CHURCH FACTIONALISM AND JUDICIAL RESOLUTION: A RECONSIDERATION OF THE NEUTRAL-PRINCIPLES APPROACH

INTRODUCTION

Religious disputes require catalysts. A faction within the church must be dissatisfied with the current dogma. Often times, the catalyst involves repercussions that echo far into posterity. Be it Martin Luther, the Pilgrims, or the faction of slaveholders who took affront to the Presbyterian Church's support of the Emancipation Proclamation in the seminal Su-

preme Court case in this area,[1] church divisions are a formative part of our history, regardless of how posterity judges those divisions.

Because of this illustrious history, it is imperative that we find an approach to resolution of these issues that does not alienate, marginalize, or discourage an important dissent. The neutral principles of law approach (the Approach) purports to be such a resolution and therefore should be subject to rigorous critique. My goal is to construe the current version of the Approach, to canvass current criticism of the Approach, and to offer my own critique—a systemic and objective economic examination.

The Supreme Court, in the seminal *Watson v. Jones* opinion, provided a list of reasons for its adoption and endorsement of the Approach.[2] This allows the opportunity to judge subjectively the neutral principles of law using the Court's own rationale. Additionally, one of the charges leveled at the Supreme Court is that it did not tie the religious non-involvement requirement of existing Establishment Clause jurisprudence into the Approach.[3] By using the objective framework proposed by Judges McConnell and Posner, the constitutionality of the Approach can be tested against existing constitutional principles relating to the Establishment Clause.[4] Finally, normative recommendations will be made by drawing upon the work of Guido Calabresi and Douglas Melamed.

I. THE CURRENT STATE OF NEUTRAL PRINCIPLES

A. History of Neutral Principles[5]

The current approach to resolving church property disputes stems from three United States Supreme Court cases decided in the period from 1969 to 1979.[6] The seminal case was *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, where the Supreme Court focused on Georgia's approach to church property disputes.[7] That approach was put succinctly by the Court: "Under Georgia law the right to the property previously used by the local churches was

1. Watson v. Jones, 80 U.S. 679 (1871).
2. *See* Jones v. Wolf, 443 U.S. 595, 603 (1979).
3. *See* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1845 (1998).
4. *See generally* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).
5. For a more extensive foray into the history of the Approach, see Greenawalt, *supra* note 3, at 1846–81.
6. The previous approach to resolving disputes over church property involved a deferral to the decisions of churches deemed "hierarchical" regarding the dispensation of the property. *See* discussion *infra* notes 110–11 and accompanying text. Churches that did not have a discernible hierarchy were subject to a haphazard attempt to award the property to the majority. *See infra* notes 80–87 and accompanying text.
7. 393 U.S. 440 (1969); *see also* Greenawalt, *supra* note 3, at 1855.

made to turn on a civil court jury decision as to whether the general church abandoned or departed from the tenets of faith and practice it held at [affiliation]."[8] The Court severely criticized the framework saying that "First Amendment values [were] plainly jeopardized when church property litigation [was] made to turn on the resolution . . . of controversies over religious doctrine."[9] The lower courts essentially had to make their own "interpretation[s] of the meaning of church doctrines."[10] The First Amendment, the Court suggested, "plainly" forbids this outcome.[11] However, the necessity for civil court resolution or recourse in property dispute cases was sufficient for the Court not only to continue its endorsement of the deference approach but also to affirm the existence of "neutral principles of law."[12] These as-yet-undefined principles could be "developed for use in all property disputes [and] applied without 'establishing' churches."[13]

Seven years later in 1976, the Supreme Court granted certiorari to determine the extent a civil court could go in order to decide a dispute on which the highest church authority had already ruled. In *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*,[14] the dispute centered over the control of the Serbian Eastern Orthodox Diocese for the United States of America and Canada, which controlled all its churches' property and assets in North America. The Serbian Orthodox church had a strict hierarchy, the "Holy Synod," located in Yugoslavia, which was the sole authority for appointing the governing bishop. Essentially the Illinois locale disputed whether a bishop elected in 1939 or a bishop appointed in 1963 controlled the property of the church. The Illinois Supreme Court ruled that the first bishop's removal was "arbitrary" because it was not in accord with the church's constitution and penal code. The United States Supreme Court held that the Illinois Supreme Court had repeated the mistake of the Georgia jury:[15] "The fallacy fatal [to the lower court's reasoning] is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals . . . and impermissibly

8. *Mary Elizabeth Blue Hull*, 393 U.S. at 441.

9. *Id.* at 449. The Georgia framework was a common departure-from-doctrine method that assumed, in the absence of an explicit, conditional gift, the church property was given in trust to further the principles or doctrine of the one who made the gift. *Id.* at 445, 449. Consequently, by adopting the method a civil court had to decide which of the warring parties was in accord with the original doctrine. *Id.* at 450. The concept of deciding fervency of belief is very much at odds with the Establishment Clause. *See id.* at 451.

10. *Id.* at 450.

11. *Id.*

12. *Id.*

13. *Id.*

14. 426 U.S. 696 (1976).

15. The Illinois court's decision that the church made an arbitrary decision invariably means that the Illinois court implemented its own independent inquiry into the situation. *Id.* at 708–09.

substitutes its own inquiry . . . ."[16] While stating that the Illinois Supreme Court had not relied on neutral principles of law, the Court once again tacitly acknowledged that they did, in fact, still exist.[17] Justice Rehnquist, somewhat foreshadowing the development of the Approach, dissented by pointing out that the Illinois Supreme Court had merely determined that the religious tribunal election had not followed its own secular rules of procedure—there was no inquiry into church doctrine.[18] The end result of the Supreme Court's initial two forays into changing the status quo in church property disputes was that a court could not investigate at all into matters of church polity or doctrine. However, a court could resort to amorphous neutral principles. Moreover, the Supreme Court still unequivocally permitted lower courts to defer to the decisions of a church hierarchy.

The Supreme Court finally shed light on the neutral-principles approach in *Jones v. Wolf*.[19] In *Jones*, the dispute centered on a minority faction's claim of possession to the property of a Presbyterian church that had separated from the governing body with which it had voluntarily affiliated. The Georgia Supreme Court then awarded the disputed church property to a majority of church members, which was also the local congregation, rather than the erstwhile national ruling body. The Georgia court relied on the deed, which purported to give the property to the local congregation. The Supreme Court sanctioned this approach because it did not involve delving into tenets of faith and forwarded the interest of the courts in providing civil recourse.[20] The Court then elaborated on the parameters of neutral principles stating that, alternatively, the lower courts may look at church constitutions, charters, trusts, and even may adopt the stance that a majority always rules voluntary religious associations.[21] All of these approaches are in concert with a neutral principles analysis.[22] *Jones* marked the first instance that the Supreme Court explicitly sanctioned a specific neutral-principles approach and endorsed alternative approaches for state courts to consider. Furthermore, the Court elucidated the reasons for the Approach,[23] however the Court stopped short of restricting the states to certain documents or a singular approach.[24]

16. *Id.* at 708.
17. *See id.* at 721.
18. *Id.* at 727 (Rehnquist, J., dissenting).
19. 443 U.S. 595 (1979).
20. *Id.* at 603–04.
21. *Id.* at 607–08.
22. *Id.* at 607.
23. *Id.* at 603 ("The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity."); *see also* William G. Ross, *The Need for an Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L.J. 263, 277 (1987) ("[The neutral-principles approach] relies exclusively upon objective, well-established concepts of trust

B. The Current Formulation and Rationale

Essentially, states are free to adopt any ordinary secular principles in order to resolve disputes between religiously affiliated participants.[25] Because the neutral principles test is such a manifold doctrine, no two inquiries, even those having the same participants, are reasoned exactly the same.[26] Commonly, civil courts delve into the various documents of church government, including constitutions, deeds, and bylaws in an attempt to figure out which party succeeds in its claim to the church property.[27] However, the civil court must do this without dealing in ecclesiastical questions. After figuring out if there is a trust created in a specific party, the civil court will search for state statutes that address the application of trust law and finally award the property to a party.[28] The current discrepancy over the neutral-principles approach is over what documents a court may examine.[29] And, if they are allowed to examine religious-language-ridden church bylaws and constitutions, does the court ignore all ecclesiastical passages or read them without reference to the ecclesiastical clauses or determinations?[30] The neutral-principles approach does not distinguish between congregational and hierarchical churches, with the goal being that of an inquiry that approximates a secular inquiry.[31] The opinion itself evidences the dialectic behind the *Jones* decision:

> The primary advantages of the neutral-principles approach are that it is completely secular . . . yet flexible enough to accommodate all forms of religious organization and polity. . . . It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore . . . [it orders] private rights and obligations to reflect the intentions of the parties.[32]

By asserting the future advantages of the Approach in unequivocal language, the Supreme Court opened the Approach up to criticism based upon its application by the lower courts.

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and property law which are familiar to lawyers and judges.").

24. *See* Ross, *supra* note 23, at 278.

25. *See* Greenawalt, *supra* note 3, at 1881.

26. *See, e.g.*, *Jones*, 443 U.S. at 601.

27. *See, e.g.*, *id.* at 600–01 n.2; S. Ohio State Executive Offices of Church of God v. Fairborn Church of God, 573 N.E.2d 172, 182–83 (Ohio Ct. App. 1989); Greenawalt, *supra* note 3, at 1879.

28. *See Jones*, 443 U.S. at 600–01.

29. *See* Greenawalt, *supra* note 3, at 1886.

30. *Id.*

31. *Id.* at 1881.

32. *Jones*, 443 U.S. at 603.

C. Overview of Current Commentator Criticism

The first academic critiques of the neutral-principles approach concerned themselves predominantly with ramifications of the Supreme Court's choice not to create a bright-line test. Generally, the critiques focus on the extensive cross-jurisdictional case law of the Presbyterian and Episcopal denominations rather than focusing on a single jurisdiction's approach.[33] Three areas dominate the current landscape of criticism around the Approach: (1) the adaptability of the Approach; (2) the inconsistency of the Approach; and (3) the varying degrees of artificial formalism needed to make the Approach constitutional. The drawbacks of the former criticism coincide with the appearance of the latter critiques. This Note will detail the general consensus about the future and explore the emerging strands of criticism.

1. Adaptability of the Approach to Different Inquiries

In any case involving a church property dispute, a court has a variety of options to consider. For instance, the course of decisions in *Jones v. Wolf* immediately shows the manifold flexibility of the Approach. Instead of merely choosing and analyzing documents until the Georgia Supreme Court found an express trust, the court scrutinized all four deeds, noticed an absence of any provision for the national church, and then referenced a Georgia statute that required deference to church authority over property holdings.[34] The Georgia Supreme Court subsequently examined the national church's constitution and determined that there was no central authority that bound the local church.[35] In another case, the Colorado Supreme Court decided to award the church property to the group that held the church in express trust to the general church.[36] The court then had to determine which document it would rely on, with options including: the local church's declaration of fealty to the larger body, the actions of the lower church subordinating itself to the declarations of the national church, the articles of incorporation, or the grants of the previous owners of the church or the deeds.[37] Essentially, the explicit language of the parties is only a threshold, and courts are free to engage in any analysis they see

33. *Cf.* Ross, *supra* note 23, at 282–98; Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 340–43 (1986).

34. Jones v. Wolf, 243 S.E.2d 860, 862–63 (Ga. 1978), *vacated*, 443 U.S. 595 (1979); *see also* Ross, *supra* note 23, at 290.

35. *Jones*, 243 S.E.2d at 862–63.

36. Bishop and Diocese of Colorado v. Mote, 716 P.2d 85, 104 (Colo. 1986); *see also* Sirico, *supra* note 33, at 356. A common application of neutral principles is to find in the church document an express trust created in favor of one party. The party holding the express trust is granted legal title to the property. *See* 76 AM. JUR. 2D *Trusts* § 17 (2005).

37. *See Mote*, 716 P.2d at 99–110; *see also* Sirico, *supra* note 33, at 354.

fit.[38] The flexibility does invite unconstitutional inquiries into religious documents, and the only way around this snare is for the courts to look exclusively at the secular documents and not concern themselves with extrinsic evidence, regardless of how compelling it may be.[39]

2. Inconsistency of the Approach

There is a lack of consistency in disputes featuring the Presbyterian and Episcopal denominations, which is indicative of the Approach's shortfalls.[40] The Presbyterian cases began to reveal the imprecise nature of neutral principles through disparate decisions that construe the same document in different ways.[41] The majority of the deciding courts found that the denominational authorities' constitution did not create an express trust and consequently relied on the local churches' certificates of incorporation to find for the local congregation.[42] Conversely, a minority of decisions found that the church constitution did create an express trust in favor of the denominational authority and subsequently found for the national church.[43] In other cases involving the United Presbyterian Church in the United States of America, the local church has generally been awarded the property, save for two instances.[44] Turning to the Episcopal cases, the difficulty begins when the courts mix the deference approach with the neutral-principles approach.[45] Essentially, the courts have a tendency to find for a national church on the basis of neutral principles.[46] However, even in an explicit application of neutral principles, the courts deciding Episcopal cases diverge.[47] Although two courts examined the exact same articles of incorporation, canons, and church constitutional rules, the courts arrived at different interpretations of the creator's intent. Consequently, one case found for the local church and the other for the national.[48] However, there may be no difference between this problem of disparate results and the

38. *See* Ross, *supra* note 23, at 313.
39. *See* Sirico, *supra* note 33, at 357.
40. *See generally* Ross, *supra* note 23, at 282–92.
41. *Id.* at 284–85. The document is the Presbyterian Book of Order.
42. *Id.* at 284.
43. *Id.*
44. *Id.* at 312; *see also* Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 818 (Iowa 1983); Babcock Mem'l Presbyterian Church v. Presbytery of Balt. of the United Presbyterian Church in the United States, 464 A.2d 1008, 1017 (Md. 1983).
45. *See* Ross, *supra* note 23, at 292.
46. *See id.*
47. *Compare* Protestant Episcopal Church v. Barker, 171 Cal. Rptr. 541, 554–55 (Cal. Ct. App. 1981), *with* Bishop & Diocese v. Mote, 716 P.2d 85, 109 (Colo. 1986). The courts construed a nearly identical provision in a charter differently—the *Mote* court finding for the national body, *Mote*, 716 P.2d at 109, and the *Barker* court finding for the national church on an implied trust theory, *Barker*, 171 Cal. Rptr. at 554–55.
48. *Id.*

normal, secular differences inherent in any analysis from one court to another.

3. Varying Degrees of Reliance on an Artificial Formalism

Avoiding the snare of unconstitutional inquiries requires a legally created fiction, imputing an "artificial formalism" on the part of the churches—assuming the secular documents contain the entirety of the antagonistic parties' expectations.[49] In secular disputes involving deeds, corporation papers, and other legal documents, extrinsic evidence tempers any gaps or ambiguities.[50] However, in the realm of religious disputes, the courts are ill-advised to consider any evidence outside of strict secular documents for fear of treading into unconstitutional inquiries.[51] Consequently, problems may occur with the court favoring those that draft self-serving, formal, and clear documents;[52] the parties that draft such documents tend to be the denominational authorities who won church property disputes under the previous deference approach.[53]

Different courts have varying abilities to stomach the idea of the artificial formalism—the level at which they are willing to pretend the secular documents contain the entirety of the parties' expectations and ignore religiously tinged documents. In sum, courts have trouble deciphering which documents can actually be examined, which also shows the non-uniformity and unpredictability of the Approach.[54] It is the incongruous nature of the Approach that prevents parties from adequately planning their affairs.[55]

There are two parts of the inquiry resting on the artificial formalism: (1) what documents may courts examine, and (2) what is the nature of the inquiry into each document?[56] The options for each court consist of the following: relevant documents, secular documents and secular parts of any church document, or only secular documents.[57] With no guidance from the Supreme Court, the lower courts have used varying levels of inquiry, although "[f]ew courts have adopted a stringent secular documents test."[58] Many courts have examined church constitutions,[59] which are not secular documents, though the Supreme Court has tacitly approved of this ap-

49. Sirico, *supra* note 33, at 357.
50. *Id.* at 357–58.
51. *See, e.g.*, *Barker*, 171 Cal. Rptr. at 554–55; Sirico, *supra* note 33, at 357.
52. Sirico, *supra* note 33, at 358–59.
53. *See Mote*, 716 P.2d at 109; *cf.* Sirico, *supra* note 33, at 348, 358–59.
54. Greenawalt, *supra* note 3, at 1882–83.
55. *See id.* at 1883; *see also infra* Part III.B.
56. Greenawalt, *supra* note 3, at 1886–88.
57. *Id.* at 1886.
58. *Id.* at 1887.
59. *Cf. id.* at 1886.

proach.[60] Therefore, most courts refuse to disallow an inquiry into any documents,[61] but some courts will continue to disregard certain passages with an overtly religious tone.[62]

The most apparent example of the imprecision of neutral principles occurs when one attempts to interpret the document itself. There are attempts to "distinguish doctrines, practices, and church government" as the categories into which a court cannot intrude.[63] These categories are lumped together because of their significant overlap—all-male priesthood as government or practice? Because of inherent overlap and confusion, along with the pressure to resolve the dispute, courts have attempted to wade into the matters of church government to determine intent.[64] However, any time courts that are averse to artificial formalism inquire into these areas, that court comes close to an unconstitutional departure-from-doctrine inquiry, in which a civil court attempts to determine what party has been more faithful to accepted church practice.[65] Moreover, sometimes when a grantor makes a secular conveyance of land to a church, he makes that grant contingent on the continued adherence to a particular doctrine, belief, or practice. In these instances there is no way for a court to avoid delving into these murky constitutional areas. Therefore, the test should be applied in a form that gives some weight to hierarchal decisions and allows courts to consider "virtually all documents designed (even partly) for civil enforcement" in making their decision.[66]

Generally, the historical consensus has been that, whatever the drawbacks of the neutral-principles approach, the Approach is preferable to the other alternatives.[67] Essentially, this is because simply determining the existence of a church hierarchy, under even a facile deference approach, involves a quasi-legal inquiry into church doctrine. Other commentators express concern over the *Jones* Court's allowance for Georgia's presumption in favor of a majority or minority because of the conflict with constitutional concerns.[68] However, this concern may be unavailing since many statutes have a presumption in favor of the majority in regards to secular associations, and the goal of neutral principles is to mimic the inquiry into secular organizations.[69] While commentators worry about the little subs-

60. *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S 440, 443 (1969).
61. *See* Greenawalt, *supra* note 3, at 1888.
62. *See id.* at 1887.
63. *Id.*
64. *Id.* at 1889.
65. *See id.* at 1890–92.
66. *Id.* at 1907.
67. *See* Ross, *supra* note 23, at 312.
68. *See id.* at 313. The commentator sees a preference for one party as automatically infringing on the Establishment Clause. *Id.*
69. *See* Jones v. Wolf, 443 U.S. 595, 603 (1979).

tantive effect of neutral principles over the deference approach with regard to smaller, local congregations[70]—still more likely to lose—recently, the commentary has solidified around the idea that universal application of neutral principles would eliminate much of the inconsistency in the process.[71] Some commentators have argued for the expansion of neutral principles into the realm of Roman Catholic Church parish suppression.[72]

II. SYSTEMIC CRITIQUE

A. Religiously Tinged Approach

The Supreme Court in *Jones* proffers four main reasons for its endorsement of the neutral-principles approach. First, the Court calls the Approach completely secular.[73] This averment makes sense if one assumes that a facially nonreligious test that mimics the same tests used in similar secular disputes is completely secular. In other words, the lower courts in *Jones* focused on applying trust and property principles to a series of deeds, an approach that is not enmeshed in spiritual matters. However, as this Note will show, there is an obvious and significant difference in an approach that is facially secular and one that courts apply in a secular manner.

B. Limited Ambit of Denominational Applicability

The second reason for the Court's adoption of neutral principles of law is its bold statement that the Approach can "accommodate all forms of religious organization and polity."[74] The Supreme Court, in essence, says that lower courts may apply neutral principles to endless permutations of every religious organization in existence. In a theoretical sense, this statement is probably valid, but, practically, the Approach may be underinclusive.

Theoretically, it may be difficult to fathom an approach that could account for disputes among every religious sect in existence in the United States. Neutral principles is an approach that relies heavily on written

70. *See* Sirico, *supra* note 33, at 348.

71. *See, e.g.*, Ashley Alderman, Note, *Where's the Wall?: Church Property Disputes Within the Civil Courts and the Need for Consistent Application of the Law*, 39 GA. L. REV. 1027, 1029 (2005).

72. In these cases where the church has not actually taken possession of the property, essentially, neutral principles is extended to apply to future church property. *See* Elizabeth Ehrlich, Note, *Taking the Religion Out of Religious Property Disputes*, 46 B.C. L. REV. 1069, 1070 (2005) (arguing for such an application of neutral principles). The suppression of church parishes generally removes any gifted property to the archbishop, however the parish remains part of the hierarchy and consequently courts have historically treated these cases as internal church decisions that are "religious in nature." *Id.* at 1088.

73. *Jones*, 443 U.S. at 603.

74. *Id.*

documents,[75] and there is likely the existence of many fragmented bodies of religious belief that may not place much importance on written documents. However, an essential element in the application of neutral principles is, of course, a dispute involving church property. Where there is property there is usually a deed that a court may analyze accordingly. Therefore, the threshold requirement of a dispute over property ensures that courts may apply facially neutral principles to a cornucopia of religious organizations.

However wide-ranging the Approach is theoretically, courts have applied it in a way that indicates a much more limited applicability. The commentary emanating from the Supreme Court's *Jones* decision indicates that a significant amount of the litigation in the area of church property rights deals with the Episcopal Church, the major national Presbyterian organizations, and to a lesser extent, some of the major Methodist organizations.[76] Together those three groups make up approximately 17.3% of the United States church-going population.[77] That courts use the Approach most often when dealing with s minority of religious organizations indicates that perhaps the Approach is not as expansive as originally indicated. Catholics and Baptists are the two largest religious groups in the country; therefore, assuming they suffer from a similar occurrence of disputes,[78] it appears as though courts have had trouble applying the neutral-principles approach to cases involving these groups. Baptist and Catholic churches represent diametric opposites as far as the neutral-principles approach is concerned. Baptist governing bodies loosely affiliate with their member churches and consequently, the churches are pervasively congregational in structure.[79] Catholic churches, on the other hand, take instruction from a rigid, historical organizational structure and are, therefore, pervasively hierarchical. A closer inspection of cases involving the two groups should reveal whether the neutral-principles approach is truly able to accommodate.

Hawkins v. Friendship Missionary Baptist Church,[80] a recent Texas appellate decision, represents the difficulty courts have in applying the

75. *See, e.g.*, *id.* at 604.

76. *See, e.g.*, Greenawalt, *supra* note 3, at 1896–904; Ross, *supra* note 23, at 282–98; Sirico, *supra* note 33, at 340, 354–57.

77. Largest Religious Groups in the USA, http://www.adherents.com/rel_USA.html (last visited Apr. 17, 2009).

78. Catholic churches are hierarchical like Episcopal churches. Therefore, we can assume that Catholic churches probably suffer a proportionally equal amount of internecine disputes—in other words, we assume that there is nothing intrinsically special about Catholic churches that keeps their adherents from disputing more than other similarly situated churches. Baptists are no strangers to internecine conflict; those involved parties rarely resort to litigation however. *See* Robert N. Nash, Jr., Myth: Baptists Believe in Doctrinal Uniformity, http://www.baptisthistory.org/mythdoctrinal.htm.

79. *See, e.g.*, Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations,* 39 AM. U. L. REV. 513, 524 n.72 (1990).

80. 69 S.W.3d 756 (Tex. App. 2002).

Approach to Baptist-affiliated churches. In *Hawkins,* the Texas court dealt with an injunction issued by the trial court in favor of the church body and pastor. The injunction prevented the plaintiff and two other deacons from interfering with the pastor or the church's property, or from expending the church's funds. The Texas court quickly found that there was no church constitution or any other governing document.[81] Consequently, since the lower court based the injunction upon testimony establishing past practices of the church, any inquiry was unconstitutional and the court lacked jurisdiction over the suit.[82] The dissenting judge took the view that the decision allowed a minority to exercise control over the clear congregational and majority views.[83] Essentially, by overruling the wishes of the congregation, the court left the church with no other option,[84] because there is no governing body, either civil or hierarchal, that can provide resolution of the dispute.[85] The dissenting judge argued that Texas courts should apply the rule that, in a congregational church, the majority is the hierarchy and the court will provide the requisite deference to their wishes.[86] Alternatively, the court could do as other jurisdictions have done and adopt a position that, as a rudimentary neutral principle of law, the majority controls.[87]

The *Hawkins* decision is not unusual. The courts have repeatedly sent mixed messages concerning adjudication of Baptist church property disputes for many years. Consider *Little v. First Baptist Church, Crestwood*,[88] a recent opportunity for a Baptist affiliation to come before the U.S. Supreme Court. In *Little*, the Supreme Court denied certiorari in a situation that two of the Justices characterized as the state court helping the church determine its pastor.[89] By not ruling definitively in a situation that looked like excessive entanglement to two of its own Justices, the Supreme Court failed to establish any sort of precedent for the application of neutral principles to Baptist affiliations.[90]

American Union of Baptists, Inc. v. Trustees of the Particular Primitive Baptist Church at Black Rock, Inc.,[91] is also indicative of the uneven judicial treatment among denominations. Unlike *Hawkins*, where there were few supporting documents of any kind, the church in *Black Rock* had

81. *Id.* at 759.
82. *Id.*
83. *Id.* at 761 (Wittig, J., dissenting).
84. Arbitration is a potential remedy, but judicial review of the arbitration is highly unlikely. *See* Am. Union of Baptists, Inc. v. Trs. of the Particular Primitive Baptist Church at Black Rock, Inc., 644 A.2d 1063, 1068–69 (Md. 1994).
85. *Hawkins*, 69 S.W.3d at 762 (Wittig, J., dissenting).
86. *Id.* at 763.
87. *See, e.g.*, *id.* at 765.
88. 475 U.S. 1148 (1986).
89. *Id.* at 1148–49 (Marshall, J., dissenting on denial of certiorari).
90. *See id.* at 1149.
91. 644 A.2d 1063 (Md. 1994).

established an official trust, complete with extensive bylaws and an elected board. The dispute centered on whether the president of the trustees had the authority to call a special meeting. The bylaws provided that if the church was extinct, with no membership, then the president had no duty or authority to call the meeting. The court, relying on an antiquated decision from before the *Jones* paradigm shift, summarily concluded that deciding church membership was not a matter for the courts.[92]

The most recent court decision concerning Baptist affiliations is very much in concert with the *Black Rock* decision. In *Central Coast Baptist Ass'n v. First Baptist Church of Los Lomas*,[93] the California court dealt with a church constitution that provided for member rule and allowed for the reversion of the church property to the Central Coast Southern Baptist Association if the church ceased to be a Southern Baptist church. The court subsequently concluded that the determination of a Southern Baptist church would involve "delving into 'matters at the very core of a religion . . . the importance of those doctrines to the religion.'"[94]

The history of judicial decisions since *Jones* is replete with imprecise analysis and a refusal to apply the neutral principles framework. In no single case illustrated in this Note did a court apply neutral principles of law even where, as in *Hawkins*,[95] the solution was easy. Indeed, there is no evidence of the application of neutral principles of law to a Baptist affiliated church. The considerable resistance to applying the *Jones* approach to the church organization with the second-most members indicates that perhaps the Approach is not flexible enough to "accommodate all forms of religious organization and polity"[96] as promised by the Supreme Court. The courts' reasoning in cases involving Catholic organizations, which represent the opposite spectrum of religious organization, is similarly Byzantine and convoluted.

In *Maffei v. Roman Catholic Archbishop of Boston,* the plaintiff asked the Supreme Court of Massachusetts to decide whether the conveyance of property to a parish was really a creation of a constructive trust, and consequently, whether the suppression of the parish violated the trust and caused the property to revert back to the descendant's of the original conveyer.[97] Traditionally, such gifts of property inured to the Roman Catholic Archbishop of Boston.[98] The court determined that under neutral principles

92. *Id.*
93. 65 Cal. Rptr. 3d 100 (Cal. Ct. App. 2007).
94. *Id.* at 120 (quoting Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969)).
95. *See* Hawkins v. Friendship Missionary Baptist Church, 69 S.W.3d 756, 763 (Tex. App. 2002).
96. Jones v. Wolf, 443 U.S. 595, 603 (1979).
97. 867 N.E.2d 300 (Mass. 2007).
98. *Id.* at 307.

of law, it could not decide whether the church official had a "duty to discuss with the plaintiffs the nature of property ownership under canon law" so that the family could refine the deed to reflect their intentions.[99] The family's argument focused on the fact that shared religious affiliation created the fiduciary duty, and the court felt that it could not delve into those matters without offending the constitution.[100]

The courts again showed their hesitance to apply the Approach in *Kleppinger v. Anglican Catholic Church, Inc.*,[101] where several bishops attempted to exercise ecclesiastical office in the church without regard to a church decision forbidding them to do so. The court reasoned that the decision of a hierarchical church's highest authority deserved high deference and that neutral principles could not be applied because of the "extensive inquiry into internal church procedures and doctrinal decisions" that would be required.[102]

Kleppinger and other Catholic decisions, along with the Baptist cases, are indicative of a disturbing trend against the reasoning of the *Jones* Court. In dealing with the two most popular religious organizations in the United States, the courts are hesitant to apply neutral principles. In the cases concerning the Baptists, the courts seem to be unwilling to apply the Approach because of a lack of material (e.g., constitutions and bylaws) to analyze. In the Catholic cases, the courts seem to be unwilling to apply neutral principles because of the entrenched and pervasive nature of the Catholic hierarchy. The courts' opinions invariably cite the tendency for every dispute to involve the impermissible intrusion into church polity or doctrine, which raises the possibility that the Catholic constitutions and bylaws are so riddled with religious language that the documents are impenetrable by the courts.[103] Whatever the reason, it is disconcerting that the approach deemed applicable to all by the *Jones* Court is rarely applied to the most populous of religious organizations. The question arises: How is the Approach different in outcome than the previous rule of deference?

C. Civil Entanglement in Religious Doctrine

The Supreme Court's third reason for the adoption of the neutral-principles approach is that it "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[104] Regardless of whether the Court attempted hyperbole when it

99. *Id.* at 310.
100. *Id.* at 314.
101. 715 A.2d 1033 (N.J. Super. Ct. Ch. Div. 1998).
102. *Id.* at 1040.
103. *See, e.g.*, *Maffei*, 867 N.E.2d at 313–15 (Mass. 2007); Fortin v. Roman Catholic Bishop, 625 N.E.2d 1352, 1355 (Mass. 1994).
104. Jones v. Wolf, 443 U.S. 595, 603 (1979).

promised complete freedom from entanglement, it is difficult to delineate doctrine, polity, and practice from church government[105] because "many internal church standards serve partly to carry forward religious and spiritual understandings."[106] Hence, courts have taken realistic, if not uniform, measures to attempt to use neutral principles.[107] The nature of the inquiry is now not about finding ways to be completely free from questions of "doctrine, polity, and practice," it is about finding ways to delve into religious documents to find their nonreligious implications.[108] Therefore, the Court's third rationale for the institution of the neutral-principles approach falls short of its literal interpretation.

D. Unpredictable Ordering of Private Rights

The Court's final, and perhaps most compelling reason, for instituting the neutral-principles approach is that "[it orders] private rights and obligations to reflect the intentions of the parties."[109] In order for a neutral principles analysis to reflect the intentions of the parties, the parties must memorialize their wishes in a written document that a court may analyze and then, the court must subsequently rely on that document. It would, therefore, be instructive to see if religious organizations responded to the Supreme Court's ruling by modifying their existing documents to make them more secular. Because the earlier approach was one of deference to church hierarchy, most churches, especially hierarchical organizations, did not have to worry about courts analyzing their deeds or other written documents—the national organization's own ad hoc, binding determinations sufficed to secure the disputed property for themselves.[110] Consequently, churches had no reason to create documents that determined who had claim to church property when a dispute arose. Therefore, for the neutral-principles approach to be as effective at ordering the "rights and obligations . . . of the parties" as the Supreme Court anticipated,[111] the lower court must now rely on a document that was created or changed after 1979, the year of the *Jones* decision. However, the new approach would have to be detrimental for existing national organizations in order to spur a change in the documentation of the church relationships.

In the initial wave of decisions following *Jones*, courts attempted to create implied trusts out of sometimes contradictory church documents.[112]

105. *See* Greenawalt, *supra* note 3, at 1887–89.
106. *Id.* at 1888.
107. *Id.* at 1887–88.
108. *See* Greenawalt, *supra* note 3, at 1888.
109. *Jones*, 443 U.S. at 603.
110. *See* Watson v. Jones, 80 U.S. 679, 727 (1871).
111. *Jones*, 443 U.S. at 603.
112. *See generally* Ross, *supra* note 23, at 281–303.

Many times in hierarchal organizations, the overarching charter would strongly insinuate that the church property would revert to the national organization in the event of a dispute.[113] However, the local parish or congregation usually held the actual deed to the church.[114] Consequently, the early cases after *Jones* tried to weigh the evidence in an attempt to find an "implied trust."[115] The results were uneven and inconsistent, with some decisions going both for and against the national organizations.[116] Accordingly, there is strong evidence that the *Jones* decision provided the impetus for religious organizations to change their constitutions.[117]

In 1981 the United Presbyterian Church in the United States of America (UPCUSA) began a trend towards more definitive statements of their intent to preserve local church property in the name of the national organization in the event of a dispute.[118] The Presbyterian Church in the United States (PCUS) followed suit in 1982 by similarly amending its Book of Church Order.[119] In 1983, the UPCUSA and the PCUS joined to form the Presbyterian Church in the United States of America (PECUSA) and further strengthened their express trust provisions.[120]

In light of the changes in the Presbyterian Church constitutions made because of the *Jones* decision, it is instructive to analyze subsequent cases involving the same national organizations. It is logical to assume that changes in the church constitution represent a clear intent on the part of the national organization to keep any disputed church property. However, the highest courts in Pennsylvania and New York have decided cases involving PECUSA in favor of the local church.[121]

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113. *See, e.g.*, Greenawalt, *supra* note 3, at 1896–904; Ross, *supra* note 23, at 282–98; Sirico, *supra* note 33, at 340, 354–57.

114. *See, e.g.*, Sirico, *supra* note 33, at 354.

115. Ross, *supra* note 23, at 284.

116. *Id.* at 280–81.

117. *Id.* at 303–04.

118. A permanent committee of the UPCUSA explicitly adopted the following amendment because of the *Jones* decision:

> [A]ll property held by or for a particular church, a Presbytery, a Synod, the General Assembly, or [the UPCUSA] 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 the particular church or of a more inclusive judicatory or retained for the production of income is held in trust nevertheless for the *use and benefit of* [the *UPCUSA*].

Presbytery of Elijah Parish Lovejoy v. Jaeggi, 682 S.W.2d 465, 470 (Mo. 1984) (emphasis added).

119. Ross, *supra* note 23, at 303.

120. *Id.* at 303–04. The united organization provided additional protection in the form of provisions preventing the severing of the parent church and by adopting a provision making the presbytery the "true Church within [PECUSA]." *Id.* at 304 (quoting BOOK OF ORDER, PRESBYTERIAN CHURCH (USA) 1987–88 G.80601 (1987)). This provision gave the organization a clear hierarchy that may either create additional deference if the court applies neutral principles or not subject the hierarchy's decision to review by the court at all, if the actual deference approach is chosen.

121. *See, e.g.*, Presbytery of Beaver–Butler of United Presbyterian Church in the United States v. Middlesex Presbyterian Church, 489 A.2d 1317, 1325 (Pa. 1985); First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States, 464 N.E.2d 454, 461–62 (N.Y. 1984).

In *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States,* New York's highest court decided whether to issue an injunction on behalf of the local church that would enjoin the national church from interfering with the property.[122] The court explicitly applied the Approach and issued the injunction based on the fact that the deeds and state law purported to give the local church title to the property.[123] The court disregarded passages in the national church's Book of Order that, as excerpted previously,[124] seem to create an express trust in favor of the national church. The court reasoned that they could not give weight to the express property provisions since the provisions deal predominantly with church government, a constitutionally forbidden area.[125]

In *Presbytery of Beaver–Butler of United Presbyterian Church in the United States v. Middlesex Presbyterian Church*, the national organization attempted to quiet title against the local church by securing an injunction against the seceding members' use of the property.[126] The Pennsylvania Supreme Court explicitly adopted and applied the *Jones* neutral-principles approach. The court relied on and endorsed the trial court's findings of fact. Namely, the highest court found that, instead of the national church's amendments to their constitution in 1981 creating an express trust, there was no indication of intent by the national organization to create an express trust at the time the local body voluntarily affiliated with the national organization.[127]

Recent cases also follow in the vein of *Beaver–Butler*. In *Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*, the Arkansas Supreme Court adopted the Approach and decided whether to grant the local church's action to quiet title.[128] The court relied heavily on the deeds that conveyed the property to the local church in 1968.[129] Echoing the reasoning of the *Beaver–Butler* court, the Arkansas Supreme Court lent little weight to the national organization's 1984 amendment that purported to create an express trust in favor of the national church.[130] The court belittled the national church's argument, reasoning that at the time of the original conveyance there was no creation of a trust and, therefore, there could not be an ad hoc creation of a trust.[131]

122. 464 N.E.2d 454 (N.Y. 1984).
123. *Id.* at 460–62. The deeds all conveyed property to the local church and contained no reversionary clauses. Additionally the court relied on a state law provision that specifically exempted Presbyterian churches incorporated before 1828 from being governed by the national constitution. *Id.* at 461.
124. *See supra* note 118 and accompanying text.
125. *Schenectady*, 464 N.E.2d at 462.
126. 489 A.2d 1317 (Pa. 1985).
127. *Id.* at 1324–25.
128. 40 S.W.3d 301, 306 (Ark. 2001).
129. *Id.* at 307–08.
130. *Id.* at 308–09.
131. *Id.* at 309.

As a legal tool created to allow parties to order their affairs and allow the resolution of disputes to reflect their respective intentions, the neutral-principles approach has been anemic at best and a trap at worst. In order to allow parties certainty in planning their affairs, an approach must be uniformly applied; the neutral-principles approach has not been adopted by some states[132] and is applied unevenly among those that do use it.[133] The main criticism of neutral principles as a planning tool lies in its uselessness for parties that actually used the *Jones* decision to make their plans more explicit.[134] The problem occurs when courts apply the most ubiquitous of neutral principles, the express trust.[135] Many churches received their property before the *Jones* decision, without reservation of a trust in favor of the national church, and there is scant evidence supporting a finding of an express trust in a grantor who imposed a trust after the conveyance.[136] The passage of time may remedy this problem but, for now, many churches are immune from the creation of an express trust.[137] Additionally, if national organizations could simply change their constitutions and have them take effect upon a dispute, the resulting preference for the large organization would look eerily similar to neutral principles' predecessor, the deference approach—where the secular courts upheld the organization's decisions.

Even if courts found another neutral principle of law to apply, the problem remains: Whose intent does a court give effect to? The parties' intent, whether they are a local church and national church, or congregational church and splinter congregation, is always going to be anathema to the other's in the event of a dispute. While the courts may give effect to the larger organization's intent because the smaller party typically voluntarily associated with the larger,[138] a problem still occurs if the parties affiliated before the *Jones* decision because, possibly, neither party would have notice of the other's intent. The only recourse for the smaller party would be to opt out of the larger organization, which would probably give

132. *Cf.* Greenawalt, *supra* note 3, at 1904 (discussing how the adoption of the neutral-principles approach is left to the state courts).

133. *See generally* Ross, *supra* note 23.

134. *See, e.g.*, Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson, 40 S.W.3d 301 (Ark. 2001); First Presbyterian Church of Schenectady v. United Presbyterian Church in the U.S., 464 N.E.2d 454 (N.Y. 1984); Presbytery of Beaver–Butler of United Presbyterian Church in the U.S. v. Middlesex Presbyterian Church, 489 A.2d 1317 (Pa. 1985).

135. *See, e.g.*, Ross, *supra* note 23, at 311.

136. *See* Greenawalt, *supra* note 3, at 1850. Express trusts require that the deed contain certain language. Therefore, once the grantor conveys the deed, it is difficult to change the language—the grantor would be changing the terms of the original grant. *Cf. id.*

137. If the deed never contained language creating the express trust, there is no way to conjure one up—courts must look to implied trusts, which involve a much closer reading of conveyance documents and religiously tinged drafting. *See id.*; *see also supra* Part I.C.3.

138. *See* Greenawalt, *supra* note 3, at 1889 (discussing "the basic authority regional and national bodies have over local churches").

rise to a property dispute. The use of neutral principles as a planning tool cannot be effective unless there is uniformity of use and application among the states, a clear statement of whose intent will control, and actual effect given to those who change their constitutions to reflect intent.

III. ECONOMIC CRITIQUE

In their seminal law article, *An Economic Approach to Issues of Religious Freedom*, Judges McConnell and Posner set out a simple framework for determining the constitutional validity of any government action regarding religion.[139] If the government action creates a burden on religion, regardless of any facial neutrality, then that action is unconstitutional unless the action burdens similar, nonreligious institutions.[140]

Facial neutrality is irrelevant in that the Constitution is not automatically satisfied if religion is treated exactly the same as any other activity.[141] Unlike other activities which may be encouraged, like building a performing arts center with public funds, the government cannot promote or discourage religion.[142] For that reason, facial neutrality is not the end of the inquiry. Just because the Approach purports to be "completely secular in operation"[143] does not mean that it cannot burden religion. A burden, for our purposes, is a governmental policy that taxes religion.[144] A policy taxes religion when it "makes it more costly to adhere to one creed than to another [or none]."[145] The cost may be pecuniary or nonpecuniary.[146]

The application of Posner and McConnell's formulation to government actions that are facially neutral requires the presence of three components: (1) there must be a government action; (2) it must have a tangible effect on religion; and (3) there must be a relevant measuring stick.[147] If the Approach makes it more costly to be a part of a religious organization instead of a similar, secular organization, then the Approach is a tax and consequently violates the Free Exercise Clause.[148] The question of "costly" is complicated. One can interpret "costly" as more costly to belong to a religious association than a nonreligious one, or as more costly to administer or control a religious association than a similarly situated secular one.[149] For our purposes, either will suffice.

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139. *See* McConnell & Posner, *supra* note 4.
140. *See id.* at 12.
141. *See id.* at 14.
142. *Id.*
143. Jones v. Wolf, 443 U.S. 595, 603 (1979).
144. *See* McConnell & Posner, *supra* note 4, at 5.
145. *Id.*
146. *Id.*
147. *See id.* at 5.
148. *See id.* at 11.
149. For examples of the former, see *id.* at 5, 39. For examples of the latter, see *id.* at 42.

Applying this formulation specifically to the Approach is troublesome because most cases of government involvement deal with a clear action or policy.[150] In the case of *Jones*, the government was attempting to create a policy of noninvolvement or facial neutrality.[151] Therefore, the only way to use the formulation to gauge the constitutionality of *Jones* and its progeny is to compare the outcome of the decisions to either outcomes under the previous deference standard or to the outcomes in similar secular organizational disputes.

A. Comparison to Watson *Deference Standard*

Under the deference standard, hierarchical churches like the Catholic Church had their decisions regarding dispensation of property made immune from judicial scrutiny.[152] Congregational churches like a Baptist affiliation were subject to a neutral principles-type analysis in an effort to determine who the controlling majority was.[153] The deference approach created uncertainty in some organizations about whether they fell into the hierarchical or congregational category—the Approach provides clarity.[154] However, the Approach does not allow hierarchical church forms the same clear deference as the previous test. Regarding hierarchical churches, the deprivation of a clear bright-line test may indicate an increased burden on hierarchical churches, and therefore constitutional concerns, when compared to the previous approach. Since the increased uncertainty hierarchical churches have may force them to draft redundant clauses, which may still not have the desired effect, it is likely that planning for the dispensation of property and assets for a hierarchal organization is more difficult than the planning under the deference regime.

Regarding congregational churches, both approaches are essentially the same—since under the previous approach there was still interpretation of documents[155] and, because of the endless permutations of the neutral principles analysis, it is difficult to distinguish the treatment of congregational churches under either approach. Therefore, neutral principles does not exhibit any additional constitutional concerns for congregational churches than the deference approach did.

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150. *See id.* at 19.
151. *See* Jones v. Wolf, 443 U.S. 595, 603 (1979).
152. *See, e.g.*, Greenawalt, *supra* note 3, at 1866.
153. *See id.* at 1867.
154. The various Presbyterian churches have been categorized as both hierarchal and congregational. *See* Ark. Presbytery of the Cumberland Presbyterian Church v. Hudson, 40 S.W.3d 301, 311 (Ark. 2001); First Presbyterian Church of Schenectady v. United Presbyterian Church in the U.S., 464 N.E.2d 454, 456 (N.Y. 1984); Presbytery of Beaver–Butler of United Presbyterian Church in the U.S. v. Middlesex Presbyterian Church, 489 A.2d 1317, 1322 (Pa. 1985).
155. *See* Greenawalt, *supra* note 3, at 1844.

B. Comparison to Secular Organizations

Although it is difficult to mimic a church property dispute in the secular realm, there are instances where interested parties charge members of nonprofit organizations with misuse of assets.[156] In these instances, each member must prove that he or she acted in a way that best accomplishes the general purpose for which the organization exists.[157] This situation is similar to that where a faction in the church claims the property of the church and an interpretation of the seminal documents determines to whom the court awards the property. Therefore, the closest analog to religious organizations seems to be a charitable corporation.

When determining if a member acted in a way that accomplishes the general purpose of the organization, a court may look into all documents and even extrinsic evidence in order to define what the general purpose of the organization is.[158] Courts delving into church property disputes are probably limited to only those documents, or parts of documents, that do not involve questions of church doctrine, polity, or practice. This is a clear difference in outcome under the religious neutral-principles approach as compared to the secular principles approach. However, only if this inconsistency has the effect of impeding or advancing religion is the Approach unconstitutional.

As shown previously, this limitation of what courts can look at limits the parties' ability to plan for future disputes or show intent. This result makes it more difficult (i.e., more expensive) to be a member of a religious organization planning for the future than it is for a member of a charitable corporation to undertake strategic planning. Therefore, it is likely that the Approach creates a burden on religion from this perspective.

Additional damning evidence for the neutral-principles approach is apparent if one considers the prospective donor. If a potential religious donor is more likely to give to a secular charity because of the Approach, then it is unconstitutional because it creates a burden for religion under the economic formulation. Commonly, the donor wishes to effect some sort of change through his gift; this is usually done by the creation of a trust to ensure that the wishes of the donor are carried out. One can imagine a scenario where a prospective donor wishes to further his faith by gifting property to a church for as long as adherents of the faith use the property. Subsequently, there is a dispute over the property. The civil court, not wanting to delve into determining who has adhered more closely to the donor's prescribed faith, awards the property to the national organization

156. *See id.* at 1870–72.
157. *See In re* Multiple Sclerosis Serv. Org. of N.Y., Inc., 496 N.E.2d 861, 864 (N.Y. 1986).
158. *See* Greenawalt, *supra* note 3, at 1882; *see also Multiple Sclerosis Serv. Org.*, 496 N.E.2d at 868.

on the basis of the national charter providing that all property belongs to the national church. The courts thus would not give effect to the donor's wishes, an unlikely result in a secular charity for which a court may consider all extrinsic evidence. Consequently, the prospective donor may choose to give money to the secular organization solely because posterity might give greater weight to his wishes.[159] Therefore, it is possible that the Approach places a burden on religion that is inconsistent with the economic formulation of constitutionality under the First Amendment.

C. Conclusion

The Approach purported to allow courts to wade into church property dispute resolution without implicating the First Amendment. It has been widely criticized because of its muddled application resulting in disparate outcomes. The Approach even fails to satisfy many of the subjective reasons given for its adoption by the Supreme Court. Also, though facially neutral, in practice, the Approach may engender First Amendment concerns.[160]

Many commentators have suggested that if the Approach were required in all jurisdictions, the lower courts would apply it in a more uniform way. Additional support has come from the perceived necessity of having civil recourse to what are essentially disputes over property.[161] On balance there are only two ways of legitimizing the existence of the neutral-principles approach. First, the overwhelming need to have civil recourse, which would then dwarf all other shortcomings of the Approach, could legitimize the Approach. Second, neutral principles of law must become the sole means of property dispute resolution, which would have the effect of standardizing the Approach. First Amendment jurisprudence must allow lower courts to delve into questions of religious doctrine, polity, and practice, which would then make the Approach substantively neutral when compared to secular organizations. Each of these alternatives suggests their own concerns, but that is routine in the arena of religious conflict, an area that, while ever-present, yields little in the way of definitive answers or elegant solutions.

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159. It would depend on what the wishes of the donor were. It is likely that a secular charity would not accept money that was given with certain religious conditions. However, a situation where a donor gives money to the church to further that sect's vision of a future of no suffering might also lend itself to secular giving. In other words, this example assumes that on some level religious giving and secular giving are substitutes for each other—when one is less expensive, people switch their giving.

160. The only way to truly avoid just facial neutrality and allow for substantive neutrality would be to permit courts to decide issues of faith—a disconcerting possibility.

161. *Cf.* Greenawalt, *supra* note 3, at 1850.

IV. EFFICIENT NORMATIVE FORMULATION

The critiques of the neutral-principles approach tend to be normatively similar. That is, most critiques offer their own slight alteration to the current formulation.[162] Perhaps rather than accept the Supreme Court's approach and tweak it on an as-applied basis, it would be better to strip this area of law down to the bare essentials, free of both precedent and First Amendment concerns. The key is to determine what right the Supreme Court is trying to protect and for what reason. Then, assuming that purported right is worth ensuring, the judiciary inquires into what is the simplest way to protect that right without engendering further hostility between the factions.

In their paradigm-shifting article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, Guido Calabresi and Douglas Melamed posit that all states have two duties.[163] Initially, the state must determine which party receives the entitlement and then, the state must decide whether to protect the legal entitlements through a property rule, a liability rule, or a rule completely banning transfer.[164] In deciding who receives an entitlement, the state will consider how to minimize the costs of enforcing the entitlement, notions of economic efficiency, and notions of which party is better able to gauge the social costs and benefits of exercising a particular entitlement.[165] A property rule is simply choosing to award an entitlement to a certain party and allowing a voluntary transaction to shift ownership of the entitlement.[166] Essentially, anyone wishing to access the entitlement must purchase it from the possessor. The advantages of a property rule include the minimum of state interference required because the entitlement shifts only at a price agreeable to the buyer and the seller.[167] The state does not attempt its own valuation of the property. A liability rule allows a party to destroy an entitlement "if willing to pay an objectively determined value for" the destruction.[168] The party that destroys the entitlement must make the possessor of the entitlement whole again. The problem with liability rules includes the necessity of a valuation of the diminution to the entitlement, which requires a fact finder to attempt to set an entitlement's worth.[169] This mechanism tends to set a different value than the holder of the entitlement would set in a voluntary

162. *Cf. id.* at 1904–05; Sirico, *supra* note 33, at 362.
163. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1091–92 (1972).
164. *Id.* "Entitlements" are decisions that favor one group over another in the event of a conflict. *See id.* at 1090.
165. *Id.* at 1096–97.
166. *Id.* at 1092.
167. *Id.*
168. *Id.*
169. *Id.* at 1092–93.

transaction.[170] While a property rule is generally preferable on grounds of efficiency,[171] there are situations where liability rules are preferable.[172]

A. The Current Formulation

Applying Calabresi and Melamed's framework to church property right disputes involves: (1) determining what the entitlement is; (2) determining what rule is applied and extrapolating from the applied rule which party is initially given the entitlement; and (3) given the strident critique of the current approach, deciphering whether another rule or entitlement is appropriate. For our purposes, it will initially suffice to characterize the entitlement as the entirety of the church property. However, the special problem of church property disputes and the different methods of resolving them lies in the fact that property rules and liability rules are not implemented at all. A court has not made a decision on who to favor in a dispute, let alone with how to protect that favored group. No party in church property disputes has the entitlement; the litigation centers on which group is more worthy of the entitlement. As postulated by Calabresi and Melamed, a court's determination of objective worth is often inadequate to one of the parties; in a circumstance where the First Amendment partially proscribes the courts' inquiry into worth, the courts' determination of worth is likely to be a polarizing and inadequate decision. The group that is finally awarded the entitlement to the church property may protect the new church with a straight-forward property rule—the losing faction may not enter the property unless they pay for or are granted access to it.[173]

What economic efficiency goals, distributive goals, or other notions of justice could cause the court to shy away from setting the entitlement? Generally, a court attempts to minimize administrative costs, which are really just costs external to the transaction that fall on the collective body through taxation—an approach consistent with economic efficiency.[174] In church property right cases, the courts seem to invite litigation—a fairly expensive administrative cost—to determine the entitlement. The court's hesitance to set a discernible property right might indicate a wariness of addressing religious institutions in general and perhaps a specific concern with violating the First Amendment. However, the fear of violating the

170. *See id.*
171. *See id.* at 1106.
172. In the case of a car accident, a property rule would necessitate that one negotiate with all fellow drivers that could conceivably be involved in a future accident and then "sell" part of the entitlement to being physically whole. Circumstances that engender the potential for freeloading also make prior negotiation and valuation difficult. *See id.* at 1108–09.
173. *Cf.* Jones v. Wolf, 443 U.S. 595 (1979).
174. *Cf.* Calabresi & Melamed, *supra* note 163, at 1096.

First Amendment is really just a fear of potential litigation—another administrative expense—for unconstitutional conduct. Therefore, it is likely that, however the court characterizes its hesitance to set entitlements in church property dispute areas, the court is really just making a decision based on economic efficiency. While "property" is at stake, other rules may also protect real property.[175] Instead of trying to award the entitlement to a nascent faction that demonstrates worth on an ad hoc basis as disputes arise, the law maker should award the entitlement prior to any dispute. Consequently, it stands to reason that an approach that fixes the entitlement and would engender fewer administrative costs achieves the court's goals in resolving these disputes.

B. Changing the Possessor of the Entitlement—The National Church[176]

Assuming a static entitlement (to the whole church property) and that the national church holds the entitlement,[177] it still remains to consider the efficacy of protecting the Approach with a property rule or a liability rule.[178]

In the event of a dispute, a property rule would establish title in favor of the national church. The local church could only regain title to the property through a voluntary purchase from the national church. Our hypothetical giver in Part III.B would immediately know that his gift would inure to the benefit of the national church regardless of how the benefactor stipulated the money to the local church, which may act as a disincentive to give to one's favorite local congregation, but also gives the reassurance of a known outcome. The benefits to this stark bright-line approach include the increased clarity to disputes, the lower administrative costs,[179] and perhaps even an incentive for the local church to mitigate any potential disputes. However, this bright-line test would be anathema to the underpinnings of the area of law since the doctrines driving the judicial reso-

175. *Id.* at 1093. For instance, if another group tried to buy a church, the church would be protected by a property rule. Conversely, if the government attempted to use eminent domain, the church would be valued objectively—protection through a liability rule. *See id.*

176. Another dichotomy for a court to consider would be choosing to favor either the dissenting or adhering faction. However, this would lead to the same problems as the departure-from-doctrine approach, as it would require increased administrative costs through forcing a court to decide a potentially unconstitutional question about the veracity of the parties and the original church doctrine. *See supra* Part I.C.3.

177. For our purposes it is enough to characterize any organization that exercises control over a single church as the national organization, whether it be an archdiocese or an organization like the Southern Baptist Convention.

178. Inalienability will not be considered, as the prohibited transfer of property is usually only viable when a party lacks capacity. *See* Calabresi & Melamed, *supra* note 163, at 1093.

179. The courts would be involved very little—thus lowering administrative costs—since the local party can make no claim on the property and the courts are not asked to discern a value for the property.

lution of church disputes seem at least partially driven by a goal of providing recourse to a powerless minority.[180] Additionally, one can foresee potential problems in an eviction where both sides to a dispute attempt to assert themselves as the national party for the purpose of evicting the other party.

Alternatively, a liability rule could protect the national churches' right to property. A liability rule would have the effect of allowing the local party to continue using the church premises until the national church brought legal action against them. The legal action would determine the value of the property the local church used and then force the local church to pay damages to continue using the property. This approach might have the effect of minimizing disputes since the onus would be on the national church to decide whether its rights were worth enforcing at the local level.[181] Consequently, courts would not have to identify or sort parties, which is where First Amendment concerns crop in;[182] the party that brings suit is the national organization. Additionally, the approach empowers local parties to continue holding religious services in a familiar setting, while the national church decides whether to commence a dispute. Unfortunately, our hypothetical investor would again face uncertainty as to whom his gift would ultimately go, however the only variable is whether the national church decides to enforce its rights. Also, like any liability rule, administrative costs are greatly increased since the court must decide how much of, and the worth of, the church property the local church has taken for its own use.

C. Changing the Possessor of the Entitlement—The Local Church

Giving the property entitlement to the local church drastically expands the ambit of possible consequences of a new approach. Under a property rule, the local church would hold the title to the church property and be able to exclude the national church.[183] If the national church wishes to utilize the property, it must purchase the property from the local church. This rule might actually create an incentive for disputes since the local church usually initiates the dispute[184] and the rule would assure the local church the recourse they seek under the current regime. Again, a local faction aligned with the national church may ask for a civil determination that they hold title to the property, but it is likely that they would be bringing

180. *Cf.* Jones v. Wolf, 443 U.S. 595, 603–04 (1979).
181. *Cf.* Calabresi & Melamed, *supra* note 163, at 1108.
182. *See supra* Part I.C.3. However an inquiry into who is the national church would be less likely to engender the problematic probing of church doctrines than an inquiry into which is the most worthy party does.
183. *Cf.* Calabresi & Melamed, *supra* note 163, at 1092.
184. *See, e.g.*, *Jones*, 443 U.S. at 599.

the suit under the auspices of the national organization thereby precluding any chance at relief and the confusion of party identity.

Conversely, the courts could protect the local churches' entitlement by a liability rule. This rule would allow the local church to recover damages if the national church continued to use the property.[185] Since most schisms are between the national and local levels, it is rare for a national church faction to remain at the local level. Consequently, the national church would be unlikely to continue to use the local facilities, thereby precluding the local church from having to resort to judicial help. This approach would have the usual drawbacks of judicial determination of value, but the civil courts would not have to decide the status of the parties. An entitlement to the national church protected by a liability rule also precludes the necessity of determining status; consequently, if the entitlement to the local church leads to fewer disputes it would be the preferable rule between the two liability-rule permutations. Because the national church is less likely to continue using the local facilities than the local church, and the national church is more likely to need judicial resolution to enforce its rights, it appears as though an entitlement to the local church is preferable when protected by a liability rule.

D. Reconceiving the Entitlement

To achieve this goal of preemptively awarding the entitlement it is helpful to think of the church as an independent whole—like a corporation—in which the entity exists apart from its members or employees. This should not be hard to conceptualize since church property disputes invariably treat each faction as a discernible group in order to award entitlements. Next, the court gives this independent whole an entitlement to being whole—much like a person who is entitled to physical well-being. Anyone who abrogates this well-being must compensate the individual based on a liability rule and the subsequent objective determination of worth. Consequently, the first entity to cause a dispute, within a previously functioning church, would be at fault. A dispute is not legally operative until a party files suit; therefore, the party that sues first causes the dispute and must then compensate the rest of the church members for abrogating the whole of the church.[186] Of course, the difficulty in objectively ascertaining value would remain.

This approach of treating the church as an independent, corporate whole has the interesting effect of creating a disincentive to litigate since the initiating party must bear the liability of abrogating the whole of the church. This disincentive to litigate allows courts to disentangle them-

185. *Cf.* Calabresi & Melamed, *supra* note 163, at 1119.
186. *Cf.* Calabresi & Melamed, *supra* note 163, at 1108–09.

selves from church property disputes and may even prevent many disputes, given the strong incentive not to be the proverbial nail that sticks up. However, the common problem of tort rules—such as, objectively ascertained value—would remain. The common problem may be ameliorated somewhat because the disincentive to resort to litigation is so strong that parties who have resorted to it may be willing to accept any means of redress—even an imprecise objective measurement of value.

While changing the entitlement is an intriguing idea, it faces the brutal gauntlet of reality. The definition of the "corporate body" or "church as a whole" is so imprecise that it invites judicial scrutiny to define the parameters. Inviting judicial scrutiny is anathema to the goal of the Approach because the lack of administrative costs and gained economic efficiency from that lack is the hallmark of the reconfiguration.

CONCLUSION

The simplification or reconfiguring of church property resolution is rife with potential pitfalls. In trying to be widely applicable, the new configurations invite litigation at the margins, which is a drawback to the already existing neutral-principles approach.[187] Nevertheless, it is an important exercise to attempt to determine the economic underpinnings of the judicial resolution of church property disputes in order to see if there is an alternative entitlement or rule calibration that achieves those underpinnings. Consequently, bestowing the entitlement to the church property upon the local church and protecting it with a liability rule seems the most theoretically prudent approach. While still creating some uncertainty for our hypothetical investor, this approach gives the endowment to the party who faces the highest marginal benefit of a dispute,[188] and the liability rule forces that same party—the local church—to ensure their legal rights. This combination of entitlement and rule allows the party with the lowest marginal benefit[189] of a dispute to avoid being a litigating party unless they affirmatively infringe on the rights of the local church. This approach has the effect of weeding out lawsuits undertaken by parties merely because they think they have a better claim to the church property. Now a party knows who has the claim and must pay damages if they affirmatively infringe on that claim.

187. Church factions bring suit to see how the court is going to treat a change in church documentation. *See supra* Part II.D.

188. If the local church wins the dispute it presumably earns the right to self-direct its own religious instruction and accord with its members in its own, familiar building. In essence, the stake and potential payoff are larger for the local church.

189. The national church is usually only litigating over property since their ability to influence the local church is usually at odds with the goal of the proceedings.

The Supreme Court's implicit reasoning in adopting the neutral principles of law approach appears to be economic efficiency, and administrative costs are part of economic efficiency.[190] Since the new entitlement/rule approach provides a disincentive to litigate, it lowers administrative costs.

Moreover, the new approach does not require a court to make the murky constitutional inquiry into the status of the parties. Reconfiguring church property disputes into a minority entitlement/tort rule combination also provides recourse for the minority party, which is a purported concern of the Court.

The new approach may not be perfect. It is broadly drawn and it requires judicial determination of value. However, given that we are entering the third century of judicial resolution of church property disputes without a consensus, it is time to reconsider the status quo.

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190. *Cf.* Calabresi & Melamed, *supra* note 163, at 1093.