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REFRAMING CHURCH PROPERTY DISPUTES IN WASHINGTON STATE

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Abstract: Real property disputes between units or members of the same church are common in the United States. To resolve such disputes, the Supreme Court has endorsed two doctrines: the hierarchical deference approach and the neutral-principles of law approach. The Court has justified both doctrines on the First Amendment's Establishment and Free Exercise Clauses, but this justification is problematic. Specifically, under the hierarchical deference approach courts must always give preferential treatment to one religious group over others—effectively endorsing a particular religion. On the other hand, courts can enforce their own interpretations of religious issues under the neutral-principles approach, thereby infringing free exercise of religious beliefs. And because Washington State courts use both approaches, they also use a flawed jurisprudence. To cure these defects, this Comment proposes that Washington State courts should treat church property disputes the way they treat property disputes from secular nonprofits or fraternity organizations. This streamlined treatment conforms to existing statutes and to Washington State Supreme Court precedent. In sum, removing the First Amendment's role is a simple and effective way for Washington State courts to resolve church property disputes without violating the federal Constitution.

INTRODUCTION

Located a few blocks from busy Downtown Seattle, the First Presbyterian Church of Seattle boasts a long history,[1] is listed on a popular travel guide,[2] and has a record of charitable work for the Seattle community.[3] But in recent years, it also frequently appeared in newspapers for legal disputes between its members.[4] What began as some

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1. *First Presbyterian Church of Seattle*, WASH. SEC'Y OF STATE, https://www.sos.wa.gov/legacy/cities_detail.aspx?i=27 [https://perma.cc/8ZKU-8ETS].

2. *First Presbyterian Church*, TRIPADVISOR, https://www.tripadvisor.com/Attraction_Review-g60878-d561318-Reviews-First_Presbyterian_Church-Seattle_Washington.html [https://perma.cc/5UAK-WAG6].

3. Vernal Coleman, *New First Hill Shelter Means 100 More Beds in Seattle's Push to Get People off the Streets*, SEATTLE TIMES (Oct. 9, 2017), https://www.seattletimes.com/seattle-news/new-homeless-shelter-on-first-hill-includes-space-for-100-beds/ [https://perma.cc/85TW-8T6Q].

4. *E.g.*, Presbytery of Seattle v. Schulz, 10 Wash. App. 696, 449 P.3d 1077 (2019), *denying review*, 195 Wash. 2d 1011, 460 P.3d 177 (2020); *see also* Nina Shapiro, *After Battle Over Downtown Site, Pastors Leave, Peace Returns – For Now – at Seattle First Presbyterian*, SEATTLE TIMES (Sept. 6,

of its members' attempt to break away from the church's parent body,[5] the internal schism eventually became contentious legal fights over the church building, estimated to be worth several millions of dollars.[6] Although the Washington Court of Appeals for Division 1 recently issued its ruling,[7] the case remains ongoing.[8]

Real property[9] disputes between churches[10] have a long history in the United States.[11] While state courts predominantly adjudicated church property disputes based on their respective state laws,[12] the English civil court tradition heavily guided state court decisions[13] because English legal principles were so influential on early American jurisprudence.[14]

2016), https://www.seattletimes.com/seattle-news/for-now-peace-at-seattle-first-presbyterian/ [https://perma.cc/B78Z-R8A6].

5. Nina Shapiro, *Presbyterian Governing Body Orders Pastors to Vacate Downtown Seattle Church*, SEATTLE TIMES (Feb. 18, 2016), https://www.seattletimes.com/seattle-news/presbyterian-governing-body-orders-pastors-to-vacate-downtown-seattle-church/ [https://perma.cc/3LJZ-4XJH].

6. Nina Shapiro, *Seattle First Presbyterian's Breakaway Vote Spurs $28.5M Real-Estate Fight*, SEATTLE TIMES (Nov. 20, 2015), https://www.seattletimes.com/seattle-news/seattle-first-presbyterians-breakaway-vote-spurs-fight-over-real-estate/ [https://perma.cc/V7RY-P3U6].

7. *Presbytery of Seattle*, 10 Wash. App. at 718, 449 P.3d at 1089 (affirming the trial court's ruling that disputed church property belonged to First Presbyterian Church's parent body).

8. Petition for Writ of Certiorari, *Presbytery of Seattle*, 10 Wash. App. 696, 449 P.3d 1077 (No. 20-261).

9. "Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

10. I limit the scope of the term "church" in this Comment to Christian entities. However, "church" is not exclusively associated with the Christian faith. *See Church*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining church as "loosely, a building dedicated to *any* type of religious worship" and "[e]cclesiastical authority or power, as opposed to the powers of a civil government" (emphasis added)). Interestingly, even secular organizations have claimed the word "church" for themselves. *See* Faith Hill, *They Tried to Start a Church Without God. For a While, It Worked.*, THE ATL. (July 21, 2019), https://www.theatlantic.com/ideas/archive/2019/07/secular-churches-rethink-their-sales-pitch/594109/ [https://perma.cc/X44C-FUDQ].

11. *See* Baker v. Fales, 16 Mass. 488 (1820); Trs. of Organ Meeting House v. Seaford, 16 N.C. (1 Dev. Eq.) 453 (1830); Miller v. Gable, 2 Denio 492 (N.Y. 1845); Unangst v. Shortz, 5 Whart. 506 (Pa. 1840).

12. Eric G. Osborne & Michael D. Bush, *Rethinking Deference: How the History of Church Property Disputes Call into Question Long-Standing First Amendment Doctrine*, 69 SMU L. REV. 811, 814 (2016) ("Prior to *Watson*, state courts handled church property disputes, but previous disputes were local and centered on specific issues of state law.").

13. *See* Watson v. Jones, 80 U.S. 679, 705 (1871) (stating that the English doctrine had been "accepted in all cases of this nature in England, Scotland, and America").

14. *See* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 268 (1968) ("Blackstone's Commentaries were published in America as early as 1771–72, and at least a thousand copies of the English edition had been imported before that time. And with the advent of law professors and law schools in America, Blackstone proved a ready tool for teaching law."); Randy J. Holland, *Anglo-American Templars: Common Law Crusaders*, 8 DEL. L. REV. 137, 138 (2006) ("[H]istory reflects that the common denominator of the

The United States Supreme Court ended the lingering English influence in 1871 when it decided in *Watson v. Jones*[15] to adopt a doctrine now known as the hierarchical deference approach.[16] The Supreme Court continuously affirmed the deference approach[17] into the 1970s.[18] Then, in 1979, the Supreme Court approved a second doctrine to interpret church property disputes in *Jones v. Wolf*[19]—the neutral-principles of law approach.[20] However, rather than invalidating the deference approach, the Supreme Court allowed states to use either doctrine.[21] This freedom created the current jurisdictional split in which most states: (1) adopt only

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Anglo-American legal system is the English common law. The fundamental principles found in the Magna Carta, 1628 Petition of Right, 1689 English Bill of Rights, United States' Bill of Rights, and the rights set forth in our respective written and unwritten constitutions all have common law origins.").

15. 80 U.S. 679 (1871).

16. Osborne & Bush, *supra* note 12, at 817 ("[T]he *Watson* Court established the 'hierarchical deference' principle . . . .").

17. "Deference approach" is a commonly used shortened version of "hierarchical deference approach." *See, e.g.*, Scotts Afr. Union Methodist Protestant Church v. Conf. of Afr. Union First Colored Methodist Protestant Church, 98 F.3d 78, 87 (3d Cir. 1996) ("The *Watson* approach is popularly termed the 'deference' approach, and requires judicial recognition of the decisions of a hierarchical church's highest body on matters of discipline, faith or ecclesiastical rule, custom or law."); W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 5:15 (1st ed. 2017) ("[T]he autonomy of the religious community should be respected, either by deferring to its normal decision-making procedures (the deference approach) . . . .").

18. *See, e.g.*, Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 709 (1976) (reaffirming that civil courts are to accept the decisions of the highest ecclesiastical tribunal within a hierarchical church); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrines and practice. . . . Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."); Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 120–21 (1952) ("Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.").

19. 443 U.S. 595 (1979).

20. *Id.* at 604.

21. *Id.* at 604–05 (holding that states are entitled to adopt the neutral-principles approach without invalidating the deference approach).

the deference approach,[22] (2) adopt only the neutral-principles approach,[23] or (3) employ a hybrid model of both approaches.[24]

Under the deference approach, civil courts cannot assess the validity of a church body's adjudication on ecclesiastical matters.[25] Thus, when a church body decides the ownership of church properties on religious grounds, courts have no discretion to overrule the church's decision on

22. *See generally* Mills v. Baldwin, 362 So. 2d 2, 6–7 (Fla. 1978), *vacated and remanded*, 443 U.S. 914 (1979), *reinstated*, 377 So. 2d 971 (Fla. 1979), *cert. denied*, 446 U.S. 983 (1980); Bennison v. Sharp, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982); Tea v. Protestant Episcopal Church, 610 P.2d 182, 184 (Nev. 1980); Diocese of Newark v. Burns, 417 A.2d 31, 33–34 (N.J. 1980); Daniel v. Wray, 580 S.E.2d 711, 717 (N.C. Ct. App. 2003); Presbytery of Cimarron v. Westminster Presbyterian Church of Enid, 515 P.2d 211, 216–17 (Okla. 1973); Presbytery of Seattle, Inc. v. Rohrbaugh, 79 Wash. 2d 367, 372–73, 485 P.2d 615, 619 (1971), *cert. denied*, 405 U.S. 996 (1972), *reh'g denied*, 405 U.S. 996 (1972); Church of God of Madison v. Noel, 318 S.E.2d 920, 923–24 (W. Va. 1984).

23. *See generally* Harris v. Apostolic Overcoming Holy Church of God, Inc., 457 So. 2d 385, 387 (Ala. 1984); Ark. Presbytery of Cumberland Presbyterian Church v. Hudson, 40 S.W.3d 301, 304 (Ark. 2001); Episcopal Church in Diocese of Conn. v. Gauss, 28 A.3d 302, 316 (Conn. 2011); E. Lake Methodist Episcopal Church, Inc. v. Trs. of Peninsula-Del. Ann. Conf. of the United Methodist Church, Inc., 731 A.2d 798, 806–07 (Del. 1999); Williams v. Bd. of Trs. of Mount Jezreel Baptist Church, 589 A.2d 901, 908 (D.C. 1991); First Evangelical Methodist Church of Lafayette v. Clinton, 360 S.E.2d 584, 585 (Ga. 1987); York v. First Presbyterian Church of Anna, 474 N.E.2d 716, 720 (Ill. 1984); Presbytery of Ohio Valley, Inc. v. OPC, Inc., 973 N.E.2d 1099, 1107 (Ind. 2012); Bjorkman v. Protestant Episcopal Church in U.S. of Diocese of Lexington, 759 S.W.2d 583, 584 (Ky. 1988); Graffam v. Wray, 437 A.2d 627, 634 (Me. 1981); Piletich v. Deretich, 328 N.W.2d 696, 701 (Minn. 1982); Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 96-CA-00922-SCT (Miss. 1998), 716 So. 2d 200, 206; Presbytery of Elijah Parish Lovejoy v. Jaeggi, 682 S.W.2d 465, 467 (Mo. 1984) (en banc); Miller v. Cath. Diocese of Great Falls, 728 P.2d 794, 796 (Mont. 1986); Berthiaume v. McCormack, 891 A.2d 539, 544–47 (N.H. 2006); First Presbyterian Church v. United Presbyterian Church in U.S., 464 N.E.2d 454, 459–60 (N.Y. 1984); S. Ohio State Exec. Offs. of Church of God v. Fairborn Church of God, 573 N.E.2d 172, 180 (Ohio Ct. App. 1989); *In re* Church of St. James the Less, 888 A.2d 795, 810 (Pa. 2005); Pearson v. Church of God, 478 S.E.2d 849, 853 (S.C. 1996); Foss v. Dykstra, 319 N.W.2d 499, 500 (S.D. 1982); Wis. Conf. Bd. of Trs. of the United Methodist Church, Inc. v. Culver, 2001 WI 55, 243 Wis. 2d 394, 627 N.W.2d 469, 475.

24. *See generally* St. Paul Church, Inc. v. Bd. of Trs. of Alaska Missionary Conf. of United Methodist Church, Inc., 145 P.3d 541, 551–53 (Alaska 2006); *In re* Episcopal Church Cases, 198 P.3d 66, 78 (Cal. 2009); Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 90 (Colo. 1986); Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 814 (Iowa 1983); Fluker Cmty. Church v. Hitchens, 419 So. 2d 445, 447–48 (La. 1982); Presbytery of Balt. of United Presbyterian Church v. Babcock Mem'l Presbyterian Church, 449 A.2d 1190, 1192 (Md. Ct. Spec. App. 1982), *aff'd*, 464 A.2d 1008 (Md. 1983); Fortin v. Roman Cath. Bishop of Worcester, 625 N.E.2d 1352, 1356–57 (Mass. 1994); Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.), 291 P.3d 711, 720 (Or. 2012); Episcopal Diocese of Forth Worth v. Episcopal Church, 422 S.W.3d 646, 651 (Tex. 2013); Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc., 531 S.W.3d 146, 170 (Tenn. 2017); Reid v. Gholson, 327 S.E.2d 107, 112–13 (Va. 1985).

25. "A matter that concerns church doctrine, creed, or form of worship, or the adoption and enforcement, within a religious association, of laws and regulations to govern the membership, including the power to exclude from such an association those deemed unworthy of membership." *Ecclesiastical Matter*, BLACK'S LAW DICTIONARY (11th ed. 2019).

the property ownership.[26] The neutral-principles of law approach operates differently because courts only use it when disputes over ecclesiastical matters are not involved. Therefore, courts applying the neutral-principles approach do not need to defer to a church body's decisions on property ownership.[27] Instead, courts employ traditional trust and property law principles to resolve church property disputes.[28] Finally, the hybrid model strikes a middle ground between the deference and the neutral-principles approaches by adopting the more deferential application of the latter.[29]

Although the deference and neutral-principles approaches differ in operation, they share the common legal justification of conforming with the First Amendment's two religion clauses[30]—the Establishment Clause and the Free Exercise Clause.[31] Ironically, the First Amendment-based justification tends to make civil courts violate the religious clauses.[32] The deference approach requires greater judicial deference to hierarchically structured churches that non-hierarchical churches do not enjoy.[33] And the neutral-principles approach invites courts to make secular interpretations

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26. *See* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. . . . [T]he Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.").

27. Jones v. Wolf, 443 U.S. 595, 605 (1979) ("We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.").

28. *Id.* at 603 ("The [neutral-principles approach] relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges."); *see also* Erdman v. Chapel Hill Presbyterian Church, 175 Wash. 2d 659, 675, 286 P.3d 357, 367 (2012) (explaining that under the neutral-principles approach courts use tools such as "language in deeds, terms of church charters, state statutes governing the holding of church property, and the provisions in a particular church constitution concerning ownership and control of church property").

29. *E.g.*, *Fluker Cmty. Church*, 419 So. 2d at 447–48 (endorsing neutral-principles approach but applying presumptive rule of majority in favor of the hierarchical organization); *see also* Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 536–37 (1990) (explaining that courts using the hybrid model expressly adopt the neutral-principles approach but nonetheless show deference to hierarchical church's decisions); 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, 423–26 (2008) (explaining the hybrid model).

30. *Jones*, 443 U.S. at 602 (explaining that First Amendment prohibits civil courts from engaging in purely ecclesiastical affairs); Watson v. Jones, 80 U.S. 679, 733–34 (1871) (stating that civil courts must not deprive church bodies their right to settle matters that concern all ecclesiastical questions).

31. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); Espinoza v. Mont. Dep't of Revenue, 591 U.S. __, 140 S. Ct. 2246, 2254 (2020) (describing two clauses as Establishment Clause and Free Exercise Clause, respectively).

32. *See infra* section II.C.

33. *See infra* section III.C.1.

of documents implicating religious affairs, such as church constitutions.[34]

To address these problems, this Comment proposes that Washington State courts replace the First Amendment's role in church property disputes with legal principles that govern property disputes from secular, voluntarily associated organizations.[35] This solution would work for two main reasons. First, such organizations share similar structural characteristics with churches. That similarity makes importing legal principles used to settle property disputes between secular organization to the church property context easy for courts. Second, in civil disputes involving voluntarily associated organizations, courts either require internal adjudicatory procedures to govern or examine governing documents to decide which party should prevail. Compelling the disputing parties to first rely on available internal adjudicatory procedures functions similarly as the deference approach, while examining governing documents resembles what courts do under the neutral-principles approach. And because voluntarily associated organizations are secular, no First Amendment justification is necessary.

Washington State law classifies churches as nonprofit organizations and nonprofits as voluntarily associated organizations. Washington State Supreme Court precedent recognizes that while churches are not the same as secular nonprofits, churches are undoubtedly subject to state regulations in the same way as their secular counterparts. Thus, by treating church property disputes in the same manner as similar disputes from voluntarily associated organizations, Washington State courts can resolve church property disputes without risking First Amendment violations.

This Comment proceeds with Part I that explains the basic concepts germane to church property disputes. Part II traces the two doctrines' genesis, as well as discussing their operation and flaws. Part III focuses on how Washington State courts resolve church and non-church property disputes and proposes that the methodological similarities justify removing the First Amendment from church property disputes. Last, Part IV expands on the proposed solution's application, ultimately calling for Washington State courts to replace the First Amendment's role in church property disputes with legal principles governing property disputes from secular, voluntarily associated organizations.

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34. *See infra* section II.C.2.

35. In proposing the solution, this Comment does not discount the potential merits or wisdom of other alternatives, such as categorically invalidating the deference approach in favor of the neutral-principles approach, or vice versa.

I. THE BASICS OF CHURCH PROPERTY DISPUTES

A church property dispute refers to a legal fight over real property between two or more Christian-entities. There are two main types of church property disputes: those that involve hierarchical churches and those that involve congregational churches. The two distinctions are further categorized into those that originate from disputes over religious matters and those that do not. Depending on the dispute type, different legal principles are involved. The main legal principles include constitutional, property, contract, and business organization law. This Part explains the basic ideas related to the major terminology and concepts that are central and indispensable when analyzing church property dispute cases.

A. Church Structure Types and Presence of Ecclesiastical Matters

The two most common church types in church property disputes are hierarchical and congregational. The former refers to churches with a vertically structured hierarchy.[36] The most prominent hierarchical church is the Roman Catholic Church, which is organized as ascending levels of authority that starts with the local parish and ends with the papacy at the apex.[37] Conversely, congregational churches do not have tiers of authority over the local church. In other words, a local congregational church independently governs its own affairs without another church body supervising it.[38] Numerous Christian churches identify as congregational, including the Baptist Church.[39]

The church structure type matters because courts employ different analyses depending on the church type. For instance, courts have consistently applied the deference approach to disputes that involve hierarchical churches.[40] Courts similarly link the neutral-principles approach to disputes that involve congregational churches, but to a lesser

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36. *See* Gerstenblith, *supra* note 29, at 523.

37. *See Structure of the Church*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Roman-Catholicism/Structure-of-the-church [https://perma.cc/UZ5L-2QW3] (explaining Roman Catholic hierarchical structure with the papacy at apex).

38. *See* Gerstenblith, *supra* note 29, at 523.

39. *Baptist Churches*, BBC (June 25, 2009), https://www.bbc.co.uk/religion/religions/christianity/subdivisions/baptist_1.shtml [https://perma.cc/4X5H-EA78]; *see also* Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1143 n.11 (1962) (list of Christian denominations classified as congregational).

40. *See* Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 709 (1976); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969); Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 120–21 (1952).

degree than they do with the deference approach to hierarchical churches.[41] Additionally, the nature of the underlying dispute—whether the dispute originates from internal strife over ecclesiastical matters—is important for courts because it dictates how involved civil courts may become when resolving church property disputes.

The term "ecclesiastical matters" is somewhat nebulous, but generally refers to matters that are religious in nature.[42] The ecclesiastical abstention doctrine, born out of *Watson*, *Jones*, and their progeny,[43] commands that "civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity" and directs courts to "accept as a given whatever the entity decides."[44] Hence, the doctrine categorically denies civil courts questioning the correctness or reasonableness of church decisions on property ownership that hinge on adjudication of ecclesiastical matters.[45]

What constitutes "secular" is less clear. *Black's Law Dictionary* defines it as "[w]ordly, as distinguished from spiritual."[46] In turn, it defines spiritual as "[o]f, relating to, or involving ecclesiastical rather than secular matters."[47] Synthesizing the three definitions of "ecclesiastical," "secular," and "spiritual" therefore implies that theoretically, any affair that is not ecclesiastical is secular.

B. Legal Principles Pertinent in Resolving Church Property Disputes: Religion Clauses, Contract Law, and Property Law

Once courts determine the church-structure type and the nature of the church property dispute's underlying issue, they apply various legal principles accordingly. The most prevalent are the First Amendment's two

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41. *Compare* Watson v. Jones, 80 U.S. 679, 724 (1871) (requiring courts to apply the neutral-principles approach's concepts to congregational churches), *with* Jones v. Wolf, 443 U.S. 595, 607–610 (1979) (expressing that applying majority-rule to disputes from hierarchical churches would be consistent with the neutral-principles approach).

42. *See Ecclesiastical Matter*, *supra* note 25 (discussing the definition of the term "ecclesiastical matters").

43. *See* Puri v. Khalsa, 844 F.3d 1152, 1162 (9th Cir. 2017) (explaining origin of ecclesiastical abstention doctrine).

44. Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 878 n.1 (9th Cir. 1987); *cf.* United States v. Ballard, 322 U.S. 78, 86–87 (1944) (holding courts will not inquire as to truth or sincerity of religious beliefs).

45. *Jones*, 443 U.S. at 604 ("If . . . the interpretation of the instruments of [church property] ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.").

46. *Secular*, BLACK'S LAW DICTIONARY (11th ed. 2019).

47. *Spiritual*, BLACK'S LAW DICTIONARY (11th ed. 2019).

religion clauses, which have been fully incorporated to states.[48] The Establishment Clause and the Free Exercise Clause work together to achieve different, but related, purposes.[49] The former textually commands the government to not make laws respecting[50] an establishment of religion.[51] But the command "does not wholly preclude the government from referencing religion."[52] Instead, the requirement is to maintain "neutrality between religion and religion, and between religion and nonreligion."[53] This neutrality requirement stands for the proposition that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[54] Stated differently, neither a state nor the federal government should be involved in setting up a church or act in a manner that discriminates between religion or between religion and nonreligion.[55]

The Free Exercise Clause's focus is slightly different than its companion. Its purpose is to "secure religious liberty . . . by prohibiting any invasions thereof by civil authority."[56] Therefore, the clause applies when a government action "discriminates against some or all religious beliefs," or when it "regulates or prohibits conduct because it is

48. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

49. The Court has recognized that the two clauses can conflict with each other when taken to the logical extreme. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668–69 (1970). However, the Court rejected a rigid view of the two clauses' operation, stating "we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts[,] there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. The Court has subsequently interpreted this general proscription to mean "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." Locke v. Davey, 540 U.S. 712, 719 (2004) (citing *Walz*, 397 U.S. 664).

50. The term "respecting" encompasses, but is not limited to, endorsing religion or a particular religion. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 620 (1992) (Souter, J., concurring) ("[T]he constitutional language forbidding laws 'respecting an establishment of religion' is not pellucid. But virtually everyone acknowledges that the Clause bans more than formal establishments of religion in the traditional sense . . . . This much follows from the Framers' explicit rejection of simpler provisions prohibiting either the establishment of a religion or laws 'establishing a religion' in favor of the broader ban on laws 'respecting an establishment of religion.'" (citation omitted)).

51. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

52. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 971 (9th Cir. 2011).

53. McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005).

54. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (quoting Watson v. Jones, 80 U.S. 679, 728 (1871)); *see also* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989) (plurality opinion) ("[T]he Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally.").

55. *See* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15 (1947).

56. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963).

undertaken for religious reasons."[57] Over the years, the Court has prohibited governmental acts that violate the clause,[58] such as compelling certain religious beliefs,[59] penalizing groups for holding views that government authorities disagree with,[60] or using the tax power to inhibit dissemination of particular religious views.[61]

The two clauses together form the ecclesiastical abstention doctrine.[62] The doctrine recognizes religious organizations' right to matters regarding faith, theological doctrine, and church governance.[63] The doctrine thus prohibits civil courts from interfering in purely ecclesiastical or administrative affairs of a church, inquiring what church rules are, or determining whether they have been correctly applied.[64] Finally, the doctrine prohibits civil courts from resolving church disputes based on religion and religious practices.[65]

The First Amendment jurisprudence is the most fundamental basis for any legal matters concerning religious organizations. But for church property disputes, contract, property, and trust laws also provide important legal principles. For instance, the contract law principle of enforcing what parties agreed to, such as how to govern and be governed, is called on when reviewing church property disputes with hierarchical church parties.[66] Thus, the deference approach underscores the need to respect the existing hierarchy of authority to bind lower church units to

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57. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (plurality opinion); *see also* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 148 (1987) (Stevens, J., concurring).

58. *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963), *abrogation recognized on other grounds by* Holt v. Hobbs, 574 U.S. 352 (2015).

59. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

60. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953).

61. Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943).

62. The doctrine is also known as the church autonomy doctrine. *See* Marjorie A. Shields, Annotation, *Constitution and Application of Church Autonomy Doctrine*, 123 A.L.R. 385, § 2 (2004).

63. *Id.*

64. *Id.*

65. *Id.* The difference between "religion" and "religious practice" is subtle but defined. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. __, 135 S. Ct. 2028, 2032 (2015) ("The word 'religion' is defined to 'includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to' a 'religious observance or practice without undue hardship on the conduct of the employer's business.'" (quoting 42 U.S.C. § 2000e(j))).

66. *See* Gonzalez v. Roman Cath. Archbishop of Manila, 280 U.S. 1, 16–17 (1929) ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, *because the parties in interest made them so by contract* or otherwise." (emphasis added)), *abrogated on other grounds by* Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 712 (1976) (characterizing fraud, collusion, or arbitrariness exceptions as dicta).

their decisions. Although similar contract law principles apply in congregational church disputes, the absence of hierarchical structure leads to a slightly different application. In such situations, courts focus instead on whether a church is governed by majority rule. If so, courts will enforce the majority's decision.[67] Additionally, the neutral-principles of law approach relies on traditional trust and property law principles that require examination of relevant documents, including title or deeds to property, as well as business organization laws regarding charters or bylaws.[68]

The complex layers inherent in church property disputes are no accident. American civil courts wrestled with different methods of resolution from the nation's infancy into the late-twentieth century.[69] The history of reliance on the English rule, as well as how the deference and the neutral-principles approaches came to be, reveal what legal concerns American courts focused on, as well as the reasons for formulating the two doctrines as they stand now.[70] Thus, studying the evolution of competing jurisprudence on church property disputes provides clarity on why and how the First Amendment became central in the current jurisprudence.

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67. Bouldin v. Alexander, 82 U.S. 131, 140 (1872) (invalidating minority faction's removal of church trustees belonging to majority faction to take control of church building) ("In a congregational church, the majority . . . represent the church. An expulsion of the majority by a minority is void act."); *see also Milivojevich*, 426 U.S. at 729 (Rehnquist, J., dissenting) (stating that the *Bouldin* decision rested on "commonsense rules for deciding an intraorganizational dispute: in an organization which has provided for majority rule through certain procedures, a minority's attempt to usurp that rule and those procedures need be given no effect by civil courts").

68. Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring) (explaining that courts can use the formal title doctrine to "study[] deeds, reverter clauses, and general state corporation laws" to resolve religious property disputes); *see also* Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1249 (9th Cir. 1999) (stating that under the neutral-principles approach, courts can rely on "state statutes concerning the holding of religious property, the language in the relevant deeds, and the terms of corporate charters of religious organizations" (citing *Md. & Va. Eldership*, 396 U.S. at 367–68)).

69. *See generally Bouldin*, 82 U.S. at 140 (applying the majority rule); Presbyterian Church in U.S. v. E. Heights Presbyterian Church, 159 S.E.2d 690, 695 (Ga. 1968) (incorporating elements of the departure-from-doctrine test), *rev'd*, 393 U.S. 440 (1969); Baker v. Fales, 16 Mass. 488, 521 (1820) (deciding that church property ownership remains with those who remain with the church, even if that group constitutes a minority).

70. *See* Watson v. Jones, 80 U.S. 679, 727–29 (1871) (expressing First Amendment-based concerns to explain why English church property dispute jurisprudence is inapplicable in the United States and why the deference approach is appropriate); Jones v. Wolf, 443 U.S. 595, 605–06 (rejecting the argument that the First Amendment requires a compulsory adherence to the deference approach in all church property disputes).

II. COMPETING JURISPRUDENCE ON CHURCH PROPERTY DISPUTES

The evolution of American jurisprudence on church property disputes begins with English tradition. The lingering English influence dissolved when the Supreme Court adopted the deference approach in *Watson v. Jones*. A century later, the Court expressly approved the neutral-principles approach. States responded by mostly embracing one over the other.[71] This part reviews all three rules' genesis and their operation, then proceeds to discussing the flaws of the two American doctrines.

A. The English Jurisprudence

State courts resolved most early church property disputes based on applicable state laws.[72] Still, the English legal traditions remained influential in many early American courts, which the Supreme Court acknowledged in *Watson v. Jones*.[73] The Court dedicated a substantial portion of the decision to surveying the development and evolution of the English rule as it existed at the time.[74] As the Supreme Court wrestled over formulating a legally sound principle to govern church property disputes in America, an English case, *Craigdallie v. Aikman* (*Craigdallie I*),[75] stood out to the *Watson* Court.

The Court found *Craigdallie I* particularly important for two reasons. First, the facts of the case bore in "some points a striking analogy" to the many church disputes that state courts faced in the 1800s.[76] Second, the House of Lords's decision in *Craigdallie I* addressed the role of civil courts in resolving church property disputes for both congregational and hierarchical structured churches.[77] This stood out to the *Watson* Court because courts typically applied a different analysis to different church structures. For instance, the English courts simply enforced the will of the majority to decide internal property disputes for congregational

71. *See* cases cited *supra* notes 22–24.

72. *See* Osborne & Bush, *supra* note 12, at 814 ("Prior to *Watson*, state courts handled church property disputes, but previous disputes were local and centered on specific issues of state law.").

73. 80 U.S. 679, 705 (1871) (tracing the origin of church property litigations in certain church denominations to Scotland and how English doctrine dealt with them, while also noting that American courts followed that doctrine).

74. *Id.* at 703–711 (explaining the development of English legal principles on how much authority civil courts should have in settling religious matters to adjudicate church property disputes).

75. [1813] 1 Dow 2, 3 Eng. Rep. 601 (HL) (appeal taken from Scotland).

76. *Watson*, 80 U.S. at 704.

77. *Id.*

churches.[78] However, applying the same rule became less logical when applied to hierarchical churches where conflicts arose between local units and general bodies of the same church.[79] In 1813, the House of Lords, the highest British appellate court for almost all matters,[80] finally stepped in to settle what rule applied in *Craigdallie I*. There, John Scott, the Lord Chancellor of the House of Lords and the first earl of Eldon,[81] laid out the basis for the rule later referred to as the departure-from-doctrine test.

Lord Eldon penned the decision, expressly holding that real property with religious purposes constituted a trust that belonged to the members of the religious organization that better followed and submitted to the organization's original founding religious principle.[82] As the ruling's language suggested, the rule promulgated in *Craigdallie v. Aikman* (*Craigdallie II*)[83] evolved into the departure-from-doctrine test.[84] In explaining this rule further, Lord Eldon commented on the inevitable need of civil courts to evaluate religious matters and determine which of the disputing parties better followed the governing religious principles.[85]

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78. *Id.* ("The earlier decisions, accepting as a conclusive test of right the action of a majority of the local congregation, afforded an easy and simple rule, so long as applied to independent churches . . . .").

79. *Id.* ("[B]ut when [deferring to the majority will] came to be applied to societies organized as a part of larger bodies, where the majorities in the local and general organizations might be different, it was found not to be founded on just or practicable principles.").

80. *House of Lords*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/House-of-Lords (last visited Feb. 27, 2020) ("A fourth element, the Law Lords . . . acted as Britain's final court of appeal (except for Scottish criminal cases) until 2009 . . . .").

81. *John Scott, 1st Earl of Eldon*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/John-Scott-1st-Earl-of-Eldon (last visited Feb. 27, 2020).

82. Craigdallie v. Aikman (*Craigdallie II*) [1820] 4 Eng. Rep. 435, 435; 2 Bligh 529, 529 (HL) (appeal taken from Scotland) ("Held, that in a case where it was difficult to ascertain who were the legal owners, as representatives of the contributors, the use of the meeting-house belongs to those who adhere to the religious principles of those by whom it was erected; and those who had separated themselves from the Associate Synod, and declined their jurisdiction, were held to have forfeited their right to the property: although it had been judicially declared that there was no intelligible difference of opinion between them and the adherents of the Synod.").

83. [1820] 4 Eng. Rep. 435, 435; 2 Bligh 529, 529 (HL) (appeal taken from Scotland); Troy Harris, *Neutral Principles of the Law and Church Property in the United States*, 30 J. CHURCH & ST. 515, 516–17 (1988) ("Seven years after *Craigdallie I* was remanded to the Scottish Court of Session, the House of Lords heard *Craigdallie II*, and the opinion was again written by Lord Eldon, who summarized his earlier decision [in *Craigdallie I*] . . . .").

84. Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 338–39 (1986).

85. *Craigdallie II*, 4 Eng. Rep. at 439; *see also* Hassler, *supra* note 29, at 408 ("[The English rule] called on courts, in the absence of express language, to make an investigation into the doctrinal beliefs of the disputing parties, and to imply a trust in favor of the party most closely adhering to the beliefs held by the donor, effectively giving that faction ownership.").

English courts subsequently followed Lord Eldon's ruling,[86] which cemented the departure-from-doctrine test's legitimacy. In turn, American courts had to evaluate its place in the American jurisprudence, ultimately rejecting it.[87]

B. The American Jurisprudence

The English influence on how American civil courts resolved church property disputes ended when the United States Supreme Court decided *Watson v. Jones* in 1871.[88] The decision had a significant consequence, signaling that courts should use the deference approach to handle church property disputes.[89] The Supreme Court caused another shift when it decided *Jones v. Wolf* in 1979, allowing states to use the competing neutral-principles of law approach so long as the dispute involved no ecclesiastical interpretation.[90] Since *Jones*, states courts have diverged on how they adjudicate real property disputes between members or units of the same church.[91] Most jurisdictions largely prefer one approach over the other, and the rest embrace both.[92]

1. The Hierarchical Deference Approach

The hierarchical deference approach enjoys the distinction of being the Supreme Court's first adopted church property jurisprudence. Despite its nineteenth century roots, the deference approach remains influential in civil courts, especially when deciding property disputes for hierarchical

86. *See* Att'y-Gen. v. Pearson (1835) 58 Eng. Rep. 848, 855; Foley v. Wontner (1820) 37 Eng. Rep. 621.

87. Watson v. Jones, 80 U.S. 679, 706–07 (1871) (recognizing that the English rule, while simple and just, still did not rid of all difficulties of its application and citing cases that support that conclusion).

88. *Id.* at 727–29.

89. *Id.* at 727 ("[W]e think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws . . . is, that, whenever the question of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application the case before them.").

90. Jones v. Wolf, 443 U.S. 595, 603 (1979) (noting the Court's prior approval of the neutral-principles approach in *Md. & Va. Churches* where the dispute involved "no inquiry into religious doctrine").

91. Hassler, *supra* note 29, at 416–17 (explaining that states organized themselves into distinct groups that apply different doctrines to resolve church property disputes).

92. *Id.* at 416–26 (arguing that most states either strictly apply the deference approach or the neutral-principles approach, or some combination of both).

churches.[93] The deference approach expressly prohibited the English departure-from-doctrine test on First Amendment grounds.[94] This marked the first time that the Supreme Court invoked federal constitutional principles to limit the role of civil courts in adjudicating church property disputes.[95] The First Amendment-based justification for the limited role of civil courts continues to thrive today, along with the deference approach. Consequently, understanding how and why the Supreme Court applied the First Amendment to church property disputes requires studying the case that started it all—*Watson v. Jones*.

Watson centered around a real property dispute between members of the Walnut Street Presbyterian Church of Louisville, Kentucky.[96] In 1842, the Walnut Street Church's members formally organized the church as a member of the Presbyterian Church in the United States.[97] Nine years later, the local congregation purchased the church lot where the church building would soon stand. It also authorized the church's trustees to "hold any real estate then owned by it"[98] and "pass[] such regulations relative to . . . control of the church property as they might think proper, not inconsistent with the Constitution of the United States and the laws of Kentucky."[99] Under the Presbyterian Church organizational structure, church trustees primarily performed secular duties of holding legal title to local church property and managing said property on the local congregations' behalf.[100]

On the other hand, local congregations vested their ecclesiastical leadership in a body called the *session*, composed of the appointed minister and ruling elders of each congregation.[101] Additionally, the

93. *See, e.g.*, Heartland Presbytery v. Presbyterian Church of Stanley, Inc., 390 P.3d 581, 594 (Kan. Ct. App. 2017) ("Thus, we find that where a dispute over the control of church property arises out of a schism within a congregation that is affiliated with a hierarchical denomination and a decision regarding the issue has been made by the highest tribunal of that denomination to which the issue has been presented, civil courts are to accept the decision of the tribunal as binding."); *cf.* Hyung Jin Moon v. Hak Ja Han Moon, 431 F. Supp. 3d 394, 406–07 (S.D.N.Y. 2019) (summarizing when the deference approach applies).

94. *See* Watson v. Jones, 80 U.S. 679, 729 (1871) ("[W]e do not think the doctrines of the English Chancery Court on this subject should have with us the influence which we would cheerfully accord to it on others.").

95. *See, e.g.*, Nelson v. Brewer, 2019 IL App (1st) 173143, ¶ 57, 138 N.E.3d 220, 233 ("The ecclesiastical abstention doctrine is grounded in the [F]irst [A]mendment. It had its genesis in *Watson v. Jones* . . . ." (citation omitted)).

96. *Watson*, 80 U.S. at 681.

97. *Id.* at 683.

98. *Id.*

99. *Id.*

100. *Id.* at 681.

101. *Id.*

Presbyterian Church organized itself into ascending levels of hierarchy. This structure had local congregations' sessions at the foundation, followed by presbyteries, synods, and finally culminating with the general assembly at the apex.[102] Under this tiered system, each body supervised and exercised varying levels of control over the one below it, with sessions' authority and control limited to its local congregation's affairs only.[103] Thus, while each local congregation's members democratically elected their ruling elders, only the presbytery that the local congregation belonged to could choose and officially appoint the minister to lead the congregation.

The Supreme Court began its opinion by first taking notice of the English departure-from-doctrine test's significance, explaining how it operated and what factors courts looked to under it.[104] But the Court found the English rule impermissible because it found any attempt from civil courts to question or critique church decision on ecclesiastical issues problematic.[105] Specifically, the Court remarked how the English rule oppressed and ran counter to the constitutional right to free religious belief.[106] The Court explained that "in so far as the fundamental laws of the church confer powers on its tribunals, the civil courts will recognize them, and where civil rights are involved, will give effect to their exercise without inquiring into the motives or grounds of action of the ecclesiastical tribunal."[107] The Court emphasized that when ecclesiastical questions are present in a property right dispute, the most authoritative standard of judgment in deciding which party would own the property would be the organizational documents, such as a church constitution.[108] The Supreme Court warned that should courts inquire into and determine matters such as doctrinal theology or church customs, such secular interpretations would unduly deprive churches of "the right of construing their own church laws."[109]

After prohibiting the English method of allowing civil courts' interpretation of ecclesiastical questions,[110] the Supreme Court criticized

102. *Id.*

103. *Id.*

104. *Id.* at 705.

105. *Id.* at 729 ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith . . . .").

106. *Id.* at 728–29.

107. *Id.* at 710.

108. *Id.* at 710–11.

109. *Id.* at 733.

110. *Id.* at 729.

the Kentucky State Court of Appeals for doing just that.[111] Ultimately, the Court found that when the appellant group left the church, they lost their right to ownership of the disputed property because the church constitution dictated that only those who remain with the church enjoy ownership of it.[112]

Although *Watson* was based on federal common law—therefore not binding on state courts until the high court incorporated the First Amendment to states[113]—the Court repeatedly affirmed its status as the only acceptable doctrine until the 1970s.[114] The focus on First Amendment principles continued in subsequent cases, where the Court declared that "[s]tates, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."[115] The Court has further held that the First Amendment bars courts from disturbing church bodies' decisions on property disputes where the final resolution turns on answering religious questions.[116] Many states have agreed with the Supreme Court's approval, either adopting or affirming their preference for the deference approach even after it became optional in 1979.[117]

2. The Neutral-Principles of Law Approach

Various state courts tried to reject compulsory application of the deference approach after *Watson*.[118] In the midst of those efforts, the

111. *Id.* at 733–34 (listing Kentucky Court of Appeals's errors).

112. *Id.* ("[T]he appellants in the case presented to us have separated themselves wholly from the church organization to which they belonged when this controversy commenced. They now deny its authority, denounce its action, and refuse to abide by its judgments. . . . [T]he appellants, in their present position, have no right to the property, or to the use of it, which is the subject of this suit.").

113. Ronald F. Chase, Annotation, *Determination of Property Rights Between Local Church and Parent Church Body: Modern View*, 52 A.L.R.3d 324, § 2(a) n.9 (1973).

114. *See* cases cited *supra* note 18 (listing Supreme Court cases that affirmed the deference approach).

115. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969). For instance, the Court explained that the compulsory deference to church rules in settling certain church property disputes followed from the need to protect free exercise of religion. *Id.*

116. Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 709 (1976).

117. *E.g.*, Mills v. Baldwin, 362 So. 2d 2, 6–7 (Fla. 1978); Tea v. Protestant Episcopal Church, 610 P.2d 182, 184 (Nev. 1980); Diocese of Newark v. Burns, 417 A.2d 31, 33–34 (N.J. 1980); Presbytery of Cimarron v. Westminster Presbyterian Church of Enid, 515 P.2d 211, 216–17 (Okla. 1973); Presbytery of Seattle, Inc. v. Rohrbaugh, 79 Wash. 2d 367, 373, 485 P.2d 615, 619 (1971); Church of God of Madison v. Noel, 318 S.E.2d 920, 923–24 (W. Va. 1984); Bennison v. Sharp, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982); Daniel v. Wray, 580 S.E.2d 711, 717 (N.C. Ct. App. 2003).

118. *See* Presbyterian Church in U.S. v. E. Heights Presbyterian Church, 159 S.E.2d 690, 696, 700–01 (Ga. 1968) (using method resembling departure-from-doctrine test), *overruled by Mary Elizabeth*

Supreme Court started to signal its tacit approval of the neutral-principles of law approach, [119] under which courts can examine deeds, relationships, and relevant contractual documents to resolve church property disputes.[120] Then in 1979, the implicit approval became explicit when the Court approved the neutral-principles approach in *Jones v. Wolf*.[121]

Like many of the typical church property disputes, *Jones* involved a local church wishing to keep its church property while attempting to break its membership from a larger, national church body. The local church, the Vineville Presbyterian Church of Macon, Georgia, organized as a member of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS).[122] When the majority of the local church's congregation voted to separate from the PCUS, the Augusta-Macon Presbytery appointed a commissioner to examine the dispute.[123] The commissioner eventually determined that the true congregation was the faction that voted against the separation and nullified all authority from the seceding faction.[124] Under that ruling, the minority faction constituted the true congregation, and the local church sued to assert ownership over the church property.[125] However, the Georgia state trial court held for the seceding majority, applying the state's neutral-principles of law approach.[126] The Georgia State Supreme Court affirmed, and the minority faction appealed to the federal Supreme Court.[127]

Before reaching the case's merits, the Court recognized Georgia's

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Blue Hull, 393 U.S. 440; Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 254 A.2d 162, 166–67 (Md. 1969) (adjudicating church property dispute through reference to relevant state laws on religious corporations and express language in disputed properties' deeds), *appeal dismissed*, 396 U.S. 367, 368 (1970) (per curiam); *cf.* St. John Chrysostom Greek Cath. Church v. Elko, 259 A.2d 419, 427 (Pa. 1969) (Roberts, J., dissenting) (citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 119 (1952) (arguing civil courts should use the neutral-principles approach, which is free of favoritism towards any particular church organization)).

119. *See, e.g.*, *Md. & Va. Eldership*, 396 U.S. at 368 (Brennan, J., concurring) ("[A] State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters . . . ." (emphasis in original)).

120. *Id.*; *Mary Elizabeth Blue Hull*, 393 U.S. at 449 ("It is obvious . . . that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment . . . . [T]here are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded.").

121. 443 U.S. 595, 604 (1979) ("We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.").

122. *Id.* at 597.

123. *Id.* at 598.

124. *Id.*

125. *Id.*

126. *Id.* at 599.

127. *Id.*

adoption of the neutral-principles of law approach.[128] The Court explained that the approach's basic operations required courts to "examine[] the deeds to the properties, the state statutes dealing with implied trusts[,] . . . and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church."[129] After explaining the basics of the neutral-principles of law approach, the Court elucidated why the First Amendment did not require compulsory adherence to the deference approach. First, the Court acknowledged that the First Amendment commanded civil courts to respect decisions regarding religious doctrine or polity from the highest church body of hierarchical churches.[130] However, the Court immediately narrowed the First Amendment's reach by stating that "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes."[131] The Court then listed the approach's two main strengths: (1) its secular operation because it relied on "objective, well-established concepts of trust and property law";[132] and (2) its shared genius of "private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties."[133] In the Court's view, the neutral-principles of law approach would effectuate the church members' intent to settle any and all internal disputes.[134]

Rejecting the dissent's insistence on strictly enforcing the deference approach,[135] the *Jones* majority explained that it "[could not] agree . . . that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved."[136] The

128. *Id.* at 600.

129. *Id.* (citation omitted). The Court also noticed the Georgia State Supreme Court's use of the neutral-principles of law approach in another state case, again noting that there the state court looked to the "deeds, the corporate charter, [and] the state statutes dealing with implied trusts." *Id.* (citing Carnes v. Smith, 222 S.E.2d 322 (Ga. 1976)).

130. *Id.* at 602.

131. *Id.*

132. *Id.* at 603.

133. *Id.*

134. *Id.* at 603–04 ("Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.").

135. *Id.* at 604–05 ("The dissent would require the States to abandon the neutral-principles method, and instead would insist as a matter of constitutional law that whenever a dispute arises over the ownership of church property, civil courts must defer to the 'authoritative resolution of the dispute within the church itself.'").

136. *Id.* at 605.

majority further defended the neutral-principles approach's constitutionality by countering the dissent's suggestion that the approach would infringe on people's free exercise rights.[137]

The long-winded road that the Supreme Court took to expressly endorse the neutral-principles of law approach's validity to resolve church property disputes exemplifies the complex and oft-confusing ways that courts handle such disputes. The *Jones* opinion only exacerbated that problem by refusing to put forth a uniform doctrine. The Court, in allowing states to depart from the deference approach, ironically confirmed that states are also free to stick with the deference approach. This freedom allowed some states, including Washington, to use both.

The *Jones* decision created a remarkable opportunity for other jurisdictions to depart from *Watson*'s compulsory mandate and use the deference approach. *Jones* empowered states to embrace the neutral-principles approach, which became the majority approach in the United States.[138] The Court's refusal to endorse a single approach also led some states to adopt the hybrid approach,[139] which usually gives trial courts wide discretion in what approach they decide to employ.[140] Lastly, some jurisdictions still have yet to firmly settle on their preferred method of resolving church property disputes.[141]

Many scholars have raised concerns regarding church property jurisprudence, including the hybrid approach.[142] But the more serious problem lurking in the background is the flawed legal basis that the two approaches rest on. Specifically, justifying either the deference or the

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137. *Id.* at 606 ("The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods . . . . At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property . . . . 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.").

138. *See* cases cited *supra* note 23 (list of states that use the neutral-principles approach).

139. *See* cases cited *supra* note 24 (list of states that use the hybrid approach).

140. *In re* Episcopal Church Cases, 198 P.3d 66, 78 (Cal. 2009) (explaining that the two approaches are not mutually exclusive); Episcopal Diocese of Fort Worth v. Episcopal Church, 422 S.W.3d 646, 651 (Tex. 2013) (explaining that both approaches are permissible).

141. *See* Hassler, *supra* note 29, at 457–63 (classifying Kansas, Nebraska, New Mexico, North Dakota, Rhode Island, Tennessee, Utah, Vermont, and Wyoming as states that have yet to decide on which approach to use).

142. *See, e.g.*, 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 286 (2009) (discussing "three serious defects" in the deference approach); Mark Strasser, *When Churches Divide: On Neutrality, Deference, and Unpredictability*, 32 HAMLINE L. REV. 427, 454–66 (2009) (discussing problems of the neutral-principles approach); Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 340 (2016) (arguing that "[t]he hybrid approach also creates significant uncertainty about property rights, harming both churches and third parties").

neutral-principles approach on First Amendment grounds has run its course: neither approach can constitutionally conform to First Amendment values.

C. Flaws of the Deference and the Neutral-Principles Approaches

Courts historically have validated the deference and the neutral-principles approaches on First Amendment grounds. Ironically, both approaches fail to respect the First Amendment's religion clauses. Courts and scholars alike have questioned the validity of both approaches because of that failure.[143] This Part examines each approach's flaws in closer detail to highlight why the First Amendment is ultimately an unworkable rationale for church property disputes.

1. The Deference Approach's Flaws

Under the deference approach, the reviewing civil courts assess whether the parties in dispute belong to a hierarchical church. To accomplish this, courts look to the parties' relationship with each other and with the general church, church governing documents, and even norms, customs, and history of the church.[144] Additionally, courts assess whether the underlying dispute stems from intraorganizational disagreement over some religious matters. These matters can include theological beliefs, appointment or removal of certain church officials, or even decisions to split from a church based on a doctrinal schism.[145] If a court finds either hierarchical church structure or religious nature of the underlying issue, the court will review: (1) whether a supervising body within the church has ruled on ownership of the property in question and (2) if it has, whether it based the decision on religious matters (e.g., whether one party better conformed to the church's beliefs).[146] If so, the civil court will enforce the church supervising body's determination on property ownership.[147]

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143. *See infra* section II.C.1.

144. *See, e.g.*, Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 716–17 (1976) (referring to the general church's written constitution to confirm which church organ has the final authority on religious matters); Watson v. Jones, 80 U.S. 679, 683 (1871) (examining the relationship between disputing parties and tracing the church's history).

145. *See, e.g.*, *Milivojevich*, 426 U.S. at 698–705 (noting the underlying dispute that triggered the property dispute).

146. *Id.* at 721–23 (noting the religious nature of the underlying dispute and affirming that since the property dispute hinged on religious affairs, civil courts are bound to follow the general church's decision).

147. *Id.* at 724–25 (stating hierarchical churches can enforce their own rules for internal discipline

The most powerful and popular reason for supporting the deference approach is that it avoids secular entanglement in religious affairs.[148] Scholars who strongly sympathize with freedom of religious practices often stress the importance of religious autonomy when discussing religion's role in the United States.[149] But regardless of how much religious organizations want to be free from external intrusion, the Supreme Court has long recognized governmental authority over some religious affairs.[150]

Secular government involvement is necessary because of the legitimate governmental interest in resolving property disputes of all kinds, including church property disputes.[151] The deference approach is usually reserved for hierarchically structured church organizations.[152] But applying the deference approach requires civil courts to factually conclude whether the disputing parties are members of a hierarchical or congregational church. Such a conclusion necessarily involves secular analysis and interpretation of the structure or polity of the disputing parties—an indisputable secular entanglement into a purely religious matter.[153] The consequence of deciding the church polity type weakens

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and government, and that if such rules are applied to direct their subordinate bodies, civil courts must accept them as binding decisions).

148. Jones v. Wolf, 443 U.S. 595, 618 (1979) (Powell, J., dissenting) ("[T]he civil court must focus directly on ascertaining, and then following, the decision made within the structure of church governance. By doing so . . . it refrains from direct review and revision of decisions of the church on matters of religious doctrine and practice . . . . [and] the civil court avoids interfering indirectly with the religious governance . . . ."); *see also* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1851 (1998) ("If civil courts were to deny church property to a body that would otherwise control it because the body has been guilty of a 'departure from doctrine,' civil courts would address matters for which they are woefully ill-suited, and the legal rule would frustrate changes in religious understandings."); Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 139 (1998) ("[W]hile deference may encounter several religion clause problems of its own, it remains the preferable approach: the lesser of two constitutional evils.").

149. *See* Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What Is at Stake*, 22 J.L. & RELIGION 153 (2006); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998); Frederick Mark Gedicks, *Toward a Constitutional Doctrine of Religious Group Rights*, 1989 WIS. L. REV. 99.

150. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

151. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445 (1969) ("It is of course true that the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution.").

152. 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, 1039–40 (2005).

153. GREENAWALT, *supra* note 142, at 275 ("[T]he [deference] approach . . . does require an initial decision about the nature of a church's government."); *id.* at 276–77 ("The more courts attempt to

the supposed benefit of the deference approach: preventing secular interference in religious affairs.[154]

Civil courts cannot determine how a church is structured without reviewing church governance documents, understandings between the disputing parties, and perhaps even looking into religious norms and customs of the church. The gravest issue with this involvement is that such reviews may infringe on the "free exercise" of religion. This concern may not be readily apparent, given that church units or members voluntarily submit to civil courts' authority to adjudicate their property disputes. However, the problem is not that the deference approach relies on civil courts to resolve church property disputes. Instead, the problem lies with civil courts interpreting what the church polity is, which an essentially religious matter. Because the deference approach requires courts to determine the church polity is, the approach inevitably forces courts to violate the First Amendment.

Another flaw with the deference approach is the weight that civil courts give to church bodies' decisions on matters that are inherently secular. Even if church property disputes originate from an internal ecclesiastical disagreement, courts cannot adjudicate them without consulting secular constitutions,[155] statutes,[156] and common law.[157] Yet, the deference approach demands civil courts to submit to the authorities of church bodies and accept their decisions as conclusive when concerning church property ownership.[158] Further exacerbating the problem is that while courts summarily accept the findings from the highest body in a hierarchical church, they do not afford the same level of deference to

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refine distinctions, asking whether hierarchical bodies have authority over particular subjects, the more their classifications in individual cases may turn on disputable ecclesiastical matters.").

154. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 604 (1979) ("The dissent suggests that a rule of compulsory deference would somehow involve less entanglement of civil courts in matters of religious doctrine, practice, and administration. Under its approach, however, civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property . . . . But in [some cases], the locus of control would be ambiguous . . . . In such cases, the suggested rule would appear to require 'a searching and therefore impermissible inquiry into church polity.'" (citation omitted)).

155. *E.g.*, U.S. CONST. amend. I (prohibiting the federal government from establishing religion or infringing on people's right to freely exercise their religious beliefs); CAL. CONST. art. I, § 4 (prohibiting the state from establishing religion and guaranteeing free exercise).

156. *E.g.*, OR. REV. STAT. § 65.042 (2019) (affirming that religious doctrine or practice will supersede state laws to the extent required by the federal or state Constitution, or both).

157. *E.g.*, Mt. Olive Afr. Methodist Episcopal Church of Fruitland, Inc. v. Bd. of Incorporators of Afr. Methodist Episcopal Church Inc., 703 A.2d 194, 200–04 (Md. 1997) (interpreting relevant statutes and precedents to determine the disputed property's ownership).

158. Belzer, *supra* note 148, at 122 ("Deference to church authorities entails the adoption by the courts of the decisions of either congregational majorities or the highest governing body in a hierarchical church.").

congregational churches.[159] The greater deference accorded to decisions from hierarchical churches may amount to a tacit governmental preference for hierarchical churches.[160] This seemingly preferential treatment towards one type of church structure over another raises a valid concern about whether the judiciary follows the Establishment Clause's command that the government be neutral towards all religious groups.[161]

2. The Neutral-Principles Approach's Flaws

The neutral-principles approach affords no deference to any church decision on property ownership. This is because the neutral-principles approach only applies to property disputes that do not originate from intraorganizational disagreement over some religious matters. Thus, the neutral-principles approach allows civil courts wider latitude in determining property ownership. Courts using this approach primarily examine the deed or title of the property in question, but also refer to church governing documents.

The Supreme Court and some state courts regard the neutral-principles approach as having the advantage of being secular in operation but sufficiently flexible to accommodate all forms of religious organization and polity.[162] However, it is not flawless. The neutral-principles approach requires civil courts to examine all relevant documents and events regarding the disputed church property. In doing so, courts can interpret religious governing rules and documents through a secular lens. Secular interpretations of religious matters can and do distort a church's intent on how it wants to organize or what powers it vests to each of its unit. Hence, civil courts sometimes fail to respect the provisions that church members

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159. GREENAWALT, *supra* note 142, at 271 ("[The] difference between the degree of procedural protection courts afford members of congregational churches and hierarchical ones favors institutional authorities of hierarchical bodies over their members who may rely on procedures found in their governing documents.").

160. *Id.* at 275 ("Another conceivable reason for favoring the general church as much as the deference approach does is to promote unity or centralized government."); *see also* Michael William Galligan, Note, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007, 2020 (1983) ("Judicial decisions to defer to one authority . . . place a governmental stamp of approval on those authorities in a manner that violates the establishment clause.").

161. Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. . . . The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." (citing relevant precedents addressing the same issue)).

162. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 603 (1979) ("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."); Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.), 291 P.3d 711, 720 (Or. 2012) ("We agree that the neutral principles approach has advantages over the hierarchical deference approach . . . .").

or units voluntarily and mutually agreed to. A California court of appeals case exemplifies how severe this problem can become.

In *Barr v. United Methodist Church*,[163] residents of a California retirement home sued the home's corporation and its parent church for fraud and breach of contract.[164] The court of appeals relied on neutral-principles of law to overturn the trial court's finding that the church did not represent a jural[165] body that could be held liable for acts committed by its agents.[166] The appellate court determined that the church's Council of Bishops essentially functioned as the church's board of directors and had the capacity to represent the church and its agents as a secular corporation's board would in similar situations.[167] However, the church constitution did not assign such a function or authority to the Council, nor did it recognize the Council as the church's highest legislative or adjudicatory body.[168] Rather, the church structure assigned different functions to a variety of bodies and agencies.[169] Despite assigning previously unavailable powers to the Council of Bishops under the existing church constitution, the court of appeals saw no evidence to believe that its decision "would affect the distribution of power or property within the denomination."[170] Essentially, the appellate court ignored the church constitution's mandates to impose its view on how the church operated.

Barr spotlights the danger of allowing civil courts to draw analogies from secular contexts and indiscriminately apply the analogies to settle religious matters. Even though *Barr* involved a commercial dispute, the court reached its ruling only after extensively discussing and interpreting the church polity. Allowing such practice to continue under the neutral-principles approach directly contradicts a supposed benefit of that approach, because it can easily frustrate the intent and desire of hierarchical church organizations and their members—who voluntarily

163. 153 Cal. Rptr. 322 (Ct. App. 1979).

164. *Id.* at 325.

165. "1. Of, relating to, or involving law or jurisprudence; legal . . . 2. Of, relating to, or involving rights and obligations . . . ." *Jural*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 414 (6th Cir. 2010) (affirming that religion is not a jural entity capable of being sued).

166. *Barr*, 153 Cal. Rptr. at 328, 330, 332.

167. *Id.* at 329.

168. *Id.*

169. *Id.* at 328–29 (recognizing different church agencies charged with different powers); *see also* William Johnson Everett, *Ecclesial Freedom and Federal Order: Reflections on the* Pacific Homes *Case*, 12 J.L. & RELIGION 371, 379 (1995) (noting the same).

170. *Barr*, 153 Cal. Rptr. at 332.

agreed to a certain governing structure.[171] Thus, the neutral-principles approach runs into the similar problem as the deference approach in that it fails to keep the government from interfering with the religious affairs of church administration.

The common problem for both approaches, based on their failure to constitutionally conform to the First Amendment's religious clauses, is their foundation. Because both are meant to resolve secular matters that require interpretations of religious matters, resting the two approaches on the First Amendment makes them vulnerable to criticisms. There may be many solutions to address this issue, such as amending the First Amendment to allow certain secular interpretations of religious affairs. But the easier and more natural solution is to look to contract and property law principles to justify the two approaches. Specifically, Washington State should mirror how it resolves property disputes between secular, voluntarily associated organizations when adjudicating church property disputes.

III. WASHINGTON STATE'S APPROACH TO RESOLVING PROPERTY DISPUTES

Washington State courts have resolved numerous civil litigations involving disputes between members or units of the same church, including disputes over church properties. Washington State courts use both the deference and neutral-principles approaches. However, both methods share similarities to how courts resolve secular property disputes, particularly those involving voluntarily-associated nonprofit or fraternal organizations. This Part examines the history of church and non-church property disputes in Washington State. It emphasizes that because the adjudication methods involved in both disputes are so similar, using legal doctrines unrelated to the First Amendment is possible and sensible to adjudicate church property disputes.

A. Church Property Disputes

Washington State applies the deference approach when resolving church property disputes from hierarchical churches.[172] Indeed, the

171. *See* GREENAWALT, *supra* note 142, at 278 ("[N]eutral principles afford religious groups more ability to carry out their exact intentions than the extreme deference of the polity approach . . . ."); *see also* McConnell & Goodrich, *supra* note 142, at 334 ("A common criticism of the strict [neutral-principles] approach is that it is not as good as the hybrid [of deference and neutral-principles] approach at ascertaining the parties' intent.").

172. *See* Presbytery of Seattle, Inc. v. Rohrbaugh, 79 Wash. 2d 367, 485 P.2d 615 (1971); Hoffman

Washington State Court of Appeals recently clarified that the deference approach still remains the binding doctrine.[173] Surveying prior decisions offers helpful insight into what Washington State courts have found relevant when adjudicating church property disputes.

The Washington State constitution's article I, section 11 discusses the religious rights of its residents.[174] It adopted the federal religion clause's core ideas of guaranteeing free exercise of religious beliefs and prohibiting governmental establishment of religion.[175] Concerning church property, the Washington State Supreme Court has interpreted the article I, section 11 to allow greater discretion to religious organizations to manage their real properties.[176] But greater discretion does not mean absolute discretion, as Washington State courts recognize instances where churches must give way to legitimate secular regulations of their real property.[177] Nonetheless, Washington State courts have consistently declined to settle internal church affairs if some ecclesiastical elements

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v. Tieton View Cmty. Methodist Episcopal Church, 33 Wash. 2d 716, 207 P.2d 699 (1949); Wilkeson v. Rector of St. Luke's Par. of Tacoma, 176 Wash. 377, 29 P.2d 748 (1934); Hendryx v. People's United Church of Spokane, 42 Wash. 336, 84 P. 1123 (1906); Herman v. Plummer, 20 Wash. 363, 55 P. 315 (1898); *see also* Choi v. Sung, 154 Wash. App. 303, 317, 225 P.3d 425, 433 (2010) (affirming the decision below that found the church as hierarchical and holding that deference approach applied); Southside Tabernacle v. Pentecostal Church of God, Pac. Nw. Dist., Inc., 32 Wash. App. 814, 825–26, 650 P.2d 231, 237 (1982) (holding that under the deference approach, trial courts should limit their inquiry to whether the local church is subject to some higher central authority); *cf.* Church of Christ at Centerville v. Carder, 105 Wash. 2d 204, 208, 713 P.2d 101, 104 (1986) (recognizing that for hierarchical churches, deference to the highest hierarchical church body's decision is proper).

173. *See* Presbytery of Seattle v. Schulz, 10 Wash. App. 2d 696, 708, 449 P.3d 1077, 1084 (2019) ("Because our Supreme Court decided *Rohrbaugh*, it is binding on this court . . . .").

174. WASH. CONST. art. I, § 11.

175. *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."), *with* WASH. CONST. art. I, § 11 ("Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion . . . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . .").

176. *See, e.g.*, First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd., 129 Wash. 2d 238, 252–53, 916 P.2d 374, 381 (1996) (holding that preventing sale of church property by designating it as a landmark violated the church's right to free exercise of religion); First Covenant Church of Seattle v. City of Seattle, 120 Wash. 2d 203, 230, 840 P.2d 174, 189 (1992) (finding city regulation that prevented church from modifying its building exterior through landmark designation violated the free exercise right); City of Sumner v. First Baptist Church of Sumner, 97 Wash. 2d 1, 10, 639 P.2d 1358, 1363 (1982) (instructing that courts are to balance governmental interest in enforcing building code and zoning ordinance with religious organizations' right to free exercise).

177. *See, e.g.*, Open Door Baptist Church v. Clark Cnty., 140 Wash. 2d 143, 168–70, 995 P.2d 33, 46–47 (2000) (finding that county ordinance can require churches to apply for conditional use permits without impermissibly burdening free right to exercise); N. Pac. Union Conf. Ass'n of the Seventh-Day Adventists v. Clark Cnty., 118 Wash. App. 22, 33, 74 P.3d 140, 146 (2003) (holding that government can require churches to comply with zoning ordinances).

are present.[178] The aversion to inserting too much secular influence when settling internal church matters also controlled how the Washington State Supreme Court adjudicated church property disputes that arose from internal religious disagreements.[179]

Prominent cases of church property disputes from the late 1800s to mid-1900s exemplify Washington State's gradual shift to preferring the deference approach. *Herman v. Plummer*,[180] decided only nine years after the state's formation,[181] is the first Washington State Supreme Court decision on church property disputes. Decided less than thirty-years after *Watson v. Jones*, *Herman* notably adopted the deference approach without relying on any constitutional values. It embraced the deference approach's fundamental logic that civil courts will enforce existing internal adjudicatory procedures and decisions where possible.[182] Additionally, it advanced ordinary voluntary-association legal principles to support their decisions.[183] Thus, the Washington State Supreme Court focused on the disputing parties' relationship with each other and what internal procedures required them to do, rather than laboring over the proper role of the judiciary in resolving church property disputes like its federal counterpart.

The Washington State Supreme Court later broke away from *Herman*'s agnostic attitude towards the judiciary's proper role.[184] The Court

178. Erdman v. Chapel Hill Presbyterian Church, 175 Wash. 2d 659, 683, 286 P.3d 357, 371 (2012) (finding church body's decision on claims of negligent retention and supervision of pastor binding on civil courts); *e.g.*, Elvig v. Ackles, 123 Wash. App. 491, 499, 98 P.3d 524, 528 (2004) (holding that while civil courts can resolve hierarchical church members' wrongdoings, courts should defer to church tribunals decisions on the matter).

179. Presbytery of Seattle, Inc. v. Rohrbaugh, 79 Wash. 2d 367, 373, 485 P.2d 615, 619 (1971) ("[I]n the absence of fraud, where a right of property in an action before a civil court depends upon a question of doctrine, ecclesiastical law, rule or custom, or church government, and the question has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive." (citing precedents that held similarly)).

180. 20 Wash. 363, 55 P. 315 (1898).

181. *Statehood*, WASH. STATE LEGISLATURE, https://apps.leg.wa.gov/oralhistory/timeline_event.aspx?e=8 [https://perma.cc/8JA8-RAF5].

182. *See* Watson v. Jones, 80 U.S. 679, 729 (1871) ("It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."); *Herman*, 20 Wash. at 367, 55 P. at 316 ("[I]t is a well-established principle . . . that until the members have exhausted their remedy within the society the courts will not assume jurisdiction of the controversy." (citing to cases supporting this proposition)).

183. *Watson*, 80 U.S. at 728–29 ("The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned."); *Herman*, 20 Wash. at 367–68, 55 P. at 316 (finding that parties had to resort to resolution under their national organization's bylaws).

184. Wilkeson v. Rector of St. Luke's Par. of Tacoma, 176 Wash. 377, 29 P.2d 748 (1934).

expressly affirmed the compulsory deference to church decisions when a property right is dependent on ecclesiastical matters.[185] The Court took note of two principles it thought relevant for the dispute, namely the deference due to church decisions on matters involving religious issues and the majority-control rule when deciding church affairs.[186] These two principles provide the foundation of the deference approach and the neutral-principles approach, respectively.

The Court continued to apply a hybrid approach on elements from both the deference approach and the neutral-principles approach.[187] Specifically, it focused on "whether the Methodist Church, through its representatives, was authorized to terminate the lease and cause an abandonment thereof."[188] The Court first determined that the church defendant belonged to a hierarchical church.[189] The Court then examined relevant documents of the Methodist Church, mainly its articles of incorporation.[190]

In *Presbytery of Seattle, Inc. v. Rohrbaugh*,[191] the Laurelhurst United Presbyterian Church of Seattle, a member of the United Presbyterian Church (UPC), voted to disassociate from UPC after UPC adopted a doctrinal change in the church constitution.[192] UPC denied Laurelhurst's requests to disassociate from UPC and to still use the church property.[193] UPC then dissolved the chapter altogether.[194] Rather than following the appeal procedure set out in the UPC constitution, the Seattle-chapter members refused to comply with UPC's order.[195] This refusal prompted the Presbytery of Seattle, which served as the intermediate supervising body for the local chapter, to sue to regain control of the church property.[196]

On appeal from the trial court's ruling for the Presbytery, Rohrbaugh and the other appellants argued that they comprised the church and that

185. *Id.* at 384–85, 29 P.2d at 751.

186. *Id.* at 385, 29 P.2d at 751.

187. Hoffman v. Tieton View Cmty. Methodist Episcopal Church, 33 Wash. 2d 716, 207 P.2d 699 (1949).

188. *Id.* at 727, 207 P.2d at 705.

189. *Id.* at 729, 207 P.2d at 706 (citing Watson v. Jones, 80 U.S. 679 (1871)).

190. *Id.* at 730, 207 P.2d at 706–07.

191. 79 Wash. 2d 367, 485 P.2d 615 (1971).

192. *Id.* at 368, 485 P.2d at 616–17.

193. *Id.* at 368, 485 P.2d at 617.

194. *Id.*

195. *Id.*

196. *Id.* at 368–69, 485 P.2d at 617.

the local church was the true record titleholder to the church property.[197] To make this argument, the appellants relied on a case with similar facts,[198] in which the Georgia Supreme Court affirmed using the departure-from-doctrine test to resolve the dispute.[199] However, the Washington State Supreme Court found the Georgia case unpersuasive, noting that the federal Supreme Court had reversed the Georgia Supreme Court.[200] The Court also stated that, regardless of the Georgia Supreme Court's rationale, Washington had consistently adhered to the principle that "in the absence of fraud, where a right of property . . . depends upon a question of doctrine . . . or church government, and the question has been decided by the highest tribunal within the organization . . . the civil court will accept that decision as conclusive."[201] The Court concluded that the record title belonged to the UPC, and that the appellants had no right to unilaterally withdraw their membership and take possession of the church property without going through the internal appeal procedure first.[202]

The four cases reveal the major concerns that the Washington State Supreme Court grappled with as it adjudicated church property disputes over the years. *Rohrbaugh*'s recency and controlling precedential value may suggest that the Washington State Supreme Court is tracking the *Watson* Court's First Amendment-based logic. Yet, *Herman*, *Wilkeson*, and *Hoffman*—which have not been overruled—caution against disregarding Washington State courts' ability to apply non-First Amendment based analysis for church property disputes. This may be especially true considering the similarities between how Washington State courts adjudicate church property disputes and non-church property disputes.

B. Non-Church Property Disputes

Rohrbaugh's deference to church decisions starkly contrasts how courts handle similar issues that come from secular voluntary associations or societies.[203] In *Grand Aerie, Fraternal Order of Eagles v. National*

197. *Id.* at 369, 485 P.2d at 617.

198. Presbyterian Church in U.S. v. E. Heights Presbyterian Church, 167 S.E.2d 658 (Ga. 1969).

199. *Rohrbaugh*, 79 Wash. 2d at 369, 485 P.2d at 618.

200. *Id.* at 369–70, 485 P.2d at 617–18.

201. *Id.* at 373, 485 P.2d at 619.

202. *Id.* at 373, 485 P.2d at 619–20.

203. GREENAWALT, *supra* note 142, at 273 (2006) ("For *both* hierarchical and congregational churches, the polity approach differs from how secular associations are treated, in that courts will not say when a shift in dominant understanding of purpose has become too great. And the absolute

Bank of Washington,[204] the Washington State Supreme Court reaffirmed that civil courts must refrain from challenging fraternal organizations' decisions regarding membership unless some procedural validity becomes questionable.[205] The Court also held that "even though the property be held in the name of the corporation of the subordinate lodge, upon suspension or revocation the property becomes that of the [national organization], if the constitution so provides."[206] In another case, the Court held that no local member of a voluntary association can use property that the association accumulated over its operation for "other uses than the uses defined in the constitution and laws of the order."[207] The court of appeals has added that members of a voluntary association "have no severable rights in the property—merely the right to joint use so long as they remain members."[208]

Relatedly, Washington State courts have a history of respecting voluntary associations' decisions on how they will govern and be governed. In *State ex rel. Butterworth v. Frater*,[209] the Court explained that subsidiary members of a national voluntary organization are "governed by the agreement which they entered into when joining the organization. Courts will not interfere in disputes of this nature, where the organization amply provides for their determination."[210] The Court has also affirmed that courts should not regulate voluntary organizations' internal affairs.[211] Likewise, lower Washington State courts have found

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deference courts afford to the highest judicatories of hierarchical religions is unparalleled for secular groups." (emphasis in original)); *see also* Sirico, *supra* note 84, at 351 (arguing that the deference approach gives churches extreme autonomy that make them "more immune from judicial review than any other organization in American society").

204. 13 Wash. 2d 131, 124 P.2d 203 (1942).

205. *Id.* at 135, 124 P.2d at 205 ("[E]xpulsion of a member from a mutual benefit association would not be inquired into by the courts, except to ascertain whether the proceedings were regular, in good faith, and not in violation of the laws of the order or the laws of the state." (citing Kelly v. Grand Circle Women of Woodcraft, 40 Wash. 691, 695, 82 P. 1007, 1008 (1905))).

206. *Id.* at 137, 124 P.2d at 205.

207. Grand Ct. of Wash., Foresters of Am. v. Hodel, 74 Wash. 314, 317, 133 P. 438, 439 (1913).

208. Nat'l Grange of Ord. of Patrons of Husbandry v. O'Sullivan Grange No. 1136, 35 Wash. App. 444, 452, 667 P.2d 1105, 1110 (1983).

209. 130 Wash. 501, 228 P. 295 (1924).

210. *Id.* at 506, 228 P. at 296.

211. Wash. Local Lodge No. 104 of Int'l Brotherhood of Boilermakers v. Int'l Brotherhood of Boilermakers, 33 Wash. 2d 1, 74, 203 P.2d 1019, 1061 (1949) ("[I]t is not within the province of the courts to regulate the internal affairs of . . . voluntary organizations . . . ."); *see also* Couie v. Local Union No. 1849 United Brotherhood of Carpenters & Joiners of Am., 51 Wash. 2d 108, 115, 316 P.2d 473, 478 (1957) ("[I]t is not for the jury to interpret the constitution of the union, nor will the courts interfere with the interpretation placed upon such a constitution by its officers and agents unless such interpretation is arbitrary and unreasonable."); Anderson v. Enter. Lodge No. 2, 80 Wash. App. 41, 46, 906 P.2d 962, 966 (1995).

the constitution or bylaws of national body of a voluntary association to be binding on its subordinate units.[212]

Washington State courts have long recognized the authority of higher or supervising bodies within the same voluntarily associated organization and enforced the organization's rules of governance, including how property ownership should get decided. Thus, the Washington State jurisprudence on dispute resolution involving secular voluntary organizations has clear similarities to both the deference and the neutral-principles approaches. The similarities provide proper justification for replacing the First Amendment bases in church property jurisprudence with the principles controlling property disputes between voluntarily associated organizations.

IV. REPLACING THE FIRST AMENDMENT'S ROLE IN CHURCH PROPERTY DISPUTES

The current jurisprudence requires an update because it fails to serve its purpose of conforming with the First Amendment's two religion clauses. Neither the deference nor the neutral-principles approach can perfectly serve the First Amendment value of religious autonomy because civil courts must be involved in settling church property disputes. An alternative, such as completely removing civil courts' role in church property disputes, is impossible given that only civil courts have the proper legal authority to determinatively settle such disputes. Therefore, a better remedy is for Washington State courts to treat church property disputes the same way they treat disputes arising from internal membership disagreements in voluntarily associated organizations.

At first glance, this solution may seem to ignore church property disputes' religious nature. But if courts correctly reframe and understand church property disputes as disputes between voluntarily organized groups or individuals over real property, the departure from the First Amendment-based justifications makes sense. Moving away from the traditional First Amendment rationale for the deference approach will not disturb how Washington State courts currently resolve church property disputes. More importantly, the departure will insulate civil courts from further criticisms for violating constitutional values, which in turn makes their decisions more authoritative and justified.

Reframing the nature of church property disputes is not new or

212. *O'Sullivan Grange*, 35 Wash. App. at 449–50, 667 P.2d at 1109 ("[T]he constitution and bylaws of the national or governing body of a beneficial association or fraternal order are binding upon the subordinate organizations.").

revolutionary.[213] Scholars have called for courts to use secular tools to resolve church property disputes over the past few years.[214] But Washington State courts have already employed rationales that did not need First Amendment values to resolve church property disputes. Aside from returning to this historical method, Washington State courts can also incorporate other methods, such as using statutory provisions that treat churches as nonprofit corporations. Doing so would free civil courts from compulsory submission to church decisions while granting them increased latitude to assess which party should have property ownership based on the review of deeds, relationships between the parties, and internal governance documents. This approach would also enable courts to enforce valid internal organizational agreements as binding on the litigating parties while reserving opportunities to examine other pertinent facets of the underlying issue.

Washington State defines and treats churches as nonprofit organizations.[215] As such, civil courts can adjudicate church property disputes by relying on existing statutory mechanisms that govern nonprofits. For instance, Washington State courts have the authority to appoint a general or custodial receiver to oversee distribution of assets once a nonprofit corporation starts its dissolution process.[216] While the statute explicitly excludes churches or their auxiliaries from most of its

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213. Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426. U.S. 696, 728 (1976) (Rehnquist, J., dissenting) ("[W]here people had chosen to organize themselves into voluntary religious associations, and had agreed to be bound by the decisions of the hierarchy created to govern such associations, the civil courts could not be availed of to hear appeals from otherwise final decisions of such hierarchical authorities. The bases from which this principle was derived clearly had no constitutional dimension; there was not the slightest suggestion that the First Amendment or any other provision of the Constitution was relevant to the decision in that case."); *see also* Watson v. Jones, 80 U.S. 679, 714 (1871) ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints.").

214. *E.g.*, McConnell & Goodrich, *supra* note 142 (proposing that courts use ordinary principles of trust and property law); David Fulton, Comment, *Surgical Arbitration: Excising First Amendment Cataracts from Religious Hierarchical Property Disputes*, 2 TEX. A&M J. PROP. L. 413 (2015) (suggesting that parties use arbitration to settle certain questions related to church property disputes); Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 VA. L. REV. 443 (2010) (arguing for a federal statute to simplify and standardize the law of church property disputes).

215. *See* WASH. REV. CODE. § 84.36.020(2)(a) (2020) (granting tax exemption to churches described as "nonprofit recognized religious denomination"); *Nonprofit Organizations*, WASH. STATE DEP'T OF REVENUE, https://dor.wa.gov/education/industry-guides/nonprofit-organizations [https://perma.cc/L8Y5-U7PS] (stating that "[a]n organization may be considered a 'nonprofit' organization because . . . [i]t is a church, charity, or benevolent organization").

216. WASH. REV. CODE § 24.03.271(3)–(8) (2020).

provisions,[217] it still authorizes civil courts to direct how the parties should manage or dispose of certain assets until a full hearing is held.[218] Reflecting civil courts' authority to settle distribution or ownership of nonprofit organizations' assets, the Washington State Supreme Court has not shied away from carefully scrutinizing what internal organizational agreements say on the matter.[219]

This close review of internal organizational documents is a key function of how Washington State courts adjudicate property disputes arising from an internal schism within congregational churches.[220] Giving internal governing documents determinative effect in deciding which disputing party has the rightful property ownership is consistent with the laws of nonprofit organizations on such matters.[221] More importantly, allowing Washington State courts to apply the principles that govern nonprofit organizations' property disputes to church property disputes is consistent with what the Supreme Court identified as one of the strengths of the neutral-principles of law approach.[222] The shared characteristics between how the Washington State courts adjudicate property disputes arising from nonprofit organizations and congregational churches therefore justify removing the First Amendment's role in resolving

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217. *Id.* § 24.03.271(10).

218. *Id.* § 24.03.271(9)(c) (referring to assets that are "charitable, religious, eleemosynary, benevolent, educational, or similar purposes"); *see also id.* § 24.03.271(3).

219. *See, e.g.*, *In re* Monks Club, Inc., 64 Wash. 2d 845, 850, 394 P.2d 804, 807 (1964) (reviewing amendments to a nonprofit corporation's bylaws that stated how assets would be distributed upon dissolution and declaring it null).

220. *See, e.g.*, Church of Christ at Centerville v. Carder, 105 Wash. 2d. 204, 205, 211, 713 P.2d 101, 102, 105 (1986) (referring to church rules to affirm the church board's decision to remove Carder as preacher and affirm the church's property ownership).

221. 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5707 (perm. ed., rev. vol. 2020) ("Where a member of a nonprofit . . . corporation voluntarily withdraws from the corporation, the member generally forfeits all interest in the property of the corporation *unless the applicable statutes or the articles or bylaws provide otherwise* . . . . Members of a subordinate lodge or fraternal association who withdraw forfeit their interest in the lodge property and cannot invoke the rule against the enforcement of forfeiture in equity." (emphasis added) (citations omitted)).

222. Jones v. Wolf, 443 U.S. 595, 607–08 (1979).

> [A] presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means . . . would be consistent with both the neutral-principles analysis and the First Amendment. Majority rule is generally employed in the governance of religious societies. Furthermore, the majority faction generally can be identified without resolving any question of religious doctrine or polity . . . . Most importantly, any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it.

Id. (citations omitted); *see also* Bouldin v. Alexander, 82 U.S. 131, 140 (1872) (employing majority rule to resolve church property dispute).

property disputes between units of congregational churches. Under the new approach, courts reviewing internal governing documents would be similar to the neutral-principles approach, while recognizing all pertinent rules as dispositive to settle the property dispute would be how the deference approach operates.

The notable exception to the court's general unwillingness to get involved in internal disputes in voluntarily associated organizations is when property rights are at issue.[223] But *Grand Aerie* is evidence that even when property rights are concerned, Washington State courts still review internal governing documents and enforce whatever pertinent provisions the organizations have. Hence, the Washington State Supreme Court's long history of giving effects to fraternal organizations' internal rules is significant for two reasons. First, Washington State courts can continue to apply the deference approach's respect for internal church decisions as they do now, even if they remove the First Amendment rationale. Second, courts can continue to use the neutral-principles approach's operative features by mandating that all church property disputes require judicial review of church governing documents for the sole purpose of referring to the relevant provisions on membership and property rights. Compelling courts to refer to church documents should discourage them from ignoring the church's intent on how it is organized and governed, thus preventing the judiciary from usurping what the church units mutually and knowingly agreed to. Cases from other jurisdictions demonstrate that other state courts apply similar reasoning when resolving legal disputes between voluntary associations' members or units.[224]

Under this new approach, Washington State courts can apply a uniform doctrine to all property disputes that stem from internal feuds in voluntarily associated organizations without infringing on their rights to be governed by mutually assented rules. The current First Amendment-based justifications for the deference and the neutral-principles approaches are the only obstacle to this new solution. But Washington State courts can remove the roadblock if they: (1) classify churches as voluntarily organized nonprofit corporations and

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223. State *ex rel.* Butterworth v. Frater, 130 Wash. 501, 504, 228 P. 295, 296 (1924) (holding that civil courts will not interfere in disputes between a voluntary association and a member unless a property right is involved).

224. *See* Levant v. Whitley, 755 A.2d 1036, 1046 (D.C. 2000); Harper v. Hoecherl, 14 So. 2d 179, 180–81 (Fla. 1943); Long v. Meade, 174 P.2d 114, 116 (Kan. 1946); Irwin v. Lorio, 126 So. 669, 672 (La. 1930); Peters v. Minn. Dep't of Ladies of Grand Army of Republic, 58 N.W.2d 58, 60 (Minn. 1953); Cuney v. State, 108 So. 298, 303 (Miss. 1926); Golden Lodge No. 13, Indep. Ord. of Odd Fellows v. Grand Lodge of Indep. Ord. of Odd Fellows, 80 P.3d 857, 859 (Colo. App. 2003); Grand Castle of the Golden Eagles v. Bridgeton Castle, No. 13, Knights of Golden Eagles, 40 A. 849, 849 (N.J. Ch. 1898).

(2) treat them the same as other secular nonprofits and voluntary associations for church property dispute purposes.

CONCLUSION

Church property disputes should not be anomalies that force civil courts to adopt a special rule to resolve them. Traditionally, civil courts adopted different methods to adjudicate church property disputes—namely the deference approach or the neutral-principles approach—and they have consistently justified the preferred method based on the First Amendment. Ironically, the First Amendment-based justifications are inherently susceptible to valid criticisms of *violating* the First Amendment. This is because no matter what approach a court uses, it will have to interpret certain religious matters from a secular perspective—an intrusion that the First Amendment prohibits.

The best solution for Washington State courts is to treat church property disputes like they treat similar disputes from voluntarily associated organizations. Washington State courts already resolve property disputes or internal disagreements between members or units of the same voluntary associations without relying on the First Amendment. By treating churches the same as other secular voluntary associations, Washington State courts can avoid criticisms that their doctrine violates constitutional values. The time has come for Washington State courts to embrace the better method in resolving church property disputes: completely removing any First Amendment reliance in whatever doctrine they use.