of any other voluntary association.

That is not to say that the religious nature of a church is irrelevant. There are still constitutional restrictions in play, but they are the same two restrictions identified by the Supreme Court in *Jones*—namely, (1) civil courts cannot "resolv[e] church property disputes on the basis of religious doctrine and practice";[114] and (2) state law must be "flexible enough to accommodate all forms of religious organization and polity."[115] So, for example, if a deed or trust agreement incorporates elements of church doctrine, a court must defer to church authorities on interpretation of the doctrine. Similarly, if state law makes it burdensome for a church to adopt a particular type of ownership structure, that law might be struck down as unconstitutional.[116]

The rationale for the strict approach is that it is simple, flexible, and predictable. It allows churches to adopt any form of governance that they wish, while keeping courts from becoming entangled in religious questions. Unlike the English rule, which presumes that churches want doctrinal continuity, or the hybrid or deference approaches, which presume that churches want centralized control of property via internal canons, the strict approach presumes that *courts don't know what churches want.* Instead, courts must rely on churches to *tell* them what they want by embodying their intent in the relevant legal documents.

A good example of the strict approach is *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina.*[117] There, the majority of an Episcopal congregation voted to sever ties with the denomination, and the congregation amended its articles of incorporation to that effect.[118] The majority of the congregation and the denomination then sued each other over control of the local property and the local corporate entity.[119] Although the original trust deed is a bit confusing, in 1903 the diocese executed a quitclaim deed placing title in the congregational corporate entity. Following the forms of corporate law,

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112. *See, e.g.*, GA. CODE ANN. § 53-12-20 (2012) (setting forth the requirements of an express trust); UNIF. TRUST CODE § 402 (UNIF. LAW COMM'N 2010).

113. Presbytery of Ohio Valley v. OPC, Inc., 973 N.E.2d 1099, 1109 (Ind. 2012) (discussing state law of implied trusts).

114. *Jones*, 443 U.S. at 602.

115. *Id.* at 603.

116. *See infra* notes 191–94 and accompanying text.

117. 685 S.E.2d 163 (S.C. 2009).

118. *Id.* at 169.

119. Technically, there were two separate lawsuits. In one, the majority faction sued the diocese and the denomination over control of the property, and the diocese and the denomination counterclaimed. *Id.* at 168. In the other, the minority faction sued the majority faction seeking a declaration that they were the true officers of the local corporate entity. *Id.* at 169–70. The two suits were eventually consolidated. *Id.*

the majority had properly amended the articles of incorporation to sever ties with the denomination. The denomination rested its claim on the Dennis Canon, and accordingly claimed that the amendments to the articles of incorporation were invalid.

The South Carolina Supreme Court ruled in favor of the majority of the congregation. First, regarding control of the property, the court analyzed the two relevant deeds—one from 1745 and one from 1903—and found that they "ma[de] clear that title to the property at issue is currently held by the congregation's corporate entity."[120] Next, the court addressed the denomination's argument. Applying ordinary principles of state trust law, the court held the Dennis Canon insufficient to create a trust, because "[i]t is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another."[121] Because the denomination had no interest in the congregation's property when it enacted the trust canon, that canon "had no legal effect."[122]

Finally, the court considered the denomination's claim that the amendments to the congregation's articles of incorporation were invalid. To do this, it applied the South Carolina Non-Profit Act, which requires any amendment to a corporation's articles to be approved by "(1) the board of directors, (2) the members 'by two-thirds of the votes cast . . . ,' and (3) any person whose approval is required by the Articles of Incorporation."[123] Because the amended articles complied with all three requirements, and because there was no separate requirement that amendments be approved by the denomination, the court held that the amendments were valid and that the majority of the congregation was entitled to control the local corporation.[124]

III. BENEFITS OF THE STRICT APPROACH

We believe that the strict approach is preferable to the hybrid approach in three main respects. First, it protects free exercise rights by giving churches flexibility to adopt any form of governance they wish. Second, it prevents civil courts from becoming entangled in religious questions. And third, it promotes clear, stable property rights. The hybrid approach, by contrast, pressures churches toward more hierarchical governance, invites courts to resolve disputes over internal church rules and practices, and creates costly uncertainty. We address each of these issues in turn.

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120. *Id.* at 174.
121. *Id.*
122. *Id.*
123. *Id.* (quoting S.C. CODE ANN. § 33-31-1003(a)(1)–(3)).
124. *Id.* at 175.

A. Protecting Free Exercise Rights

Under the hybrid approach, courts must first determine whether a church is "congregational" or "hierarchical."[125] If a church is "congregational," it is treated like any other voluntary association—which typically means that the property is controlled by a majority vote of the leaders or members. But if the church is deemed "hierarchical," courts must give weight to the rules of the denomination and the relationship between the congregation and denomination. The reason for the different treatment is the notion that congregations implicitly consent to the rules of a "hierarchical" church.

This approach raises serious First Amendment problems for two reasons. First, it assumes that all churches are either "congregational" or "hierarchical," and that "hierarchical" churches share the same notion of implied consent. But in the real world, not all churches are purely "congregational" or "hierarchical," and a church's governing structure may offer little insight into how it intends to hold its property. Second, this approach puts a heavy thumb on the scales in favor of a more "hierarchical" form of polity, contradicting the First Amendment rule that churches must remain free "to decide for themselves, free from state interference, matters of church government."[126]

1. False Congregational/Hierarchical Dichotomy

In the religiously diverse American context, many religious associations are neither "congregational" nor "hierarchical," and it is no easy task for a court to determine where along the spectrum a given church lies.[127] The "hierarchical" label best fits the Roman Catholic Church, where local parishes are subject to strict, ascending levels of authority—from priests, to diocesan bishops, to the Pope. Typically, Roman Catholic parishes hold property in the name of the diocesan bishop—thus ensuring hierarchical control.[128]

At the other end of the polity spectrum, Quakers and Independent Baptists exemplify the classic "congregational" model. As the Supreme Court said in *Watson*, these groups are "strictly independent of other ecclesiastical

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125. *See* All Saints Par. Waccamaw v. Protestant Episcopal Church in Diocese of S.C., 685 S.E.2d 163, 171 (S.C. 2009).

126. Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

127. Jones v. Wolf, 443 U.S. 595, 605–06 (1979) (noting that, in many cases, church government is "ambiguous"); *see also* H. REESE HANSEN, *Religious Organizations and the Law of Trusts*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 279, 285 n.49 (James A. Serritella ed., 2006) ("Approximately 17% of the religious organizations responding to the DePaul study answered that their organizational structure is either along a continuum of types or of some structural form other than hierarchical, congregational, presbyterial, or connectional.") (citing DePaul University, 1994 Survey of American Religions at the National Level, Public Release Document 3).

128. JOSEPH CHISHOLM, *Civil Incorporation of Church Property*, *in* 7 CATHOLIC ENCYCLOPEDIA (1910), http://www.newadvent.org/cathen/07719b.htm.

associations."[129] There are no religious bodies connecting individual congregations to each other. They recognize no ecclesiastical authority outside of the congregation.

But many religious polities fall somewhere between the two, or change over time. Familiar examples include "mainline" Protestant denominations such as Methodists, Presbyterians, and Lutherans. The Evangelical Lutheran Church in America, for example, emphasizes that it is organized neither as a hierarchical church in the Roman Catholic tradition nor as a congregational church in the Anabaptist tradition, but as a church in which all levels are "*interdependent* partners sharing responsibility in God's mission."[130]

Another example is the Presbyterian Church (U.S.A.) ("PCUSA"). It has multiple levels of governance. Individual congregations are governed directly by a "Session," which consists of the pastor and congregationally elected elders. The Session in turn sends delegates to a regional Presbytery; the Presbytery sends delegates to a Synod; and the Synod sends delegates to the nationwide General Assembly. In light of this multi-tiered structure, the highest adjudicative body in the PCUSA has declared that the church's structure "*must not be understood in hierarchical terms*, but in light of the shared responsibility and power at the heart of Presbyterian order."[131]

Moreover, a "hierarchical" form alone offers little insight into how any given church intends to hold property. Different Presbyterian denominations, for example, hold the same beliefs about the nature of church government (ecclesiology), but take different positions as to property ownership. Since 1983, the PCUSA constitution has included a provision stating that all property of local congregations is held in trust for the denomination.[132] But the constitution of the Presbyterian Church in America ("PCA"), with an ecclesial structure virtually identical to that of the PCUSA, affirms just the opposite: local churches retain their properties if they leave.[133] As one commentary has noted, "the mere outward

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129. 80 U.S. (13 Wall.) 679, 722 (1872).

130. EVANGELICAL LUTHERAN CHURCH IN AM., CONSTITUTIONS, BYLAWS, AND CONTINUING RESOLUTIONS Ch. 5, § 5.01 (2008), http://www.newlifelutheran.com/media/13e6ab7d8db073ebffff80f0ffffd502.pdf (emphasis added).

131. Johnston v. Heartland Presbytery of the Presbyterian Church (U.S.A.), Remedial Case 217-2 (Permanent Judicial Comm'n of the Gen. Assembly of the Presbyterian Church (U.S.A.) 2004), http://oga.pcusa.org/media/uploads/oga/pdf/pjc21702.pdf (emphasis added).

132. *See* PRESBYTERIAN CHURCH (U.S.A.) BOOK OF ORDER 2015–2017, *supra* note 2, § G-4.0203 ("All property held by or for a congregation [i.e. local church] . . . is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).").

133. *See* THE BOOK OF CHURCH ORDER OF THE PRESBYTERIAN CHURCH IN AMERICA §§ 25-9, -10 (6th ed. 2007) ("All particular [i.e. local] churches shall be entitled to hold, own and enjoy their own local properties, without any right of reversion whatsoever to any Presbytery, General Assembly or any other courts hereafter created, trustees or other officers of such courts."); *see also* OFFICE OF THEOLOGY & WORSHIP, PRESBYTERIAN MISSION AGENCY, *Comparison of Basic Beliefs and Viewpoints of Three Presbyterian*

presbyterial form—i.e., a series of assemblies—does not necessarily import a functional hierarchy."[134]

Other religious groups cannot be located on a hierarchical–congregational spectrum at all. This is particularly true of non-Christian religious organizations, which often do not share the Christian notions of "assembly" and "membership" that underlie the hierarchical–congregational dichotomy. Examples include Hindu temples,[135] Islamic mosques,[136] Sikh temples,[137] and some Jewish groups.[138] For these groups, a hierarchical–congregational categorization makes no sense.

Moreover, regardless of how a religious organization is formally structured, it is virtually impossible to discern how a church is governed by examining formal ecclesial structure alone. To understand how a church is really governed, one must be intimately familiar not merely with documents such as the church constitution, canons, and bylaws, but also with the history of those laws in operation. As one scholar of church governance put it, "the constitutions of church groups vary widely in how, and the extent to which, they provide the definitive clue to the governance patterns of those groups."[139] Some constitutions are hortatory but widely ignored in practice, some are purely aspirational, some are adopted over the opposition of a large minority of local congregations or individual members and may not reflect the desires of those constituencies.

In short, the blanket assumption that all churches are either hierarchical or congregational, and that all hierarchical churches share the same ideas of "implied consent," is a poor fit for many church polities. Of course, some polities are hierarchical in that sense, but others are not. The true nature of a church's polity is a complex, nuanced factual question that civil courts are ill equipped to resolve.

Denominations, https://www.pcusa.org/site_media/media/uploads/theologyandworship/epcecopcusa_comparisonchart_1_1_2015.pdf (stating that, in the PCUSA, "[c]ongregations hold property in trust for the use and benefit of the PC(USA)"; in the Evangelical Covenant Order of Presbyterians, the "[c]ongregation owns property"; and in the Evangelical Presbyterian Church, the "[c]ongregation owns property, and this provision cannot be changed").

134. *Judicial Intervention*, *supra* note 23, at 1160; *see also* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1851, 1879 (1998).

135. *See, e.g.*, WILLARD G. OXTOBY, *The Nature of Religion*, *in* WORLD RELIGIONS: EASTERN TRADITIONS 486, 489 (Willard G. Oxtoby ed., 2001) (noting that Hindu temples have neither "members" nor "congregations").

136. HELEN R. EBAUGH & JANET S. CHAFETZ, RELIGION AND THE NEW IMMIGRANTS 49 (2000) (noting that Islamic mosques have neither congregations nor members).

137. Singh v. Singh, 9 Cal. Rptr. 3d 4, 19 n.20 (Ct. App. 2004) (noting that Sikh temples or "gurdwaras" are not arranged in either a "congregational" or "hierarchical" fashion).

138. Congregation Yetev Lev D'Satmar, Inc. v. Kahana, 879 N.E.2d 1282, 1289 (N.Y. 2007) (Smith, J., dissenting) (noting that Hasidic Jewish groups defy "congregational" or "hierarchical" classification).

139. EDWARD LEROY LONG, JR., PATTERNS OF POLITY: VARIETIES OF CHURCH GOVERNANCE 3 (2001).

2. Pressure Toward a Hierarchical Form

Unfortunately, courts adopting the hybrid approach have not grappled with this problem. Instead, once a church is deemed hierarchical, courts assume that the denomination has a "general and ultimate power of control more or less complete" over all congregations.[140] Accordingly, these courts give great and often dispositive weight to the denomination's interpretation of its constitution, canons, and internal church practices—even when it conflicts with the language of the deeds and other legal instruments.

The problem is that not all "hierarchical" churches want the denomination to exercise complete control over congregations.[141] Some denominations want elements of local autonomy—including a right of local congregations to exit the denomination and keep their property.[142] There can be many reasons for preserving such a right of exit. For example, a right of exit can serve as a check on the denomination from running roughshod over the strongly held views of a minority, including on divisive theological issues. A right of exit also allows congregations to affiliate with a denomination safe in the knowledge that they can depart if deep differences arise.[143] This makes it more likely that congregations will join in the first place, and it may make them more willing to stay and work through differences.[144] And, of course, some denominations may have theological reasons for preserving a right of exit.

Nor is this intermediate form of organizational structure unique to churches. Many organizations are hierarchical in the sense that all members must

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140. Watson v. Jones, 80 U.S. (13 Wall.) 679, 722–23 (1872).

141. *Id.*

142. *See supra* note 133 and accompanying text.

143. *Cf.* Robert C. Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 440 n.69 (1964) (collecting cases in which a congregation affiliated with a denomination and later sought to withdraw).

144. One possible example of this dynamic is the development of "gracious dismissal" policies in the PCUSA. In 2008, with the denomination facing many property disputes, the PCUSA General Assembly adopted a resolution encouraging intermediate governing bodies to "develop and make available to lower governing bodies and local congregations a process that exercises the responsibility and power 'to divide, dismiss, or dissolve churches in consultation with their members.'" PRESBYTERIAN CHURCH (USA) EXPLORER, ACTIONS OF THE 218TH GENERAL ASSEMBLY, *Item 04-28: Commissioners' Resolution. On Urging a Gracious, Pastoral Response to Churches Requesting Dismissal from the PC(USA)* (2008), http://pc-biz.org/(S(2f01mx1pwmu20cq40yffbzcw))/Explorer.aspx?id=2137 (quoting THE CONST. OF THE PRESBYTERIAN CHURCH (U.S.A.) PART II, BOOK OF ORDER 2007–2009, at 82, G-11.0103i, http://bookoforder.info/boo07-09.pdf). In response, some presbyteries have adopted "gracious dismissal policies" allowing local congregations to leave the denomination and take local property with them. This reflects the denomination's view that resolving church property disputes through litigation "is deadly to the cause of Christ" and should be used only "as a last resort." PRESBYTERIAN CHURCH (U.S.A.), ADVISORY OPINION, THE TRUST CLAUSE AND GRACIOUS SEPARATION: IMPLEMENTING THE TRUST CLAUSE FOR THE UNITY OF THE CHURCH 3, 9 n.32 (2013), http://s3.amazonaws.com/churchplantmedia-cms/goodshepherdca/advisory-opinion-19.pdf.

abide by the organization's rules as long as they belong, but they also have a right of exit. Labor unions may join the AFL-CIO and must abide by its rules, but they are also free to leave.[145] The same is true of other organizations, like teachers' unions or veterans' groups.[146] In international law, states may ratify a treaty and be bound by its provisions, but they can typically terminate the treaty in accordance with its terms and be released from their obligations.[147] In all of these relationships, providing a right of exit may make it easier to establish an association in the first place. So it is not surprising that some denominations may desire the same.

Political scientists have recognized that organizations and associations have a range of choices about how to allocate power and influence.[148] In particular, in the case of disagreement, dissidents may exercise *voice* by remaining within the organization and keeping up the debate, or they may *exit*. The possibility of exit can make voice more powerful—the majority will have an incentive to listen to the minority and perhaps to compromise. Indeed, the possibility of exit in the case of irremediable conflict may make it more likely that a diverse group will form an association to begin with. The purpose of the Dennis Canon and similar internal church rules is to make exit very costly. Not every religious society will want to do that.

Under the hybrid approach, however, establishing a form of governance with a secure right of exit is not possible. Even if a denomination adopts a constitutional provision guaranteeing local control of church property—as a different Presbyterian denomination, the Presbyterian Church in America ("PCA"), has[149]—it is impossible to make that constitutional provision binding. If the denomination decides to amend its constitution, or even if it simply adopts a new interpretation of the old constitution, the hybrid approach would require courts to defer to that decision.[150] That is, even if the PCA fully intends *ex ante* to give local

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145. Mark Brenner, *Longshore Union Quits the AFL-CIO*, LABOR NOTES (Aug. 31, 2013), http://www.labornotes.org/2013/08/longshore-union-quits-afl-cio.

146. *See, e.g.*, Mo. State Teachers Ass'n v. St. Louis Suburban Teachers Ass'n, 622 S.W.2d 745, 752 (Mo. Ct. App. 1981) (allowing a district teachers' association to disaffiliate from state association); *cf.* Vikings USA Bootheel Mo. v. Modern Day Veterans, 33 S.W.3d 709, 711–12 (Mo. Ct. App. 2000) (holding that local affiliates of a national non-profit organization were not necessarily bound by provisions of the national organization's articles of incorporation).

147. Vienna Convention on the Law of Treaties arts. 42–45, 54–56, 65–68, 70, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; *see generally* Laurence R. Helfer, *Terminating Treaties*, *in* THE OXFORD GUIDE TO TREATIES 634–49 (Duncan Hollis ed., Oxford University Press 2012). The same is true of signing and "unsigning" a treaty, like the Rome Statute establishing the International Criminal Court. *See* Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

148. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

149. *See supra* note 133 and accompanying text.

150. *Cf.* Comm'n of Holy Hill Cmty. Church v. Bang, No. B184856, 2007 WL 1180453, at *1 (Cal. Ct. App. Apr. 23, 2007) (PCA denomination attempted to control the

congregations ultimate control over their property, and existing local congregations join or remain within the denomination on that basis, the hybrid approach makes it impossible for the PCA to make that aspect of "congregational" governance binding on itself.

This is not merely hypothetical. In one prominent case involving a historic church property in Virginia, the local church antedated formation of the Episcopal denomination by decades.[151] At the time it chose to join the denomination, there was no canon imposing a denominational trust; indeed, in 1914 the diocese formally recognized that the property was locally owned.[152] That did not keep the denomination from adopting the Dennis Canon, or the state court from enforcing it.[153]

Thus, the hybrid approach creates a one-way ratchet. Once a church is deemed "hierarchical," all elements of denominational control must be enforced by the courts; but any elements of congregational control can be canceled by the denomination on a moment's notice, simply by changing the denomination's rules or adopting new interpretations of old rules. Ultimately, this imposes more centralized forms of governance on churches than they may have agreed to, violating the longstanding constitutional command that churches be free "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[154]

By contrast, the strict neutral principles approach—which focuses on ordinary legal documents like deeds, contracts, and trust agreements—protects *all* forms of church governance. If a denomination like the PCA wants local property to be under local control, it can place title in the local congregation, and mere changes to the church constitution will not change ownership. If a denomination wants local property to be under denominational control, it can require congregations to adopt use restrictions, execute trust agreements, or place title in the name of denominational authorities. And if a denomination wants to change the way it holds church property, it can change the legal documents accordingly. There is no reason for courts to place a thumb on the scales in favor of any particular form of governance.

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property of a breakaway congregation, notwithstanding the denomination's constitutional commitment to local property control).

151. *See* Brief for Appellant at 7, 12–13, Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530 (Va. 2013) (No. 120919), 2012 WL 8899588, at *6.

152. *Id.* at *11–12.

153. Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530, 540–41 (Va. 2013).

154. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952); *accord* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 704–06 (2012); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447–48 (1969).

3. The Intent of the Parties

A common criticism of the strict approach is that it is not as good as the hybrid approach at ascertaining the parties' intent. According to this argument, the "ultimate goal" in church property disputes "is to determine 'the intentions of the parties.'"[155] And the best way to determine the intentions of the parties is to consider "all [available] materials"—not just the deeds and other legal documents, but also church canons and internal relationships.[156] This argument assumes that the formal instruments of property, trust, and contract law may not be accurate sources of churches' intent. One scholar puts the point this way: because churches may not "have the resources to retain legal counsel" and "may not adequately understand all the potential issues, . . . the legal documents may be inconsistent with normal practice and understanding within the religious community," and may not "reflect[] the spiritual and organizational realities and expectations within a belief tradition."[157]

But there is no reason to assume that rules adopted at a denominational level are inherently more reflective of the intentions of the church community as a whole than are the legal documents. In fact, longstanding principles of property, trust, and contract law say just the opposite—namely, that the best evidence of the parties' intent is found in the final legal documents. The strict approach presumes that the most reliable way to communicate intent is to put it in writing, in the specified legal form. Our legal system does not decide the intent of the testator by a consider-all-evidence approach; we stick to the will. The parol evidence rule limits the use of extra-contractual evidence to interpret a contract. And property law is the strictest of all, as anyone who buys or sells a house can attest. There are good reasons for these legal formalisms: they avoid having the ownership of property hinge on debatable subjective judgments. As one contract scholar explains, "the formal writing reflects the parties' minds at a point of maximum resolution," and relying on extrinsic evidence presents an "obvious danger of outright fraud."[158] Moreover, in the context of real property, the rule promotes clarity and stability of property rights by allowing all parties to a transaction to rely on publically accessible written instruments.[159]

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155. Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc., 719 S.E.2d 446, 450 (Ga. 2011).

156. *Id.*; *see also* Bishop & Diocese of Colorado v. Mote, 716 P.2d 85, 100 (Colo. 1986) (noting that a strict approach "preclud[es] the trial courts from considering evidence relevant to a church property dispute that is not couched in the traditional forms and language of trust law").

157. HANSEN, *supra* note 127, at 301–02.

158. MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 82–83 (6th ed. 1990).

159. Of course, there are narrow exceptions where extrinsic evidence may be considered in certain contexts. For example, in some jurisdictions the terms of a will or trust can be reformed if it is proven by clear and convincing evidence that that transferor's or settlor's intention was otherwise and that the terms of the legal instrument were affected by a mistake of fact or law. UNIF. PROBATE CODE § 2-805 (UNIF. LAW COMM'N 2010); UNIF. TRUST CODE § 415 (UNIF. LAW COMM'N 2010). But this is a narrow exception, not the rule.

The hybrid approach turns this rule on its head, allowing extrinsic evidence of church canons and internal relationships to trump the deeds and other common legal instruments. But there is no reason to assume that churches alone—unique among all voluntary associations—are incapable of embodying their intent in the relevant legal documents. And contrary to the criticism noted above,[160] it is not technically difficult to draft deeds or trusts in favor of the denomination, if that is what the parties to those instruments wish. The reason local churches have not always done so is often that they do not want to do it.

A related criticism of the strict approach is that declining to defer to internal church rules imposes congregational forms of governance on hierarchical churches. According to this view, an inherent feature of hierarchical churches is the fact that congregations implicitly consent to the denomination's rules. As *Watson* said, "[a]ll who unite themselves to [a hierarchical church] do so with an implied consent to [its] government, and are bound to submit to it."[161] Thus, it is argued that failing to give legal effect to a denomination's rules would interfere with church governance in violation of the First Amendment.[162]

But this argument is fallacious because it assumes the answer as the premise. Enforcing denominational rules imposes hierarchical governance on less-than-hierarchical churches, which is just as bad a problem. The constitutional need is to adopt a system that allows church communities to form and enforce institutional arrangements in accordance with their own ecclesiology. It makes no sense to guard against the possibility of mistakenly imposing congregational governance on hierarchical churches at the expense of automatically converting all churches (other than obviously congregational ones) into hierarchical ones.

The argument from implied consent also misunderstands the nature of consent within a voluntary association. To be sure, the members of any voluntary association—church or otherwise—agree to be bound by the association's rules, *in the sense that they can be expelled for violating them*. But that does not elevate every rule of a voluntary association to the level of a legally enforceable contract.

For example, if a fraternal lodge adopts a new rule that members must donate 50 hours of service to the lodge each year, and a member fails to do so, the lodge may expel him—but it cannot, on a theory of implied consent, obtain a court order requiring him to perform the service. The rule would be enforceable as a contract only if it met the ordinary rules for contract formation in the state.

Similarly, if the lodge adopts a bylaw declaring that all members must give the lodge a vested remainder in their real property that becomes possessory

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It is still a very high bar. And some jurisdictions reject even this sort of narrow exception. *See, e.g.*, Flannery v. McNamara, 738 N.E.2d 739, 747 (Mass. 2000). We address such exceptions in Part IV, *infra*.

160. *See supra* text accompanying note 157 (quoting HANSEN, *supra* note 127, at 301–02).

161. Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872).

162. HANSEN, *supra* note 127, at 301–02; *see also* Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 VA. L. REV. 443, 458–59 (2010).

upon their death, it will not automatically obtain the members' property when they die. The property interest must be created by a formal agreement or conveyance. If a member refuses to make the agreement or conveyance, he can be expelled from the lodge. But the mere existence of the rule, and the members' implied consent to it by remaining within the organization, does not constitute a legal conveyance.

The same is true of a church. If a church adopts a rule requiring all members to tithe ten percent of their income to the church, it can enforce the rule on pain of excommunication. But the mere existence of the rule, and the members' implied consent to it by remaining within the church, does not empower the church to sue the members for unpaid tithes at the end of the year.

Similarly, if a hierarchical church adopts a rule declaring a trust interest in local property, it can order local officials to execute a trust agreement or be expelled from the denomination.[163] But the mere existence of the internal rule, and the congregations' implied consent to it by remaining within the denomination, does not create a legally cognizable trust.

That was the experience of the Roman Catholic hierarchy in the 1800s when it sought to obtain control over local church buildings during the trusteeship controversy. The Council of Baltimore in 1823 declared that church property should be held in the name of the bishop. But that did not mean that bishops across the country immediately gained title to local church property. It took decades before this decision was effectuated through changes in property and trust instruments.[164] The same is true today. Churches can adopt any internal rules they wish, but those rules do not have legal force unless they are embodied in the forms required by state law.

A final criticism of the strict approach is that it is supposedly in tension with *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, which recognized the First Amendment "ministerial exception."[165] There, a former teacher sued a Lutheran school, claiming that it had fired her in violation of the Americans with Disabilities Act. The Supreme Court held that the suit was barred by the ministerial exception, which protects the right of religious groups to select their leaders free from government interference.[166] The opinion contains important language protecting churches from "government interference with an internal church decision that affects the faith and mission of the church itself."[167]

According to at least one litigant, *Hosanna-Tabor* is "flatly inconsistent" with the strict neutral principles approach.[168] Just as the First Amendment "'bar[s] the

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163. *Cf.* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (expelled bishop).

164. CHISHOLM, *supra* note 128.

165. 132 S. Ct. 694, 705–06 (2012). One of the Authors was co-counsel for the prevailing church in *Hosanna-Tabor*.

166. *Id.* at 707–08.

167. *Id.* at 707.

168. Petition for a Writ of Certiorari at 35, Episcopal Church v. Episcopal Diocese of Fort Worth, 135 S. Ct. 435 (2014) (No. 13-1520), 2014 WL 6334170, at *35.

government from interfering with the decision of a religious group to fire one of its ministers,' [it] likewise bar[s] interference with the equally fundamental decision as to the identity of the rightful church."[169] In other words, *Hosanna-Tabor* requires "a return to deference" in church property disputes.[170]

But this criticism conflates two fundamentally different types of dispute. The ministerial exception involves a conflict between a church and an unwanted minister, who is seeking to use external legal restrictions, such as employment discrimination laws, to thwart the church's decision about who can be a minister. *Hosanna-Tabor* rightly holds that when external legal restrictions would interfere with internal church decisions such as the selection of clergy, the church must prevail. Church property cases do not present a conflict between the civil law and an internal church decision; they present a conflict between two church entities over what the church's decision was in the first place. The laws of trust and property are not being used to thwart that decision but to discern what it was and give legal effect to it. In that context, *Hosanna-Tabor*'s unquestioned principle that the government must not interfere in internal church decisions does not dictate which church entity is entitled to prevail for purposes of property law. It simply reinforces the two constitutional principles that have governed since *Gonzales*, *Kedroff*, *Kreshik Hull Church*, *Sharpsburg*, *Milivojevich*, and *Jones v. Wolf*: first, that civil courts should not decide ecclesiastical questions; second, that churches have a First Amendment right to be free from state interference in their internal affairs.[171] For reasons already explained, we believe the strict neutral principles approach better accords with those principles and gives effect to churches' decisions than the deference approach. Nothing in *Hosanna-Tabor* suggests otherwise.

At bottom, the hybrid approach and the related criticisms of the strict approach are based on a crucial, unstated assumption about churches' intent—namely, that if a church adopts a form of governance that falls on the hierarchical side of the artificial dichotomy, it must want all property to be subject to the hierarchy's rules. In that sense, the hybrid approach shares a key defect of the deference approach and the English approach: all three approaches make unwarranted assumptions about what all churches want. The English approach assumes that all churches want doctrinal continuity, so it awards property to the most orthodox faction. But that is not always true; some churches want to evolve. The deference approach assumes that all hierarchical churches want hierarchical control, so it awards property to the faction approved by the hierarchy. But that is not always true; some churches want to form national associations that balance power and control between local and national authorities. Finally, the hybrid approach assumes that all hierarchical churches want property to be subject to the hierarchy's rules, so it awards property in accordance with those rules. But that is not always true either; some hierarchical churches want property to be independent

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169. *Id.* at 35–36 (internal citation omitted) (quoting *Hosanna-Tabor*, 132 S. Ct. at 702).

170. *Id.* at 36.

171. *See supra* Part I.

of the hierarchy's rules. Only the strict approach makes no assumption about the type of polity that churches want. It assumes only that churches—like all other voluntary associations—are capable of expressing their chosen polity in the ordinary language of trust and property law.[172] The strict approach is the only scheme that fully protects the right of churches to organize as they see fit.

B. Reducing Entanglement in Religious Questions

The strict approach also keeps courts from becoming entangled in religious questions. In any given church property dispute, there will typically be at least three types of ownership evidence: (1) legal documents, such as the deed, corporate charter, state laws governing trusts, and any formal contracts or trusts; (2) church governance documents, such as the church constitution and canons; and (3) evidence of church practice, such as who typically controls local property and how the church constitution and canons are applied in practice.[173]

Under the strict neutral principles approach, courts can resolve church property disputes exclusively on the basis of the legal documents. If the deeds are in the name of denominational authorities, or if there is a contract or trust agreement in favor of the denomination, the denomination will prevail. But if the deeds are in the name of the local church, and there is no contract or trust in favor of the denomination, the congregation will prevail. As the Court said in *Jones*, this approach "is completely secular in operation" and eliminates the need for "[a] careful examination of the constitutions of the general and local church."[174]

Under the hybrid approach, by contrast, the typical legal documents are not dispositive. Courts must instead examine church canons and the relationships within the church. In some cases, this might not be difficult, because the canons might be clear or the parties might agree on their meaning.[175] But in other cases, as *Jones* said, "the locus of control w[ill] be ambiguous, and '[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [will] be necessary to ascertain the form of governance adopted by the members of the religious association.'"[176]

This has often proved to be the case under the hybrid approach, because parties routinely present conflicting evidence on church canons and internal relationships. A prominent example is *In re Multi-Circuit Church Property Litigation*,[177] which involved a dispute between the Episcopal Church and several breakaway congregations in Virginia. The denomination relied on the Dennis

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172. For another discussion of the assumptions underlying the various approaches, see Louis J. Sirico, Jr., *Church Property Disputes: Churches As Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 344–59 (1986).

173. *See* Greenawalt, *supra* note 134, at 1886 (listing possibilities).

174. Jones v. Wolf, 443 U.S. 595, 603, 605 (1979).

175. *Id.* at 605 ("In some cases, [examining the polity and administration of the church] would not prove to be difficult.").

176. *Id.*

177. 84 Va. Cir. 105 (2012), *aff'd sub nom.* Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530 (Va. 2013), *cert. denied*, 134 S. Ct. 1513 (2014).

Canon, a church canon enacted in 1979, which stated that all property held by a congregation was held in trust for the denomination.[178] The congregation argued that this canon was inapplicable for three reasons (beyond the fact that the canon had no legal force under state trust law): (1) because the congregation took title to its property during colonial times, before the denomination existed; (2) because other canons and statements by the denomination acknowledged that the colonial churches belonged to the local congregations; and (3) because the denomination's official commentary on the Dennis Canon said that it had no legal force.[179]

The parties presented even more conflicting evidence on the "course of dealings" within the church. For example, the denomination relied on the oaths of loyalty sworn by clergy and vestry members, the hymnals and prayer books used by congregations, and the attendance of local delegates at national councils, claiming that these demonstrated implied consent to denominational control of local property.[180] The congregation disputed the ecclesiastical significance of each of these actions; it also cited other actions that were more consistent with local control—such as the fact that the congregation purchased, designed, built, maintained, and controlled the property, and the fact that diocesan bishops could visit only at the congregation's invitation.[181]

Ultimately, the trial court conducted a 22-day bench trial with over 60 witnesses and extensive testimony on the polity and administration of the church. It decided the dispute not on the basis of the property deeds, which were in the name of the congregation,[182] but on the basis of contested evidence regarding internal church rules and the "course of dealings" between the parties.[183] This is precisely the sort of "searching and therefore impermissible inquiry into church polity" discouraged by *Jones*.[184]

One possible response to this problem is to say that courts can avoid entanglement simply by deferring to the denomination on the meaning of its

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178. *In re Multi-Circuit Church Prop. Litig.*, 84 Va. Cir. at 127.

179. Brief for Appellant at 12–13, 34–35, Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530 (Va. 2013) (No. 120919), 2012 WL 8899588, at *11–12, *33–34.

180. Brief for Appellee Protestant Episcopal Church in the Diocese of Virginia at 10–17, Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530 (Va. 2013) (No. 120919), 2013 WL 4548632, at *9–16.

181. Brief for Appellant at 21–22, Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530 (Va. 2013) (No. 120919), 2012 WL 8899588, at *20–21.

182. *See In re Multi-Circuit Church Prop. Litig.*, 84 Va. Cir. at 106. Many of the relevant deeds named only the "Trustees of The Falls Church"—i.e., the local congregation. *Id.* at 160–61.

183. *Id.* at 141–42, 198–99.

184. Jones v. Wolf, 443 U.S. 595, 605 (1979). It is also difficult to square with *Milivojevich*, where the Court rejected the idea that courts can authoritatively interpret internal church rules. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); *cf.* Mitchell v. Helms, 530 U.S. 793, 828 (2000) ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs.").

canons and internal relationships—in other words, return to *Watson*'s hierarchical deference approach instead of the hybrid approach. That might solve the entanglement problem, but it only makes the free-exercise problem worse. It effectively forces all churches to adopt either a purely congregational form or a hierarchical form. Many religious denominations prefer intermediate forms of ecclesiastical government. Both hierarchical deference and the hybrid approach presume that the "essence" of belonging to a denominational structure is subordination to the national level of authority. In effect, they place a thumb on the scale in favor of denominations, making it easy for them to assert control over property by adopting new canons or reinterpreting old ones; but that, in turn, makes it impossible to adopt certain forms of church polity—namely, polities that guarantee the right to exit.[185] Nor is this a "neutral principles" approach in any meaningful sense; it is simply the hierarchical deference approach by another name.[186]

In short, by giving special weight to internal church rules, the hybrid approach creates a dilemma: if the rules are interpreted by civil courts, those courts become entangled in religious questions; but if the court defers to an interpretation by the highest church authority, the church is converted into a hierarchical structure whether or not that is what the founders, donors, or members wanted. Even worse, the hybrid approach gives courts discretion to decide how much weight to give to internal church rules, and how much to defer to denominations on the interpretation of those rules. This gives judges tremendous flexibility to reach almost any result—making the outcome unpredictable and "largely depende[nt] upon the predilections of the judges."[187]

C. Promoting Stable Property Rights

The hybrid approach also creates significant uncertainty about property rights, harming both churches and third parties. If ownership no longer turns on publicly recorded deeds and trust instruments, but on the meaning of internal church rules and relationships, no one can know for certain who owns church property—at least not without the benefit of a thorough trial.

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185. *See supra* notes 140–47 and accompanying text.

186. *See* Presbytery of Ohio Valley v. OPC, Inc., 973 N.E.2d 1099, 1106 n.7 (Ind. 2012) (stating that deferring to a trust provision in the church constitution "would result in de facto compulsory deference"); Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.), 291 P.3d 711, 722 (Or. 2012) ("[L]ooking to only the church constitution, as [the denomination] argues we should do, would detract from the advantages of the neutral principles approach and essentially would be a de facto application of hierarchical deference.").

187. *Judicial Intervention*, *supra* note 23, at 1148; *see also* Arlin M. Adams & William R. Hanlon, Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1335 (1980) ("State courts willing to inject their own preferences regarding church polity often will be able, in the absence of an express provision regarding church property, to adopt the presumption reflecting their own predilections.").

This affects potential purchasers, lenders, and title insurers, who cannot be certain of ownership without a detailed inquiry into church rules and relationships—an inquiry they are not competent to make. Even if the deed were in the name of a local congregation, with no apparent encumbrances, there would be no guarantee that the congregation could claim clear title; ownership would be subject to internal church laws or practices, which could be subject to dispute within the church.

The uncertainty would harm churches, too. First, during the period of uncertainty, which can last years, donors are reluctant to contribute, because they do not know which of the two warring sides will get the benefit of their contribution. For example, in *Falls Church*, the court awarded the denomination not only the real property, but also donations that members had given on the express condition that the donations *not* support the denomination, including donations given *after* the congregation broke away from the denomination.[188] That is a recipe for making congregants unwilling to contribute. Second, it can be difficult for a church to obtain title insurance or loans when ownership is unclear. This has already affected some churches that are subject to disputed canons.[189] Third, it greatly increases the likelihood and cost of litigation. When ownership turns on publicly recorded deeds and trust instruments, it is relatively easy to predict the outcome of potential litigation. But when ownership turns on a court's decision about how much weight to give internal church rules and relationships, the outcome is anyone's guess. The result is protracted, expensive litigation.

Uncertain ownership could also affect potential tort claimants. The available scope of recovery for tort claims often depends on who exactly owns the property where the tort occurred. Thus, if ownership turns on internal canons and relationships, courts and juries would be forced to analyze those canons and relationships to determine from whom the tort claimant could recover. To make matters more complicated still, churches can always revise or reinterpret their canons. Some churches might even be pressured to revise canon law in order to avoid tort liability. In short, the hybrid approach creates deep uncertainty and a host of difficulties, all of which are unnecessary.

In response, advocates of the hybrid approach have argued that requiring churches to comply with the legal formalities of 50 state property regimes is unduly burdensome. According to this view, if courts do not give legal effect to church constitutions, "then an enormous number of deeds and corporate charters would need to be examined and reconveyed or amended."[190] Even if churches made the effort to comply, the complexity of 50 different state regimes would

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188. Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530, 543–44 (Va. 2013).

189. All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., 685 S.E.2d 163, 168 (2009) (noting that, because of a dispute over church canons, "the congregation was unable to acquire title insurance").

190. Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc., 719 S.E.2d 446, 453 (2011).

create traps for the unwary, making it difficult for churches to succeed.[191] This would be an "immense" burden on the free exercise of religion.[192]

While the costs of complying with legal formalities are not insignificant, they are surely overstated. Thousands of voluntary associations, including churches, deal with diverse state laws on a regular basis—not only for property and trust arrangements, but also for corporate governance, employment, zoning, contracts, insurance, tax, and torts, among others. It is not a complex matter to insert a use restriction in a deed, execute a trust agreement, or transfer title to a denominational official. There is standard language that can be used across states, and several denominations have adopted it.[193] Others have adopted a variety of property structures in various states. Of course, if state law makes it impossible to adopt certain forms of church governance, such as by prohibiting churches from incorporating,[194] banning denominational trusts,[195] limiting the amount of land that church trustees may hold,[196] or imposing draconian tax penalties on transfers of ownership within the church,[197] such restrictions may violate the First Amendment. But in the vast majority of jurisdictions, the ordinary rules of property, contract, and trust law make it easy for churches to embody their chosen form.

One common method is to include a restrictive covenant in local property deeds. If the deed states that the property must be used only for the benefit of a particular denomination and is subject to the rules of that denomination, the congregation cannot keep the property if it withdraws from the denomination.[198] This is what the United Methodist Church does. It requires "all written instruments of conveyance" for all church property to state that the property "shall be kept,

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191. HANSEN, *supra* note 127, at 301–02 (noting that many churches do not "have the resources to retain legal counsel that possesses the level of expertise needed").

192. *Timberridge*, 719 S.E.2d at 453; *see also* Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.), 291 P.3d 711, 722 (Or. 2012) ("[The denomination] argues that, if it is required to comply with the trust laws of all 50 states where it has congregations, rather than merely amending its constitution, it will face an 'enormous burden.'").

193. *See* UNITED METHODIST CHURCH BOOK OF DISCIPLINE, *supra* note 84, at 649 ¶ 2503(2)–(3), (6).

194. VA. CONST. art. IV, § 14(20) (1971) ("The General Assembly shall not grant a charter of incorporation to any church or religious denomination . . . ."), *invalidated by* Falwell v. Miller, 203 F. Supp. 2d 624, 628 (W.D. Va. 2002).

195. VA. CODE ANN. § 57-7 (repealed 1993); *see also* Norfolk Presbytery v. Bollinger, 201 S.E.2d 752, 758 (Va. 1974) (noting that "express trusts for supercongregational churches [we]re invalid under Virginia law").

196. VA. CODE ANN. § 57-12 (repealed 2003); *see also Norfolk Presbytery*, 201 S.E.2d at 758 (noting that Virginia law "limit[ed] the amount of land which may lawfully be held by church trustees").

197. *See, e.g.*, Rachel Gordon, *Board Backs City over Archdiocese in Tax Matter*, S.F. CHRON., Dec. 1, 2009, at C-1 (Catholic archdiocese assessed $14.4 million in property taxes for transferring title between different Catholic entities).

198. *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.3 (AM. LAW INST. 2000).

maintained, and disposed of for the benefit of The United Methodist Church and subject to the usages and the Discipline of The United Methodist Church."[199] Other denominations place similar restrictions in their deeds.[200] Such restrictions have rarely been the subject of litigation in reported cases—most likely because these restrictions make ownership clear. Rather, litigation has arisen when a local church declines to place use restrictions in a deed even when the denomination's rules call for it to do so.[201]

Another practical way to ensure denominational control is to execute a trust agreement. Such agreements need not be complex. In most cases, the title holder (usually the trustees or officers of the church corporation) need only sign a document stating that all property held or later acquired by the congregation is held in irrevocable trust for the benefit of the denomination. Such an agreement removes all doubt about whether the property is held in trust for the denomination.

A third method of ensuring denominational control is to place title in the name of a denominational official, such as a diocesan bishop. This is standard practice in the Roman Catholic Church and the Church of Jesus Christ of Latter-day Saints, and it is common in the Episcopal Church.[202] Placing title in a denominational official ensures that the property will always remain within the denomination.

Of course, some congregations might refuse a denomination's request to record a restrictive covenant, sign a trust agreement, or place title in the name of a

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199. *See, e.g.*, UNITED METHODIST CHURCH BOOK OF DISCIPLINE, *supra* note 84, at 649 ¶ 2503(4); *see also id.* at ¶ 2503(1) (providing specific language for places of divine worship); *id.* at ¶ 2503(2) (parsonages); *id.* at ¶ 2503(5) (properties acquired from other United Methodist entities).

200. Brief for Appellant at 17–18, Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530 (Va. 2013) (No. 120919), 2012 WL 8899588, at *16–17 (citing examples of Episcopal, Presbyterian, Lutheran, AME Zion, Church of God, and Baptist deeds); *see also* Church of the Brethren v. Roann Church of the Brethren, Inc., 20 N.E.3d 906, 907 (Ind. Ct. App. 2014) (noting that the Church of the Brethren requires restrictive covenants in individual congregations' deeds).

201. *See, e.g.*, St. Paul Church, Inc. v. Bd. of Trs. of Alaska Missionary Conference of United Methodist Church, Inc., 145 P.3d 541, 555 (Alaska 2006) (local church "annually informed the [denomination] that it did not put the trust clause in its deeds"); Pac. Sw. Dist. of the Church of the Brethren v. Church of the Brethren, Inc., No. B247729, 2014 WL 2811540, at *5 (Cal. Ct. App. June 23, 2014), *as modified on denial of reh'g* (July 22, 2014), *review denied* (Sept. 10, 2014); Cal.-Nev. Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church, 17 Cal. Rptr. 3d 442, 450–51 (2004) (local church omitted required trust language "from four of the nine deeds"); *Roann Church of Brethren, Inc.*, 20 N.E.3d at 907; Bd. of Trs. of the La. Annual Conference of the United Methodist Church, S. Cent. Jurisdiction v. Revelation Knowledge Outreach Ministry, LLC, 142 So.3d 353, 359 n.4 (La. Ct. App. 2014) (Although "[a] trust clause is required to be included in all written conveyances of local church property[,] . . . [i]t is undisputed that the 1974 donation of the property from St. George to Ninde does not include a trust clause.").

202. Brief for Appellant at 18, Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530 (Va. 2013) (No. 120919), 2012 WL 8899588, at *17.

denominational official. If that occurs, the denomination can exercise any form of ecclesiastical discipline it sees fit, including excommunicating recalcitrant church members or officials. That is how the Roman Catholic Church ensured control over local church buildings during the trusteeship controversy in the 1800s.[203] That sort of intra-church coercive action cannot be reviewed or overturned by a civil court.[204] But the mere fact that some members of an organization might resist taking steps to comply with ordinary principles of property, trust, and contract law is not a sufficient ground for abandoning those principles. Civil law does not takes sides, and should not be used to enforce internal church obligations.

A final criticism of the strict approach is that adopting it in place of the hybrid or deference approach will undermine churches' reliance interests—at least in those jurisdictions where the hybrid or deference approach is settled law. According to this argument, "[c]hurches have drafted literally thousands of contracts and deeds . . . in reliance on [the deference or hybrid approach];" accordingly, switching to the strict approach "would go against the core principles that justify stare decisis."[205]

This criticism has some force, but its force is not limited to the strict approach. The same criticism applies to *any* change in the rules governing church property disputes, whether from hybrid to strict or vice versa. In other words, it is not an argument against the strict approach, but an argument against any change in the rules governing church property. Ironically, this argument would in many cases militate against giving force to the Dennis Canon, and similar denominational rules, with respect to property acquired before *Jones v. Wolf* in 1979. If taken seriously, many of the hybrid cases decided in favor of the denomination should have gone the other way.

Moreover, this criticism is relevant only when a new approach is applied *retroactively*. As the Court noted in *Jones*, "retroactive application" of a new property regime might violate free-exercise rights, because it would interfere with a church's ability to choose its desired form of internal governance.[206] A church might adopt one form of governance, only to be thwarted by retroactive changes in state laws. This would make it impossible for churches to "specify what is to happen to church property in the event of a particular contingency"[207]—thus violating the core rationale of *Jones*.

Be we are not arguing that the strict approach (or any other) should be applied retroactively. A basic rule of property law is that "[d]eeds are to be

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203. CHISHOLM, *supra* note 128.

204. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

205. Brief of Amici Curiae at 14, Masterson v. Diocese of Nw. Tex., 422 S.W.3d 594 (Tex. 2013) (No. 11-0332), 2012 WL 6047947, at *14; *see also* Greenawalt, *supra* note 134, at 1886.

206. *See* Jones v. Wolf, 443 U.S. 595, 606 n.4 (1979) ("Given that the Georgia Supreme Court clearly enunciated its intent to follow the neutral-principles analysis in Presbyterian Church II and Carnes, this case does not involve a claim that retroactive application of a neutral-principles approach infringes free-exercise rights.").

207. *Id.* at 603.

construed according to the law in force at the time they are executed."[208] The same rule applies to trusts: "[T]he provisions of the trust are to be governed by the law existing at the time of its creation."[209] Thus, a subsequent change in the law cannot affect the original meaning of a deed or trust. But this rule does not stop states from clarifying an approach that was muddled to begin with, or from applying a better approach prospectively. As *Jones* suggested, as long as a state "clearly enunciate[s]" its intent to follow a particular property regime going forward, there is no problem of disrupting reliance interests.[210]

IV. KEY PROPERTY, TRUST, AND CONTRACT PRINCIPLES

Thus far, we have argued that the strict approach, by enforcing ordinary principles of property, trust, and contract law, protects free exercise rights, prevents entanglement, and promotes clear property rights. But what, precisely, are these "ordinary principles" of property, trust, and contract law? And how, in practice, should they operate in church property disputes? In this Section, we explain how these principles have often been distorted under the hybrid approach, and how they should be applied under the strict approach.

A. Jones *as a substantive rule of property law*

The first way that hybrid courts have distorted ordinary principles of property and trust law is by treating *Jones* as establishing unique, substantive rules for church property disputes that trump other principles of state property and trust law—a sort of federal common law for church property disputes. According to these courts, *Jones* requires courts to consider "the provisions in the constitution of the general church" and "to give effect" to these provisions when they "recite an express trust in favor of the denominational church."[211] Thus, these courts say that they must recognize a trust declared by internal church rules—even when such rules lack the indicia of legal enforceability under traditional state principles of property, trust, and contract law.[212] These courts are the most candid about giving special weight to internal church rules.

The problem with this approach is that *Jones* does not purport to establish substantive rules that trump ordinary state property and trust laws; rather, it affirmatively encourages courts to apply those laws. It says that the neutral principles approach is "*completely secular* in operation" and "relies *exclusively* on objective, well-established concepts of trust and property law familiar to lawyers

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208. 26A C.J.S. *Deeds* § 170 (2015); 23 AM. JUR. 2D *Deeds* § 9 (2016) ("[T]he law in effect at the time of the execution of a deed governs its validity and interpretation.").

209. 76 AM. JUR. 2D *Trusts* § 36 (2016).

210. 443 U.S. at 606 n.4.

211. *Id.* at 606.

212. *See, e.g.*, Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc., 719 S.E.2d 446, 454 (Ga. 2011) ("[T]he fact that a trust was not created under our state's generic express (or implied) trust statutes does not preclude the implication of a trust on church property under the neutral principles of law doctrine."); Rector, Wardens, Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc., 718 S.E.2d 237, 245 (Ga. 2011) (same).

and judges."[213] When it speaks of giving legal effect to language of trust in a church constitution, it says that such language will be given legal effect only if it is "embodied in some legally cognizable form."[214] The dissent criticized the majority for refusing to enforce church canons unless they "ha[d] been stated, in express relation to church property, *in the language of trust and property law*."[215] Thus, the courts that interpret *Jones* as establishing substantive rules of property law are giving the case a tendentious reading; the better reading is that *Jones* does not require courts to enforce internal church rules to the detriment of ordinary principles of state property and trust law.[216]

B. Express Trust

Other courts applying the hybrid approach recognize that *Jones* does not create substantive rules of property law; but they reach the same result by saying that internal church rules, combined with the actions of the parties, give rise to an "express trust" under state trust law.[217] According to these courts, once a congregation joins a denomination, it consents to abide by the denomination's rules—including any rules addressing church property. So when the denomination

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213. *Jones*, 443 U.S. at 603 (emphasis added).

214. *Id.* at 606.

215. *Id.* at 612 (Powell, J., dissenting) (emphasis added); *see also id.* at 612 n.1 (rejecting the "search for statements expressed in the language of trust and property law"); *id.* at 613 n.2 (rejecting the requirement that churches "include a specific statement of church polity in the language of property and trust law").

216. *Accord* Heartland Presbytery v. Gashland Presbyterian Church, 364 S.W.3d 575, 589 (Mo. Ct. App. 2012) ("We will not read the quoted passage as itself establishing the substantive property and trust law to be applied to church-property disputes."); Peters Creek United Presbyterian Church v. Wash. Presbytery of Pa., 90 A.3d 95, 109 (Pa. Commw. Ct. 2014) ("[W]e do not believe that the United States Supreme Court intended in 1979 to nullify standard principles of trust law that have stood for hundreds of years."); Masterson v. Diocese of Nw. Tex., 422 S.W.3d 594, 612 (Tex. 2013) ("We do not read *Jones* as purporting to establish substantive property and trust law that state courts must apply to church property disputes."), *reh'g denied* (Mar. 21, 2014), *cert. denied sub nom.* Episcopal Church v. Episcopal Diocese of Fort Worth, 135 S. Ct. 435 (2014); Episcopal Diocese of Fort Worth v. Episcopal Church, 422 S.W.3d 646, 652 (Tex. 2013) ("*Jones* did not purport to establish a federal common law of neutral principles to be applied in this type of case."), *reh'g denied* (Mar. 21, 2014), *cert. denied*, 135 S. Ct. 435 (2014).

217. *See, e.g.*, Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 103 n.14 (Colo. 1986) (calling it, for lack of a better term, "an express trust created by implication in fact"); Connecticut v. Gauss, 28 A.3d 302, 319 (Conn. 2011) ("When the Dennis Canon is considered together with the application submitted by the members of the local congregation in 1956 for admission to the general church as a parish and with other church documents, it is clear that the disputed property in the present case is held in trust for the Episcopal Church and the Diocese."); Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920, 925 (N.Y. 2008) (citation omitted) ("We conclude that the Dennis Canons clearly establish an express trust in favor of the Rochester Diocese and the National Church, and that All Saints agreed to abide by this express trust either upon incorporation in 1927 or upon recognition as a parish in spiritual union with the Rochester Diocese in 1947.").

enacts a rule declaring a trust interest in local property, and the congregation remains within the denomination, it is deemed to consent to an "express trust."

These courts also rely on general expressions of the congregation's intent to be bound by the denomination's rules—such as when a congregation's articles of incorporation provide that it will submit to the denomination's rules.[218] These expressions of "consent" can be deemed to create a trust even when they are "not couched in the traditional forms and language of trust law."[219]

Under ordinary principles of trust law, however, there are several problems with the idea that internal church rules create an "express trust." First, to create a trust, the *settlor*—the person who holds title—must express the intent to create a trust.[220] "It is an axiomatic principle of law that a person or entity *must hold title to property* to declare that it is held in trust for the benefit of another."[221] But in the typical church property dispute, the *congregation* holds title, while the *denomination* purports to declare the trust.[222] Thus, under ordinary principles of trust law, an internal church rule enacted by the denomination cannot create an express trust.[223] Many courts purporting to apply neutral principles of trust law simply ignore this basic point.[224]

When courts do recognize this problem, they sometimes say that the congregation has expressed its intent to create a trust by joining and remaining within the denomination, or by expressly agreeing to be bound by the denomination's rules.[225] But there are problems with this approach, too. First, it is

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218. *Bishop & Diocese of Colo.*, 716 P.2d at 88 (noting that the corporate charter and bylaws stated that the congregation "expressly accede[s] to all the provisions of the constitution and canons" of the denomination).

219. *Id.* at 108–09.

220. AMY M. HESS ET AL., THE LAW OF TRUSTS AND TRUSTEES § 1 (2d ed. 1993).

221. All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., 685 S.E.2d 163, 174 (S.C. 2009) (emphasis added); *see also* UNIF. TRUST CODE § 401 (UNIF. LAW COMM'N 2010) ("A trust may be created by: . . . (2) declaration *by the owner of property* that the owner holds identifiable property as trustee . . . .") (emphasis added); RESTATEMENT (THIRD) OF TRUSTS § 10 (AM. LAW INST. 2003) ("[A] trust may be created by: . . . (c) a declaration *by an owner of property* that he or she holds that property as trustee for one or more persons.") (emphasis added); HESS ET AL., *supra* note 220, § 43 & n.2 ("In order for a trust to take effect as intended, the settlor must have, when the trust is created, a property interest equal to or greater than the interest to conveyed in trust.") (collecting cases).

222. *See, e.g.*, *supra* note 217.

223. *All Saints Parish Waccamaw*, 685 S.E.2d at 174 (rejecting the argument that denominational canons can create an express trust).

224. *See, e.g.*, *supra* note 217.

225. *See, e.g.*, E. Lake Methodist Episcopal Church, Inc. v. Trs. of Peninsula-Del. Annual Conference of the United Methodist Church, Inc., 731 A.2d 798, 810 (Del. 1999) (relying on the congregation's "constant association with, and explicit recognition of, the parent church"); Presbytery of Ohio Valley, Inc. v. OPC, Inc., 973 N.E.2d 1099, 1113 (Ind. 2012) (relying, in part, on the fact that the congregation "continu[ed] as a member of the [denomination] from 1983 until 2006"); Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920, 925 (N.Y. 2008) ("We find it significant, moreover, that [the congregation]

not the usual way to create an express trust. Most express trusts are created by formal documents clearly stating the settlor's intent to create a trust and setting forth the terms of the trust.[226] When the trust involves real estate, the trust instrument can be recorded with the deed—or title can be placed in the name of the trustee *as trustee*—so that title companies, purchasers, and mortgagees are on notice of the trust.[227] Although a formal trust instrument and formal trust language are not absolutely required,[228] these formalities make it much easier to prove the settlor's intent.

Absent a formal trust instrument, the party alleging a trust bears a heavy burden of proving the settlor's intent. The intent to create a trust must be "sufficiently certain," not vague or indefinite.[229] And it must be proved by "clear and convincing" evidence, not just a preponderance.[230] That burden is particularly heavy in cases involving land, given the public interest in security of record titles.[231] Thus, although the parties' conduct may have some probative value in proving intent, "ambiguous act[s] which could be based on the existence of . . . another relationship" are not sufficient.[232]

Under this standard, a congregation's actions are unlikely to create an express trust. Denominations typically point to the fact that the congregation has chosen to remain within the denomination even after the denomination adopted internal rules declaring a trust.[233] They might also point to language in the congregation's governing documents expressly agreeing to submit to the denomination's rules.[234] But none of this constitutes unambiguous evidence of intent to create a legally enforceable trust; it is equally consistent (or even more consistent) with an intent to create an ecclesiastical relationship enforced by

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never objected to the applicability or attempted to remove itself from the reach of the [National Church's canons] in the more than 20 years since the National Church adopted the express trust provision."); *In re* Church of St. James the Less, 888 A.2d 795, 808–10 (Pa. 2005) (finding that an express trust arose because the congregation in its charter agreed "to always accede to the authority of the National Episcopal Church"); Peters Creek United Presbyterian Church v. Wash. Presbytery of Pa., 90 A.3d 95 (Pa. Commw. Ct. 2014) (congregation's bylaws agreed to be bound by the denomination's constitution).

226. HESS ET AL., *supra* note 220, § 45; *id.* § 50 ("The most orderly and usual way of expressing an intent to create a trust is, of course, to execute a written instrument describing the terms of the trust.").

227. *Id.* § 45. A number of state statutes provide that if a trust interest is not recorded, the rights of the beneficiaries are cut off by a conveyance to a purchaser without notice. *Id.*

228. *Id.*

229. *Id.*; *see also* UNIF. TRUST CODE § 402(a)(2) (UNIF. LAW COMM'N 2010); RESTATEMENT (THIRD) OF TRUSTS § 13 (AM. LAW INST. 2003).

230. HESS ET AL., *supra* note 220, § 49.

231. *Id.*

232. *Id.* § 50.

233. *See supra* note 225 and accompanying text.

234. *Id.*

ecclesiastical discipline.[235] It is difficult to characterize this as clear and convincing evidence of intent to create an express trust—unless courts make unwarranted assumptions about what a congregation really intends.

The argument for an express trust runs into further problems under the statute of frauds, which in most states applies to all express trusts involving real property.[236] Under the statute of frauds, all trusts in land must be manifested in a writing (or writings),[237] which sets forth the essential terms of the trust, including the trustee, beneficiary, and trust property.[238] If any essential term is missing, the trust fails.[239] The writing must also be signed by the party with legal authority to create the trust—namely, the legal titleholder.[240] The purpose of these requirements is "to obtain a written statement of the terms of the trust, signed by the appropriate party, so that all doubt of the genuineness and terms of the trust may be removed."[241]

These requirements make it impossible for a denominational canon—either standing alone, or in conjunction with a congregation's act of remaining within the denomination—to create an express trust. Neither consists of a writing signed by the congregation. And it is doubtful whether the sweeping language of the typical denominational trust canon adequately identifies a specific trustee or specific trust property.[242] Even when a congregation adopts bylaws acknowledging

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235. *See supra* notes 155–62 and accompanying text. Alternatively, it might be construed as an intent to comply with any request by the denomination to create a legally enforceable trust in the future. But "[i]ntent to give a legal interest at a future date is not the same as intent to create a trust." HESS ET AL., *supra* note 220, § 46; *see also* Presbytery of Ohio Valley, Inc. v. OPC, Inc., 973 N.E.2d 1099, 1112 (Ind. 2012) (congregation's bylaws recognizing the denomination's constitution as authoritative were "not a 'clear and unequivocal' statement of [congregation's] intent to create a trust on its property"), *reh'g denied* (Oct. 23, 2012), *cert. denied*, 133 S. Ct. 2022 (2013); Heartland Presbytery v. Gashland Presbyterian Church, 364 S.W.3d 575, 588 (Mo. Ct. App. 2012) ("[W]e would be hard-pressed to find that the [congregation's] By–Laws' general statements concerning subordination to the [denomination's] Constitution establish a trust by clear, cogent and convincing evidence, dispelling all doubt as to whether [the congregation] intended a trust relationship."), *transfer denied* (Feb. 28, 2012), *transfer denied* (May 29, 2012); Presbytery of Beaver–Butler of the United Presbyterian Church in the U.S. v. Middlesex Presbyterian Church, 489 A.2d 1317, 1325 (Pa. 1985) (overall intent of church constitution was to oversee the spiritual development of the member churches; the provisions mostly showed the national church's wishes and were "far from constituting the clear equivocal evidence necessary to support a conclusion that a trust existed").

236. HESS ET AL., *supra* note 220, § 62 (collecting state statutes); *see generally id.* §§ 61–71, 81–92.

237. *Id.* § 90; *see also* RESTATEMENT (THIRD) OF TRUSTS § 22 cmt. c (AM. LAW INST. 2003).

238. HESS ET AL., *supra* note 220, § 87.

239. *Id.*

240. *Id.* § 82.

241. *Id.* § 84.

242. Heartland Presbytery v. Gashland Presbyterian Church, 364 S.W.3d 575, 583 (Mo. Ct. App. 2012) (rejecting express trust where there was no "document executed

the authority of denominational canons, it is doubtful whether such general bylaws are "'sufficiently definite' to establish an express trust 'with reasonable certainty.'"[243] Yet many decisions adopting the hybrid approach have found an express trust without ever mentioning the statute of frauds.[244]

Finally, even assuming that there is an express trust that satisfies the statute of frauds, the congregation, as settlor, might retain the power to revoke the trust. Revocation is an act by which the settlor resumes title to the trust property without any obligation to the beneficiaries.[245] At common law, trusts were irrevocable unless the settlor expressly reserved the right of revocation.[246] But that presumption has been reversed by statute in 26 states and the District of Columbia.[247] In these states, a trust is revocable unless the terms of the trust provide otherwise.[248] In general, "any reasonable method may be used" to exercise the power of revocation.[249]

In these states, if an express trust arises when a congregation joins a denomination or agrees to be bound by its rules, it is equally appropriate to conclude that the congregation has revoked the trust when it leaves the denomination or amends its articles of incorporation to indicate that it is no longer bound by the denomination's rules. Some courts have reached this result.[250]

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contemporaneously with, or prior to, the 1948 conveyance which could satisfy the requirement that the intent to create a trust in land be expressed in writing").

243. Presbytery of Ohio Valley, Inc. v. OPC, Inc., 973 N.E.2d 1099, 1112 (Ind. 2012).

244. *See, e.g.*, *In re* Episcopal Church Cases, 198 P.3d 66 (Cal. 2009); Rector, Wardens, & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc., 718 S.E.2d 237, 253–54 (Ga. 2011); Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920, 924–25 (N.Y. 2008); *In re* Church of St. James the Less, 888 A.2d 795, 809 (Pa. 2005); *see also* Episcopal Church in Diocese of Conn. v. Gauss, 28 A.3d 302, 325 (Conn. 2011) (recognizing no need to address statute of frauds, because *Jones* requires enforcement of denominational trust canon); *cf.* St. Paul Church, Inc. v. Bd. of Trs. of Alaska Missionary Conference of the United Methodist Church, Inc., 145 P.3d 541, 556 (Alaska 2006) (holding that statute of frauds was satisfied by writings merely indicating an intent to affiliate with the denomination).

245. HESS ET AL., *supra* note 220, § 998.

246. *Id.*

247. *Id.* § 998 nn.4–5 (listing states).

248. *Id.* § 999.

249. *Id.* § 1001.

250. Cal.–Nev. Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church, 17 Cal. Rptr. 3d 442, 445 (Ct. App. 2004) (holding that a trust was revoked after the congregation amended its articles of incorporation); From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 803 A.2d 548, 571 (Md. 2002) ("Consent to holding property in trust during the course of affiliation does not automatically constitute consent to relinquishing that property once the affiliation terminates. This is particularly the case where the trust is revocable . . ."); Masterson v. Diocese of Nw. Texas, 422 S.W.3d 594, 613 (Tex. 2013) (citing TEX. PROP. CODE § 112.051 ("A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.")) ("Assuming the Dennis Canon imposed a trust on Good Shepherd's property and limited Good Shepherd's authority over

Others, especially under the hybrid approach, have not considered the question of revocability at all.[251]

None of these basic principles of trust law—such as the need for a clear expression of intent by the title holder, the need for a signed writing setting forth the essential terms of the trust, and the need to consider revocability—make it particularly burdensome to establish an express trust. If a denomination wants congregations to hold property in trust, it can require congregations to execute a deed of trust. Even more simply, it can require congregations to sign trust agreements, which are easy to draft and need not include any "formal or technical language."[252] Or it can require congregations to amend their corporate documents to declare that they hold their property in trust for the denomination. That is what the congregation did in *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*. There, the Oregon Supreme Court, applying the strict neutral principles approach, correctly held that this was sufficient to create an express trust in favor of the denomination.[253] All of these approaches are easy to implement—assuming the congregations will consent. They also eliminate the risk of costly litigation.

C. Implied Trust

Some courts applying the hybrid approach have acknowledged that the mere existence of an internal church rule, combined with the conduct of the congregation, does not give rise to an "express trust" in the ordinary sense of that term. Instead, these courts find that internal church rules and relationships give rise to an "implied trust."[254] The basic reasoning is that the denomination expressed its

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the property as the dissent argues, and we expressly do not decide whether it did, the Canon simply does not contain language making the trust *expressly* irrevocable."). *But see* St. Paul Church, Inc. v. Bd. of Trs. of Alaska Missionary Conference of the United Methodist Church, Inc., 145 P.3d 541, 557 (Alaska 2006) (recognizing that a trust is not revocable unless the settlor "reserved the right to revoke the trust").

251. *See, e.g.*, Rector, Wardens, & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc., 718 S.E.2d 237, 253–54 (Ga. 2011); Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920, 924–25 (N.Y. 2008); *In re* Church Of St. James The Less, 888 A.2d 795, 809 (Pa. 2005). *But see In re* Episcopal Church Cases, 198 P.3d 66, 83 (Cal. 2009) (concluding that the trust was not revoked, because "any revocation of [a] trust [must] exist in the document that created it"—i.e., the church canons).

252. HESS ET AL., *supra* note 220, § 45.

253. Hope Presbyerian Church of Rogue River v. Presbyterian Church (U.S.A.), 291 P.3d 711, 722–23, 727 (Or. 2012).

254. *See, e.g.*, E. Lake Methodist Episcopal Church, Inc. v. Trs. of Peninsula–Del. Annual Conference of the United Methodist Church, Inc., 731 A.2d 798, 810 (Del. 1999) (local church held property under "an implied trust based on the language of the conveyances, the recitals and the acknowledgments in the incorporation documents, and the adherence to the Discipline of the parent church"); *Rector, Wardens, & Vestrymen*, 718 S.E.2d at 245, 255; Presbytery of Ohio Valley, Inc. v. OPC, Inc., 973 N.E.2d 1099, 1113 (Ind. 2012) (finding implied trust based on the denomination's rules reciting a trust,

intent to create a trust by adopting an internal rule, and the congregation arguably expressed its intent to create a trust by remaining within the denomination and recognizing the denomination's rules as binding.[255] Thus, even if their words and actions are insufficient to create an express trust, they at least give rise to an "implied trust."

For someone unfamiliar with the doctrine of implied trust, this reasoning may seem appealing. *Express* trusts are typically created by formal trust instruments with clear and convincing proof of intent. One might therefore assume that *implied* trusts are created less formally and with less proof of intent, making them a sort of fallback option, used when the requirements of an express trust are not quite met. Courts that have found an implied trust in favor of a denomination have generally treated implied trusts in just this way.[256]

But this reasoning is based on a misunderstanding of implied trusts. An implied trust is not a fallback option for a not-quite-express trust; rather, it is a technical legal relationship that arises in specific factual contexts, most of which are irrelevant to church property disputes. We address the various types of implied trust in turn.

1. Resulting Trust

The first type of implied trust is a "resulting trust." There are two types of resulting trusts. The first is called a "purchase-money resulting trust." It arises when one party pays for property, but title is transferred to another.[257] Unless there is good reason to think that the payor was giving a gift—such as when the recipient is a "spouse, child, or other natural object of the bounty of the payor"—the law presumes that the transfer was *not* a gift.[258] Instead, the person paying the purchase price retains beneficial title, and the person receiving the property is said to hold it in a "resulting trust" for the payor.[259]

Purchase-money resulting trusts are inapplicable in most church property disputes, because the purchase price is typically paid by the *congregation*. In fact, we are aware of no case recognizing a purchase money resulting trust in favor of a denomination. Most claims of purchase-money resulting trust have been made by congregations that paid for property and are trying to keep the denomination from taking it,[260] or by parishioners who donated money and are trying to keep a parish from closing.[261] Those claims generally fail.

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combined with the congregation's "continuance as a member of the [denomination]" and recognition of the denomination's rules as authoritative).

255. *Presbytery of Ohio Valley*, 973 N.E.2d at 1113.

256. *See supra* note 254.

257. RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. c (AM. LAW INST. 2003).

258. *Id.*

259. *Id.*

260. *See, e.g.*, Reorganized Church of Jesus Christ of Latter Day Saints v. Thomas, 758 S.W.2d 726, 727–29, 733 (Mo. Ct. App. 1988).

261. *See, e.g.*, Maffei v. Roman Catholic Archbishop of Bos., 867 N.E.2d 300, 305, 317–18 (Mass. 2007); Fortin v. Roman Catholic Bishop of Worcester,

The second type of resulting trust arises when a settlor creates an express trust, but does not successfully transfer the entire beneficial interest in the property.[262] In particular, this occurs when (a) the express trust fails to dispose of the entire interest in the property; or (b) the express trust fails for a specific reason—such as a lack of identifiable beneficiaries, an illegal or impossible trust purpose, or a beneficiary who disclaims or forfeits his interest.[263] Either way, the settlor has created (or has attempted to create) an express trust, but has failed to account for some eventuality. Something must be done with the property interests that weren't fully disposed of. So the law presumes that the settlor would have kept a reversionary interest, and the property reverts to the settlor. The settlor is then said to be the beneficiary of a "resulting trust."[264]

This type of implied trust, too, is a poor fit for most church property disputes. First, it assumes that the settlor has already created (or has attempted to create) an express trust. But as we have explained above,[265] a declaration of trust by a denomination, even when combined with the actions of a congregation, typically does not create an express trust. Second, this type of resulting trust is, by nature, a "reversionary" interest.[266] It assumes that there has been a *transfer* of property, and the property is reverting to the transferor. But in the typical church property disputes, the congregation does not *transfer* the property; rather, the denomination claims that a trust has been created by *declaration*. Finally, even assuming this sort of resulting trust arises, it arises for the benefit of the original *settlor*—i.e., the entity that held title and created the trust. But in the typical church property dispute, the legal titleholder is the congregation. So any resulting trust would benefit the congregation, not the denomination.

2. Constructive Trust

Aside from resulting trusts, the only other type of implied trust is a constructive trust. Unlike a resulting or express trust, a constructive trust is not created by an expression of intent by the parties; it is imposed by a court.[267] And it is not imposed to give effect to the parties' intent; it is imposed to prevent one party from unjustly depriving another of its property.[268] "It is a 'fraud-rectifying' trust and not an 'intent-enforcing' trust."[269]

The basic requirement of a constructive trust is that the defendant has acquired title by wrongdoing and would be unjustly enriched if allowed to keep

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625 N.E.2d 1352, 1355, 1357 (Mass. 1994); Schmidt v. Catholic Diocese of Biloxi, 18 So. 3d 814, 828-29 (Miss. 2009).

262. RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. b.

263. *Id.*; *see also* HESS ET AL., *supra* note 220, § 468.

264. RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. b.

265. *See supra* notes 220–51 and accompanying text.

266. RESTATEMENT (THIRD) OF TRUSTS § 7.

267. HESS ET AL., *supra* note 220, § 471; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. LAW INST. 2011).

268. HESS ET AL., *supra* note 220, § 471.

269. *Id.*

it.[270] The difficulty, however, is in determining "what types of unconscionable or unethical conduct will serve as a basis for the constructive trust."[271] One common formulation, adopted in several states, has four elements: "(1) a confidential or fiduciary relationship must exist[;] (2) a promise was made[;] (3) a transfer was made in reliance on that promise[;] and (4) there was unjust enrichment."[272] Other states say that a constructive trust will be imposed "only in the 'limited circumstances'" where: "(1) title to the property 'must be held by someone who in equity and good conscience should not be entitled to [its] beneficial enjoyment'; and (2) that person's title 'must . . . have been obtained by means of . . . fraud, duress, . . . commission of a wrong, or by any form of unconscionable conduct.'"[273] Regardless of the formulation, most states require a constructive trust to be proved by "clear and convincing" evidence.[274]

We are aware of only one court that has imposed a constructive trust in favor of a denomination: the Virginia Supreme Court in *Falls Church v. Protestant Episcopal Church in the United States*.[275] According to that court, the denomination's canons did not, and legally could not, create an express trust—but the canons nonetheless gave rise to a "fiduciary relationship" requiring congregations to hold their property in trust for the denomination. By seeking to withdraw from the denomination, the congregation violated this fiduciary duty; thus, equity required "that a constructive trust be imposed on the property for the benefit of [the denomination]."[276]

This analysis is a *Through the Looking Glass* version of trust law. First, a "[c]onstructive trust is a remedy, not a cause of action."[277] That is, there can be no constructive trust unless the defendant breached a legal obligation. Where did the legal obligation come from? Here, the court concluded that the constructive trust created the legal obligation, which cannot be correct. Remedies do not create legal obligations; they are responses to the breach of a legal obligation. If internal church rules do not amount to an express trust, they cannot give rise to a fiduciary duty to hold the property in trust.

In the typical church property dispute, the only alleged obligation is the congregation's duty to hold property in trust for the denomination. But there is no such obligation unless there is a valid trust. In an appropriate case, the denomination could ask for the imposition of a constructive trust to remedy the breach of an express trust. But unless internal church rules and relationships satisfy

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270. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(1).

271. HESS ET AL., *supra* note 220, § 471.

272. *Id.*

273. *Id.* (quoting Krueger v. Rodenberg, 527 N.W.2d 381, 385–86 (Wis. Ct. App. 1994)).

274. HESS ET AL., *supra* note 220, § 472.

275. 740 S.E.2d 530, 545 (Va. 2013), *cert. denied*, 134 S. Ct. 1513 (U.S. 2014).

276. *Id.* at 542.

277. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. f (AM. LAW INST. 2011).

the ordinary legal rules for creation of an express trust, there is no basis for a constructive trust.

Second, a constructive trust rests on a finding of particularly unconscionable wrongdoing. Whatever one might think of the proper relationship between a congregation and a denomination, or the strength of a denomination's claim of express trust, it is a stretch to say that a congregation has engaged in unconscionable conduct simply by maintaining that it never expressed an intent to hold its property in trust, and that the court should give legal effect to a properly executed, recorded, and unambiguous deed.

Ultimately, the Virginia Supreme Court's imposition of a constructive trust seems driven not by ordinary principles of trust law, but by an odd feature of Virginia law—namely, that until very recently, Virginia barred denominational trusts. Thus, the court was precluded from holding that the denomination's trust canon created an express trust. But it still wanted to rule in favor of the denomination, so the court concluded that the canon gave rise to a constructive trust. That is not surprising under the flexible, all-facts-and-circumstances hybrid approach, which gives each court broad discretion to reach what it believes is an equitable result. But it is not an application of ordinary principles of trust law. Courts that have applied ordinary principles of trust law have generally found that internal church rules and relationships fail to create either a resulting trust or a constructive trust.[278]

D. Estoppel

In the absence of an express or implied trust, other judges applying the hybrid approach have suggested that a trust might arise based on principles of equitable estoppel or quasi-estoppel.[279] Equitable estoppel arises when one party says or does something calculated to induce another party to believe certain facts, and then the other party relies on those facts to its detriment.[280] Quasi-estoppel is

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278. *See, e.g.*, Rector, Wardens, & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc., 718 S.E.2d 237, 271 (Ga. 2011) (Brown, J., dissenting) (criticizing the majority for "declar[ing] a new type of implied trust" that was neither a resulting nor constructive trust); Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 826 (Iowa 1983) (rejecting a claim of a resulting trust in favor of a denomination); Colonial Presbyterian Church v. Heartland Presbytery, 375 S.W.3d 190, 195 (Mo. Ct. App. 2012) ("Since [the denomination] is not asserting a constructive trust or a resulting trust (and has not identified any other legally recognized theory of implied trust), its claim to an implied trust must fail.").

279. *See* Masterson v. Diocese of Nw. Texas, 422 S.W.3d 594, 622–23 (Tex. 2013) (Lehrmann, J., dissenting) (arguing that the denomination should prevail "under the doctrine of quasi-estoppel"); *see also* Crumbley v. Solomon, 254 S.E.2d 330, 333 (Ga. 1979); *id.* at 336 (Bowles, J., dissenting) (arguing that the majority was using "language [of] estoppel"); PATTY GERSTENBLITH, *Civil Court Resolution of Property Disputes among Religious Organizations*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 315, 340–41 (James A. Serritella ed., 2006); HESS ET AL., *supra* note 220, § 143 (elements of trust created by estoppel).

280. 31 C.J.S. *Estoppel and Waiver* § 94 (2015).

similar, but it does not require a misrepresentation or detrimental reliance; instead, it is enough to show that it would be unconscionable to allow a party to maintain a position that is inconsistent with one from which it received a benefit.[281] According to judges relying on estoppel, a congregation is estopped from promising to be subject to a denomination's canons and accepting the benefits of denominational affiliation, only to reject those canons, leave the denomination, and keep its property.[282]

But the doctrine of estoppel has important limitations. First, in some jurisdictions, estoppel "cannot be the basis of title to land."[283] The reason for this rule is "to prevent the uncertainty of titles which would arise if parol evidence of an estoppel could be introduced to show that the paper title is not what it appears to be."[284] Second, even in jurisdictions where estoppel *can* create an interest in land, courts impose a heightened burden of proof. The party raising estoppel must show an "express intention to deceive or such careless and culpable negligence as amounts to constructive fraud,"[285] and each element of estoppel must be proved by clear and convincing evidence.[286]

This is a very difficult burden to meet, even assuming a congregation has expressly agreed to be bound by the denomination's canons. First, it is unclear whether any misrepresentation has been made, much less one amounting to constructive fraud. The congregation may intend to be bound by church canons in an *ecclesiastical* sense, such that it is subject to church discipline if it disobeys them. But it might not intend for church canons to have *legal* effect, especially when it never takes any steps to embody those canons in a legally cognizable form. At a minimum, a court cannot decide between these two possibilities without making key assumptions about how churches are intended to operate.[287] Second, it is difficult for the denomination to prove lack of knowledge or detrimental reliance. In the typical case, the publicly recorded deeds are in the name of the local congregation, and there is no deed of trust or formal trust agreement. Thus, the denomination is on notice of "the real condition of the title to the property in

281. *Id.* § 146.
282. *See supra* note 279.
283. 31 C.J.S. *Estoppel and Waiver* § 208.
284. *Id.* (citing Tunnage v. Green, 947 So. 2d 686 (Fla. Dist. Ct. App. 2007)).
285. 28 AM. JUR. 2D *Estoppel and Waiver* § 80 (2016).
286. 31 C.J.S. *Estoppel and Waiver* § 289 (2016).
287. *Cf.* Comm. to Save St. Brigid v. Egan, 819 N.Y.S.2d 7, 8 (App. Div. 2006) (rejecting a claim of estoppel to keep a parish open, where there was a "lack of a specific promise to keep the subject church building in operation as a church if funds were collected for that purpose").

question."[288] And in many cases, the denomination has not provided the purchase price for the property, so its claim of detrimental reliance is weak.[289]

E. Contract

Finally, other courts (predominantly in Virginia) have applied a theory of contract rather than trust—mainly because Virginia law long (and unconstitutionally) prohibited denominations from being the beneficiary of a trust.[290] According to these courts, "the relationship between a hierarchical church and a local church is analogous to a contractual relationship," and internal church rules and relationships can give the denomination a contractual interest in local property.[291] However, the Virginia Supreme Court has cautioned that not all principles of contract law are relevant: "some concepts of contract law apply to church property cases, others do not."[292] This is consistent with the hybrid approach, which gives courts broad discretion to determine which legal principles apply and how much weight to give internal church rules and relationships.

But under the strict approach, the denomination in a typical property dispute would have a difficult time establishing a breach of contract. First, the formation of a contract requires each party to manifest its assent to the terms of the contract,[293] and to do so "with reference to the manifestation of the other."[294] The problem here is the same as it was for establishing an express trust: just as there

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288. 28 AM. JUR. 2D *Estoppel and Waiver* § 101; *cf.* From the Heart Church Ministries, Inc. v. Phila.-Balt. Annual Conference, 964 A.2d 215, 239 (Md. Ct. Spec. App. 2009) (rejecting congregation's claim of estoppel, because the congregation "had as much knowledge of the true state of the title of the real property as [the denomination did]").

289. *See* GERSTENBLITH, *supra* note 279, at 341 ("Perhaps the single most important consideration is the source of the funds used to purchase the disputed property.").

290. *See* Norfolk Presbytery v. Bollinger, 201 S.E.2d 752, 757–58 (Va. 1974). Virginia law also limited the amount of property that churches could own and prohibited them from incorporating. GERSTENBLITH, *supra* note 279, at 339–41. These prohibitions dated to Virginia's disestablishment, led by Thomas Jefferson and James Madison in the 1780s, and they stemmed from fears that hierarchical churches would accumulate too much property and therefore too much power. The prohibition on incorporation was eventually struck down as a violation of the Free Exercise Clause in *Falwell v. Miller*, 203 F. Supp. 2d 624, 632 (W.D. Va. 2002). Limits on the amount of property churches could own were repealed at about the same time. *See* VA. CODE ANN. § 57-12 (repealed by Acts 2003, c. 813). And the prohibition on denominational trusts was removed by legislation. *See* Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530, 539 (Va. 2013) (discussing VA. CODE ANN. § 57–7.1), *cert. denied*, 134 S. Ct. 1513 (2014).

291. *Falls Church*, 740 S.E.2d at 540 n.9; *see also In re* Multi-Circuit Church Prop. Litig., 84 Va. Cir. 105, 200 (2012) (concluding that the denomination had "contractual and proprietary interests in the real and personal property of [the congregations]"); *see generally* GERSTENBLITH, *supra* note 279, at 343 n.180.

292. *Falls Church*, 740 S.E.2d at 540 n.9; *see also* In re *Multi-Circuit Church Prop. Litig.*, 84 Va. Cir. at 144 (rejecting the argument that courts should "apply traditional concepts of contract law, such as the requirement of consideration, mutuality of remedies in the event of breach, and so on").

293. RESTATEMENT (SECOND) OF CONTRACTS § 18 (AM. LAW INST. 1981).

294. *Id.* § 23.

was no clear manifestation of intent to create an express trust, there is no clear manifestation of intent to enter a contract creating the same trust. While one can argue that the act of joining a denomination and assenting to its rules creates a contractual relationship enforceable in civil court, it is just as plausible to conclude that it creates an ecclesiastical relationship enforced by ecclesiastical sanctions alone. One cannot decide between these two possibilities without making crucial, unfounded assumptions about what a church really intends.

Second, a contract for an interest in land must satisfy the statute of frauds. That means that the contract must be evidenced by a writing that identifies the parties,[295] identifies the subject matter of the contract,[296] indicates that a contract has been made or offered,[297] states with reasonable certainty the essential terms of the contract,[298] and is signed by the party against whom the contract is being enforced—i.e., the congregation.[299] But in the typical church property dispute, the primary writing consists of a broadly worded church canon that does not identify the local parties or local property, does not indicate that a contract has been made, does not set forth the terms of the agreement, and has not been signed by the congregation.

CONCLUSION

In the abstract, all courts seem to agree on the same, overarching goals when resolving church property disputes—namely, that churches should be free to organize as they wish, that courts should avoid resolving religious questions, that property rights should be clear and predictable, and that property should be awarded in accordance with the parties' intent. But they are deeply divided over how best to accomplish those goals.

This division arises from fundamentally different assumptions about the nature of churches. Under the English rule, courts assumed that an inherent feature of churches is doctrinal continuity. Thus, they awarded property to the faction of the church that adhered to the original doctrine.

Under the deference approach, courts assume that an inherent feature of churches is submission of all members to the hierarchical authorities. Thus, they award property to the faction chosen by the hierarchical authorities.

Under the hybrid approach, courts assume that an inherent feature of churches is control of church property via internal church rules. Thus, they award property in accordance with those internal rules.

The strict approach, however, is different. It makes no assumption about the inherent features of churches—other than the assumption that courts should not make assumptions. Maybe some churches will want doctrinal continuity; maybe some will want submission to hierarchical authorities; maybe some will want

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295. *Id.* § 131 cmt. f.
296. *Id.* § 131(a) cmts. e–f.
297. *Id.* § 131(b) cmt. f.
298. *Id.* § 131(c) cmt. g.
299. *Id.* § 135.

control via internal church rules; and maybe some will want none of the above. Under the strict approach, the ball is in churches' court to translate their desires and their inherent features into the ordinary language of property, trust, and contract law. Of course, this assumes that churches are *capable* of translating their intent into a legally cognizable form; but this is an assumption that courts already make for all other voluntary associations.

As a result, the strict approach gives churches maximum flexibility to adopt any form of polity they wish. If a church wants doctrinal continuity, it can place title in an entity on condition that the entity remains faithful to church doctrine. Of course, a court can't decide whether that entity has remained faithful to church doctrine. But the church can still specify who should decide this question—whether a particular hierarchical authority, a congregational majority, or someone else. Then the court will be required to defer to that authority on the religious question.

Similarly, if churches want submission to hierarchical authorities or control via internal church rules, they can insert those conditions in the appropriate legal documents—whether by placing use restrictions in a deed, executing a formal trust agreement, or subjecting title to denominational authorities or canons (as many denominations have done). And if churches want local control or some other arrangement, they can change the legal documents accordingly.

By contrast, when courts make assumptions about what makes a church a church, they inevitably get things wrong. When they assume that churches want doctrinal continuity, they make it impossible for churches to evolve. When they assume that churches want hierarchical control, they make it impossible for churches to have local control. And when they assume that churches want to control property via internal rules, they make it impossible for churches to hold property independently of those rules.

The assumptions underlying the hybrid approach are also problematic when it comes to the issue of entanglement. By assuming that churches want property to be controlled by internal church canons and relationships, courts are forced to examine those canons and relationships, and parties are encouraged to present conflicting evidence about them. This does one of two things: (1) it forces courts to resolve religious questions; or (2) it forces courts to defer to hierarchical authorities, making the hybrid approach nothing more than hierarchical deference by another name. Neither result is consistent with the First Amendment.

Finally, the assumptions underlying the hybrid approach undermine the public and private interest in clear property rights. When property rights turn on internal church canons and relationships, no one can know for sure who owns church property. This harms not only potential purchasers and tort claimants, but also churches themselves.

In short, the history of church property disputes has taught us that civil courts are not good at making assumptions about what churches want. But they *are* good at applying ordinary principles of property, trust, and contract law to ordinary legal instruments like deeds, trust agreements, and contracts. Those principles of

law and legal instruments work just as well for churches as for other voluntary associations. Both courts and churches would be well served by relying on them.