THE LAW OF ECCLESIASTICAL POLITIES

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"What is at stake here is the power to exercise religious authority. That is the essence of this controversy."[1]

The following is a very early draft—a series of notes, really—towards a paper/project on the standard that should govern judicial review of disputes involving ecclesiastical authority. In most cases, the dispute concerns the division of property between schismatic elements of a church. Occasionally, the appointment of church officials or of employees of a religious organization is at issue. More recently, these disputes have come to encompass the civil and criminal responsibility religious organizations facing complaints of negligence in the exercise of supervisory duties by higher church officials over members of the clergy accused of sexual and other kinds of abuse.

At the moment, the bulk of the paper is expository. I am trying to develop a series of arguments to some recent articles; a brief sketch of them is at the end of the piece. And forgive the many %%% signs. They are easily searchable markers of places that still require my attention.

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INTRODUCTION

Many (perhaps most) Christian churches claim to have authority over their corporate body as well as some measure of authority over their ministers and members, and hold that this authority is be independent from that of the state. This independence can be simultaneously understood as "foundational plurality"—the claim that their authority has an independent source of legitimacy, whether historical or spiritual—, and as "incommensurability"—they claim that their authority is not subordinate to that of the state, nor is the state's subordinate to that of the church. The extent of this authority is unclear, but it usually includes at least the internal governance of the church, the appointment of ministers, the ownership and control over property (within general zoning and other guidelines), and the disciplining of members

[*] Author's note.

[1] F. Frankfurter, concurring in *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952), 121.

(through expulsion, though not through penal sanction).

This is especially the case for churches (such as Roman Catholics or Anglicans) with a robust canonical tradition and a hierarchical system of governance, and those (like Free Kirk Presbyterians) with a history of opposition to establishment and some measure of governance hierarchy. Hierarchy here is understood in two ways: as submission of individual members of the church to a superior authority (a bishop or a church tribunal) and as subordination of local congregations (e.g. parishes) to regional, national, or supra-national bodies.

Disputes often arise within a church which pit individuals against ecclesiastical superiors, or local congregations against more general bodies. In cases of internal disputes within a church, the parties often resort to the state courts to settle their disagreements, since these often entail questions about determination of ownership of property, appointment or dismissal of ministers or employees, or enjoyment of the benefits of membership. The question of how the state should respond to these disputes, what standard it should use to settle them, vexes secular liberal democracies.

The recent disputes within the Anglican Communion—both in The Episcopal Church in the United States and the Anglican Church of Canada—and the Presbyterian Church again bring to the fore the importance of the ecclesiastical polity. The context of the present disputes is the debate over LGBT rights, where the hierarchies of national churches have taken a more liberal position on the ordination of gay and lesbian priests and bishops and on the recognition of same-sex marriage. A minority of local congregations have decided to disaffiliate either from the general church or from one of its regional divisions because of perceived doctrinal incompatibilities with the hierarchy's position.

Similar disputes had arisen within Presbyterianism after the United States Civil War, and within Russian Orthodoxy during the Cold War. And even in the nineteenth century, the American Revolution had caused a rift in Roman Catholicism which nearly led to heresy and schism and profoundly transformed the organization of the Catholic Church in the Americas. Every great crisis that divides the national polity seems has a similar effect on the ecclesiastical polity within it, and this division is maximized in hierarchical churches with long traditions and substantial real and pecuniary holdings.

THE PROBLEM OF ECCLESIASTICAL POLITIES

The form of ecclesiastical polity is a perennially important political question. The temporal authority of the Pope and the authority he claimed over bishops was at the heart of the Conciliarist controversy of the fifteenth and sixteenth centuries.[2] The structure of Protestant churches was the cause of acrimonious dispute throughout the period of the Reformation, with Lutherans, Calvinists, and Anabaptists taking different sides.[3] King James thought the preservation of the Anglican episcopacy against Presbyterianism crucial enough to issue the warning "No bishop, no King" and the Puritan colonists in America thought it equally important to guard against episcopal church government, lest it undermine republican institutions.[4] The standard narrative of religious freedom saw these disputes as matters of individual conscience. In recent times, however, some scholars of law and religion have made an "institutional turn" towards the study of religious liberty, one that emphasizes the corporate "freedom of the church" as contrasted with the individual's freedom of conscience.[5] In this context, the question of church governance emerges as an expression of the autonomy of religious associations, itself an important aspect of religious liberty. Richard Garnett and others have explained not only the foundational character of this question, but also its explanatory potential, as it seems to justify the deference normally given to churches and other religious authorities in liberal-democratic states.[6] Such states are normally hesitant to interfere with the internal organization and deliberation of religious bodies, and defer to their judgments in matters concerning religious doctrine and religious law. Some examples of this are exemptions from certain anti-discrimination statutes, differences in the application of some provisions of the tax code, special consideration during bankruptcy and tort proceedings.[7]

While modern liberal democracies are reluctant to intervene directly in shaping the government of churches, the problem of polity persists. In a series of sermons later published under the title *Churches in the Modern State*, Anglican theologian and political theorist John Neville Figgis argues that religious organizations claim "recognition as a social union with an inherent original power of self-development"[8] and, as such, demand that the state defer to their internal governing structures on religious matters and on

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[2] Oakely 2003; Burns and Izbicki 1997
[3] MacCulloch 2009, 604ff
[4] McConnell 2003, 2186
[5] Garnett 2008a; Laycock 1981, 2009; Horwitz 2011, 2013
[6] Garnett 2008a, 2008b, 2009a, 2009b
[7] Dane 2010; Scharffs 2004
[8] Figgis [1914] 1997, 99 [%%%change citations to Blue or Red Book]

decisions regarding their ministry. Yet Figgis also recognizes that in modern societies the state is "the guardian of property and interpreter of contract"[9] and that it may require of churches "certain marks, such as proofs of registration, permanence, constitution, before it recognizes the personality of societies".[10] This demand of the state creates a relationship between the "ecclesiastical polity"—the structures of governance of a religious body, such as its hierarchy (or lack thereof), ministry, decisional and disciplinary procedures, and standards of membership—and secular legal institutions, a relationship that is in tension with the church's claim to autonomy.

In brief, churches must use the law of the state to organize their ecclesiastical polities in accordance with their religious principles and, at the same time, secure their autonomy from state interference. How do they negotiate this tension? Most legal scholars treat this question as a matter of constitutional law.[11] It is true that constitutional law sets some limits on whether and how state courts can intervene in ecclesiastical disputes. But the substance of these disputes is usually in the domain of private law—the law of property, contract, and tort, corporate law, family law, and private arbitration—and not so much on constitutional principles.

Some brief words about the state of the literature are necessary. Despite the enormous productivity of law and religion scholars,[12] there remain important gaps in the scholarship on ecclesiastical polities and state law. Some scholarship addresses the effects of private law on the interaction of religious groups (as corporate legal persons) with third parties, but not their effects on churches' internal governance.[13] In the United States, Bassett, et al. have produced a massive compendium of the laws, regulations, and judicial decisions that bear on the organization of religious bodies,[14] W. Cole Durham has brought attention to issues of church organization in international human rights law and comparative constitutional law,[15] and Runquist and Frey have drafted a guide aimed at lawyers who represent religious organizations.[16] The subject of all these texts is on churches in general, or on broad judicially construed categories of ecclesiastical polity (e.g. hierarchical versus congregational) which have proven satisfactory to neither the courts nor the churches themselves. The focus of most studies is also on the United States, which presents other problems of extrapolation

[9] Figgis, cited in Nicholls 1994, 158
[10] Figgis quoted in Webb 1958, 56
[11] Robbers 2001; Ahdar and Leigh 2005, 325-59
[12] Cite recent books%%%
[13] Ogilvie 2010, 207-99
[14] Bassett, et al. 2012
[15] Lindholm, et al. 2004
[16] Runquist and Frey, 2009

from a very specific historical case. The prevalence of established churches in most European countries and, for a significant period, in Canada has not made contests over ecclesiastical authority less prevalent, although it has altered the legal framework of these disputes.

Although many critics have pointed out that the categories that courts have devised to classify ecclesiastical bodies are problematic, little attempt at comparison of the private legal practice of religious denominations has been carried out. The result is that many scholars fail to make the connection between the particular internal political organization of churches and the legal instruments that give it form. This is unfortunate for both doctrinal and theoretical reasons: Doctrinally, such scholarship misses many of the legal mechanisms through which religious bodies organize and govern themselves and through which they interact with non-members and the state, and ignores the variance in governance structure between different religious organizations and the reasons and political and legal effects of that variance. Theoretically, it relies on constitutional rights that protect individuals and thus does not address the collective or corporate identity of religious organizations, and does not treat churches as political and legal institutions on their own right.[17]

There has been some attention paid to issues of ecclesiastical polity from the discipline of ecclesiology (the study of church organization) but this research is either internal to each faith tradition or else aimed principally at a theological and ministerial audience.[18] Moreover, the focus of this work is on the churches' self-understanding of their own structures of organization rather than the interaction between this self-understanding and the state's legal institutions.[19] Intellectually, there is an established ecclesiological literature on different forms of governance structures in the Christian churches which converges on three distinct types of ecclesiastical polity: episcopal (rule by bishops), presbyterian (rule by elders), and congregational (rule by lay members).[20] Moreover, there is consensus on which churches follow which forms of polity.[21] The coherence of this literature keeps questions of religious doctrine separate from those of ecclesiastical

[17] [%%% Run through Garnett, Horowitz. Besides hierarchical/congregational categories, any more attention?]

[18] E.g. Reese 1989

[19] Long 2001; Reese 1989

[20] Long 2001, 8; Fahlbusch 2005, 262

[21] The relations of authority are theoretically a little more complicated. It is one thing to ask what is the ecclesiastical polity of a local religious community, which may be more or less democratic, and another to ask what is the relationship between the local community and the national (or in some cases, transnational) church. But in practice, local hierarchy corresponds to lower autonomy for local churches. [%%% but perhaps add an explanation from Long here]

governance, as "the doctrinal positions of most mainline denominations are quite similar… [b]ut their polities are different".[22]

Legal historians have shown that private law (notably the Roman law of corporations) was the means by which the Church first asserted its autonomy from the state,[23] and that ecclesiastical governance was profoundly shaped by institutions of private law well before constitutional protections became prevalent.[24] Further, many recent controversies over religious liberty are actually questions about the relationship of private law to the ecclesiastical polity. Examples include the creation of the United Church of Canada, which necessitated the settlement of multiple claims to church property in cases of Presbyterian denominations which did not wish to join the church. They are echoed in the current disputes within the Anglican communion and the Presbyterian Church, in which some conservative parishes have seceded from their diocese and raised issues of who—the diocese or the parish—should control church property. Similar concerns animate the reaction to the use of private arbitration in divorce and custody disputes by Islamic and Jewish communities in Canada and the United States. They are also central to the settlement of claims over the handling of accusations sexual abuse in Roman Catholic and other churches, which raises questions of corporate liability of individual priests in parishes, of bishops in dioceses, and of the hierarchy of the church as a whole.

The question of ecclesiastical polity and religious governance is not limited to Christian churches. Canadian courts have recently had few scruples when intervening in decisions regarding criteria for membership in a religious organization[25] or appointment and dismissal of ministers.[26] Many (though not all) non-Christian organizations resemble what courts have called "congregational" forms of polity, that is, they are generally controlled by the local congregation and governed more or less democratically. However, while the theological principles that apply to the governance of religious bodies may vary, the general outlines of a theory about the interaction of religious and state authorities should not turn on details of theology but on the assertion of an authority other than the state's.

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[22] Long 2001, 1

[23] Berman 1983, 215-21; Tierney 2008, 19. Also Muniz-Fraticelly and David in Osgoode L J %%%

[24] Tierney 2008, 80ff

[25] Sandhu v Sikh Gurdwara of Alberta %%%

[26] Kong v Korean Baptist Church %%% Several cases involving rabbis (ask LD)

JUDICIAL APPROACHES TO ECCLESIASTICAL POLITIES IN THE U.S.

Judicial review of ecclesiastical polity can take one of three paradigmatic forms. The forms here referred to emerge from United States constitutional law, but they can be generalized to other legal systems. They are regularly referenced in Canadian jurisprudence, despite very different history and constitutional language. But more broadly, the three approaches can be classified according to the kinds of reasons (religious or legal) taken into account when conducting review, and according to the body (church or court) that has final authority to create and interpret the legal norms that apply to the ecclesiastical polity. This makes them applicable to other legal systems.

A. Doctrinal fidelity (or the "English Rule")

The traditional common-law standard of review for disputes over ecclesiastical polity was an examination of the fidelity of each disputing party to the original doctrinal tenets of the church. The reasons English courts adopted the standard had to do with the ways in which ecclesiastical polities were ordinarily constituted and in which they received and held property. Some churches, especially established churches, received a corporate charter from the state which stated their purpose in terms of continued adherence to certain doctrines.[27] Deviation from those doctrines would have been an *ultra vires* act and thus invalid *ab initio*. Most often, however, the institution of ecclesiastical polity was a matter of internal concern for the church, and the state courts only cared about the disposition of assets. Churches themselves were constituted as trusts, because that institution was easier to set up and avoided some of the formalities and complications of the corporate form, including Parliamentary and judicial oversight over corporate charters.[28] These assets were usually acquired as charitable trusts, and a dispute over control of the property was made to turn on which of the contesting parties most faithfully promoted the intent of the settlor. Since the terms of the trust seldom made express and detailed reference to specific purposes, save the support of a giver church or parish.

In cases of disputes over property given to a church in trust, courts had to determine to whom the settlor intended to leave it. They determined that "in the absence of evidence of an express trust provision the court assumed that property was held in 'implied trust' by and for the benefit of individuals or

[27] %%% this appears to be the case for some established churches in early US. Check England. Include civil-law parallel.

[28] As Maitland explains, the functional difference between trusts and corporate charters from the perspective of the church itself was largely irrelevant. %%%Maitland, in State Trust…

groups that adhered to the same religious standards and beliefs as the donors did."[29] As a result, the court was called upon to make extensive determinations about the content of church doctrine and the merits of various interpretations of it.

The implied church doctrine faced criticism from theologians such as John Figgis, because of two related but independent reasons. In the first place, the implied trust doctrine inhibited religious organizations to change and adapt, and effectively bound them to the original wishes of their founders or early donors. This was more than an abstract worry for Figgis—the disastrous dispute over the control of the assets of the Free Church of Scotland was not about recent innovations to long established doctrine, but rather about the attempt of wealthy Scottish patrons with powerful allies in Parliament to control parsonages in the Scottish church over the wished of the Presbyterian elders and the congregation.[30] More important was Figgis' second objection: that the implied trust doctrine placed authority over the life of the church in a power wholly outside of it, depriving it of institutional autonomy.

The latter objection would have greater resonance across the Atlantic. In the United States, the implied trust doctrine was quickly seen to be inapplicable because it embroiled the state courts in theological disputes that would force them to grant their imprimatur to some religious congregants over others *on religious grounds*. The usual solution was for the courts to strip the trust of any reference to purpose, unless one was expressly stated in the trust instrument itself, and consider it an unencumbered gift to the congregation. which was controlled by its officials controlled "without the limitation of trust obligations and without regard to religious doctrines, affiliations, or practices."[31]

It is important to consider that the implied trust approach, with its attendant examination of religious doctrine by a secular court, is not obviously wrong, and only seems so given the peculiar constitutional arrangement in the United States.[32] Secular courts are unclear about the grounds for their reluctance to interpret religious doctrine, usually settling on an admission of their own incompetence to do so. But it is not clear that the incompetence refers to a lack of expertise (which could be resolved through

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[29] Hansen (in Serritella, et al. 2006), 286 discussing *Craigdallie v Aikman* 4 Eng Rep 435 (1820).

[30] Bannatyne v Overtoun (Free Church case), [1904] A.C. 515. %%% See also discussion in SoP

[31] Oaks, *Trust Doctrines in Church Controversies*, 36-37, cited in Hansen, 287.

[32] The leading Canadian scholar on religious organizations rightly observes that religious purpose can be treated as a statement of fact, like any other trust objective, and evaluated by a court with the assistance of witnesses. Ogilvie, *Religious Organizations and the Law in Canada* %%% It would seem that the Canadian Supreme Court decision in *Amselem v Syndicat Northcrest* would preclude this, but that is not certain.

expert testimony), a lack of jurisdiction (which the United States Supreme Court has ruled out in principle, but seems to endorse in practice), or an inability to enter the right (i.e. devotional) frame of mind necessary to properly address a religious dispute.[33]

The deeper problem of the doctrinal fidelity standard is that it privileges belief over authority, content over structure. [%%% *I need more here. What if individual beliefs are beliefs* about *authority?*]

It also privileges the interpretive authority of state courts over those of the ecclesiastical authority. Absent the constitutional impediments to secular courts interpreting theological doctrine, the doctrinal fidelity standard would be acceptable under a definition of religion that considered institutions as merely incidental to individual belief. If a church is merely a vehicle for the practice of belief, then institutional authoritative structures have no special standing.

B. Polity approach

The doctrinal fidelity approach had the twin effects of involving state courts in theological disputes, and disregarding instances of actual practice of religion. State courts in the United States rejected it early on. Finally, in *Watson v Jones*,[34] the US Supreme Court officially rejected doctrinal fidelity in favor of a hierarchical deference or polity approach. The Court faced a Presbyterian congregation divided over opposition to slavery during the Civil War that had just ended. Both sides claimed fidelity to church teachings [%%% more]

Rather than examine which party held most steadfastly to doctrine, the Court established a hierarchy of sources on which to decide the question: it would first defer to explicit deeds of trust, if they exist; then to hierarchical authority, if there is one; and if there is none, to majority membership.

> In this class of cases we 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, and supported by a preponderating weight of judicial authority is, that, whenever the questions 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 to the case before them.

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[33] %%% Need source (apart from Hosanna Tabor)

[34] 80 US 679 (1872),

The *Watson* decision went unchallenged for nearly a century, but it had significant problems, not least the fact that religious bodies come in more varieties than hierarchical and congregational; Presbyterian churches, which ironically were the cause of the suit, don't fit neatly into either category. Moreover the polity approach is not universally deferential to church polity. Under it, courts generally deferred to hierarchical churches (understood as churches in which the national church held authority over local churches) but not to congregational ones, whose disputes were to be settled according to ordinary law.

Another objection, made by Kent Greenwald but which would find a welcome ear in Figgis, is that the polity approach is stanchly conservative when it comes to development of the religious body, as it has the effect of always siding with the hierarchy. But the effects of this are more ambiguous than that. It is true that the polity approach defers to the hierarchy, but it is not the case that the hierarchy is always the most conservative faction of a church. In the Episcopal Church of the USA cases, for instance, the churches that have recently seceded from the national church are more conservative than the central organization. A better

The polity approach at least attempted to take religious institutions seriously and accord them a place in the protection of religious liberty. But there are important and troubling similarities between the doctrinal fidelity and polity approaches. In both cases, the court is led to make a religious judgment, in the former case about the content of doctrine, in the latter about the locus of authority. But especially in cases when the locus of authority is articulated in religious, rather than legal terms, there can be as much controversy about doctrine as there is about its proper interpreter. In some cases the interpretive authority has textual support in internal church law. In other cases, the judgment will be irreducibly religious, despite the express attempt of the court to disallow such exercise of judicial discretion.

C. Neutral principles of law approach

Nearly a century after *Watson*, the Court turned in a decidedly different direction. In a series of cases on ecclesiastical property disputes, the Court reaffirmed the principle that state courts could not decide church disputes by interpreting religious doctrine,[35] but permitted lower courts to apply a so-called "neutral principles" approach. The advantage to the courts was avoidance of considerations of religious doctrine.

[35] *Presbyterian Church v. Hull Church*, 393 US 440 (1969), Maryland v. VA churches 396 US 368, and Jones v Wolf, 443 US 595

> 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. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.

The advantage to churches was the ability to organize their polities as they saw fit, though amendment and revision of legal documents.

> Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general - flexibility in ordering private rights and obligations to reflect the intentions of the parties. 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.[36]

These two passages together seem to suggest that religious organizations may use the institutions of the common law—trusts and property arrangements, for instance—to give secular legal force to their ecclesiastical polities, and it expresses confidence in the flexibility of the common law to accommodate nearly any such polity, from the congregational structure of Baptists and Quakers to the elective eldership of Presbyterian and Reformed Churches, through to the centralized episcopal government of Anglicans and Roman Catholics (although it is not clear what force would be given to the latter polity's trans-national authority in the Holy See).[37]

But the *Jones* went further than recommending to churches that they employ the instruments of secular law. It also recognized them as legal authorities in their own right, and allowed state courts to consider their internal legal instruments as dispositive when secular legal instruments were unclear or incomplete.

> 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

[36] *Jones v Wolf*, 443 US 595, 603-04 (1979).

[37] Mention that FW Maitland had also endorsed flexibility, especially og the trust, in his earlier %%%

> church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. 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.[38]

The new approach, which states could adopt as an alternative to the polity approach, "requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church" but instructs it to "take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust." The interpretation of the meaning of religious concepts in these documents, however, required the court to "defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[39]

Three months after the *Jones* decision, The Episcopal Church held its General Convention. Guided by the paragraphs in the decision that invited churches to modify ecclesiastical instruments to ensure that parish property would be retained by the national church in cases of schism. [The Presbyterian church too, although it did so in the context of a church merger. Later cases complicate the issue. Need more history, more context. %%%]

Following the *Jones* decision, the neutral principles approach was adopted by an overwhelming majority of US states[40]. But the uniformity is deceptive. In truth, the twin imperatives of the *Jones* decision—the permission for state courts to apply neutral principles of law and the invitation for churches to enact their own law—stand in tension, and state courts, while claiming fidelity to the *Jones* decision, have interpreted it in radically different directions.[41]

Most of the controversies turn on the interpretation of religious charitable trusts. While churches may organize themselves in different ways, most

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[38] *Jones v Wolf*, 443 U.S. 595, 606 (1979).

[39] *Jones v Wolf*, 443 U.S. 595, 604 (1979).

[40] %%% possible exceptions are KY, MI, NV, and WV. HI, ID, NM, OR, RI, VT, and WY seem to have no cases. CHECK It has also been cited, though not accepted, in some Canadian jurisdictions Bentley v Anglican Synod of the Diocese of New Westminster, 2010 BCCA 506.

[41] Jeffrey Hassler, "A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife" 35 Pepperdine L. Rev. 399 (2008); Cameron Ellis, "Church Factionalism and Judicial Resolution: A Reconsideration of the Neutral-Principles Approach" 60 Alabama L. Rev. 1001 (2009).

choose some form of religious corporation,[42] or a combination of common law institutions. Whatever the legal form that the church takes, however, church property is often held in trust. This charitable trust is a legal instrument through which a *trustee* administers a certain property at the request of a *settlor* (who donates the property) for the benefit of a stated *cause* or *purpose* (say, the sustainment of a parish).[43] The trust itself may have a religious object, but it a secular instrument, and disputes arising from it are subject to resolution by state court.

The thorniest controversies arise when a trust is set up for the support of a local congregation which is a member of a more general church, and the congregation later attempts to break away from the general church, often citing doctrinal differences. If church assets, such as the building and treasury, are held in trust, it becomes important to determine whether the purpose of the trust is best fulfilled by the property remaining in the congregation or in the national church.

[Summary of the fault lines among state courts. May be skipped.]

State courts in Florida, Nevada, New Jersey, West Virginia, Michigan, and Texas have followed strict deference to denominational hierarchy in cases concerning ownership and control of property. To justify this, some courts reason that deference to a hierarchy's determination of the proper leadership of a local church entity is necessary because such decisions involve questions of doctrine and faith, while other courts consider these disputes to involve secular matters. The basic reasoning is that the church's hierarchical structure either creates an *implied trust* in favor of the hierarchy or grants control of property disposition to the hierarchy. When there is a schism, the court defers to the denominational hierarchy's determination of the leadership of the local congregation, and assigns the benefit of the trust to them.

This position is problematic for congregationally organized churches, since courts that follow a deferential approach may regard the existence of a national organization as evidence of hierarchical structure even if the local church does not consider itself subject to the national body. Some churches are explicit in considering the national body to be a mere coordinating agency, without practical authority over the local congregation (e.g. Baptists), while other churches have clear lines of authority that vest on national or transnational officials (e.g. Serbian Orthodox). In other church traditions, there is some dispute about where the lines of authority end (e.g.

[42] %%% list some examples, esp. the NYS Religious Corporations Act

[43] %%% This differs from an ordinary trust in that it is the cause or purpose, and not the welfare of a specific person, that is the beneficiary of the trust.

Episcopalians).

Courts in Alabama, California [double check; is the Episcopal Church Cases, 198 P.3D 66, 2009, consistent with strict neutral principles? %%%], Georgia, Illinois, Kentucky, Minnesota, New York, Ohio, Pennsylvania, and South Dakota have decided to apply a strict neutral principles approach which relies on the legal rules developed in trust, property, and corporate law when resolving church property disputes. They focus on where the title to the disputed property is vested. Without a clear showing that the grantor intended to create a trust, courts adhering to this approach will not impose a trust. In cases where an express charitable trust has been created, the court next determines whether the general church or the local congregation in the beneficiary. The hierarchy may determine the membership of a particular church as consisting only of those persons loyal to the hierarchy or its doctrine, but the court could still decide that the dissenting faction is the legal successor to the secular corporation that controls the disputed property. Here, denominational hierarchies may be less certain of their right to control property.

Courts in Colorado, Connecticut, Indiana, Iowa, Louisiana, Maryland, and Virginia have adopted an approach to church property disputes that is a mix of the deferential and neutral principles theories. Even when there is a clear showing that title is vested in the local congregation—that is, that the trust document states that the property to be used for the local church—the courts may still grant control of the property to the general church. There are two possible reasons why a court may do this. [Again, California seems to have moved in this direction %%%]

The first is a finding of intent, through which a court may determine that a title to property is impressed with an implied or express trust. The court may find that the intent to create a trust for the benefit of the national church arises from the wishes of the grantor or from the provisions. Because a careful examination of church doctrine is prohibited, courts often find even the mention of the general denomination in church documents sufficient to indicate an intention by the local congregation to be subject to hierarchical control. The deeds, incorporation documents, or bylaws may contain restrictions that the court will interpret as creating an implied trust in favor of the national entity (if there is express mention of a particular denomination in the deed, etc.) The same conclusion is reached when the canon or bylaws of the hierarchical restrict the holding and use of property. Some courts have maintained that a local church has implied its consent to general church control of property if it has previously sought hierarchical approval or permission before encumbering the property. Any history of subordination by the local church to hierarchical authority may be viewed as implying its intent to be subject to national control.

The second reason is a finding of consent. Regardless of where title is actually vested, the documents of a local church or its membership in a hierarchical organization indicate that the local entity has impliedly consented to control of its property by the general church. The courts will conclude that those loyal to the general church control the property whether they represent a majority or minority of the local membership. The court will defer to the documents ad to the hierarchy's decision, based not on polity, but on the language of the documents. The result in these cases is identical to that reaches in states that adopt the strict deference approach.

A CRITIQUE OF THE NEUTRAL PRINCIPLES APPROACH

[*This part is mostly a sketch of arguments to be filled out*.]

The neutral principles approach of *Jones v. Wolf* has yielded two interpretive currents: a strict and a hybrid approach. The more restrictive current would look to state-sanctioned legal institutions—deeds of trust, contracts, corporate charters—and interpret them as if the church was a non-religious organization. The broader approach would also look to internal church documents—constitutions, regulations, and the like—as sources of law, albeit not state law and not necessarily isomorphic with state law.

In a recent article [so recent, in fact, that I'm still trying to respond to it %%%] Michael McConnell and Luke Goodrich defend the strict neutral principles approach against the hybrid alternative.[44] This is the strongest case yet made for the strict approach not least because the authors defend it on the grounds of preserving the autonomy of religious bodies. The authors argue "that the strict approach is preferable to the hybrid approach in three main respects. First, it protects free exercise rights by giving churches flexibility to adopt any form of governance they wish. Second, it prevents civil courts from becoming entangled in religious questions. And third, it promotes clear, stable property rights."[45]

By contrast, the hybrid approach "by giving special weight to internal church rules … creates a dilemma: if the rules are interpreted by civil courts, those courts become entangled in religious questions; but if the court defers to an interpretation by the highest church authority, the church is converted into a hierarchical structure whether or not that is what the founders, donors, or members wanted. Even worse, the hybrid approach gives courts discretion to decide how much weight to give to internal church rules, and how much to defer to denominations on the interpretation of those rules. This gives

[44] MW McConnell and L Goodrich, ''On Resolving Church Property Disputes'' 58 Ariz. L. Rev. 307 (2016)

[45] McConnell and Goodrich, 327

judges tremendous flexibility to reach almost any result—making the outcome unpredictable and 'largely depende[nt] upon the predilections of the judges.'"[46]

I believe that the perils of the hybrid approach are exaggerated, and that there are theoretical and practical reasons for preferring deference to church authorities in interpreting relations of authority (including but not limited to authority over property).

[I intend to deal with the problems of entanglement and property rights eventually. For now I am concentrating on the effects of the hybrid and strict approaches on the form of polity, or the distribution of authority within the organization, because this seems to be the place where religious freedom is most likely to be infringed.]

A. Legal pluralism and Legal form

The strict neutral principles of law approach relies on the sufficiency of secular legal instruments to determine the form of an ecclesiastical polity and the exercise of authority within it, authority over property, ministry, membership and discipline. The models are obviously the charitable trust and the non-for-profit corporation.

But in the case of ordinary business or non-profit corporations, it is generally accepted that the entity does not come into existence until the legal formalities have been met. A corporate charter or a deed of trust are *constitutive* of the business corporation and the trust. In the case of religious institutions, this is not the case. The existence of the institution is prior to the secular legal forms through which it is recognized, and these forms are only *declarative* of its corporate existence, and only imperfectly so. State legal form would need to be complemented by looking at the organization's principles of the church and not adhered to blindly as if the secular form constituted the entire reality of the organization.

Strict adherence to secular instruments assimilates all churches to voluntary associations of various types, and especially to business corporations. But this has perverse effects when it comes to respecting the form of the organization.

[Explain more %%%]

The distinction between declarative and constitutive legal form is consistent with the tradition of British political pluralism and the more obviously pluralist members of the New Religious Institutionalism (Garnett, Horwitz, Dane, etc.).[47] Among the British pluralists, Frederick W. Maitland argues that the positive law should offer associations the broadest catalogue

[46] Idem 339

[47] %%%

of instruments to order their affairs as they see fit.[48] John N. Figgis agrees, and adds that the changes and amendments of the political constitution of a church should be in the hands of the corporate body, and that the state should have no part in shaping it, although he admits that the state may require marks of registration to ensure that the existence of the association is public and that it can answer to third parties and that the state is to be 'guardian of property and interpreter of contract'.[49] [%%% reference to Free Church Case]

But churches have their own internal law. A religious legal system, including its ecclesiology and canon, is a full-fleged legal system. On strictly positivist grounds, such a system has rules of recognition, interpretation, and change which are valid because they are so held by self-appointed legal officials. There is no need to engage with spiritual language to recognize church law as law. [%%% Raz, Marmor, Gardner, Shapiro acknowledge this; explain]. The question is, how does a church ensure that its law is given the fullest possible force in a secular legal system? How does a church ensure that its law determines the status of members, the appointment and authority of ministers, the relationship between national (or transnational) bodies and local churches, and the holding of property? This is what is at stake in church autonomy disputes.

Even on a strong religious institutionalist model, courts, third parties, and even church members need some institutions commonly recognized both by those inside and those outside the organization. The problem is that, for those inside the organization, the institutions should reflect the *nomos* of the group (e.g. the authority of any Catholic group must be subject to episcopal, not lay, control) while for third parties this *nomos* is irrelevant and often completely unknown. So, how can churches institutions that allow them to give full force to their authority structure, without requiring courts to reconstruct the doctrines or norms of the association. Constitutional protections of freedom of religion and assembly play an important part in securing autonomy of religious organizations. Most of the legal structure of ecclesiastical polities is not, however, the subject of constitutional law directly. The primary means of securing autonomy is legislation. Special civil legislation and ordinary civil law play a much larger role.

B. The problem of ratcheting

McConnell and Goodrich are correct that legal norms should not encourage certain ecclesiastical forms over others, either by directly favoring hierarchy or by creating incentives towards it. This, they argue, is the effect of the hybrid approach which, in considering internal church constitutions

[48] %%%
[49] %%%

which are presumably under hierarchical control, would lead to increased concentration of power in the hands of the highest church officials.

But it is not clear that either a strict or a hybrid approach leads to a ratcheting effect. Indeed, one of the clearest examples of increased hierarchization in American legal history involved ecclesiastical retrenchment in the face of a strict application of principles of law that ignored (willfully, in this case) the history, traditions, structure and internal norms of the religious body.

In the early nineteenth century, the Roman Catholic Church in the United States (and, to a lesser extent, in the Atlantic provinces of Canada) was fraught with struggles over the control of ecclesiastical institutions. Catholics in European countries where the Roman church was established or recognized through a concordat were used to having the authority of bishops recognized through the direct application of canon law over parish, priests, and laity, or through special legislation governing the organization of Roman Catholic institutions.[50] The parish retained legal personality and the laity were often involved in its administration, but if there was a dispute Episcopal authority was recognized as paramount, regardless of who ostensibly held title in a secular legal document. The structure of the church was laid out in canon law, and was considered binding on Catholics regardless of state forms of property ownership or administration.

> [Current Canon law on the subject below. Check Corpus Iuris Canonicum for law valid in 19th c. %%%
>
> Can. 22 Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise.
>
> Can. 113 §1. The Catholic Church and the Apostolic See have the character of a moral person by divine ordinance itself.
> §2. In the Church, besides physical persons, there are also juridic persons, that is, subjects in canon law of obligations and rights which correspond to their nature.
>
> Can. 114 §1. Juridic persons are constituted either by the prescript of law or by special grant of competent authority given through a decree. They are aggregates of persons (universitates personarum) or of things (universitates rerum) ordered for a purpose which is in keeping with the mission of the Church and which transcends the purpose of the individuals.
>
> Can. 1254 §1. To pursue its proper purposes, the Catholic Church by innate right is able to acquire, retain, administer, and alienate temporal goods independently from civil power.

[50] This legislation survives in Quebec. %%% Loi des fabriques, %%% Loi des eveques catholiques

§2. The proper purposes are principally: to order divine worship, to care for the decent support of the clergy and other ministers, and to exercise works of the sacred apostolate and of charity, especially toward the needy.]

In colonial America (both the future United States and Canada), American Catholics had set up their institutions without a thought for the legal and political condition of the the new country. After the revolution, tensions arose between laypersons and the episcopate over control. The issue was the discrepancy between canon law, which dictates that while parishes have independent legal personality (thus allowing them to contract for services and purchase or lease property on their own) they ultimately answer to the bishop of the diocese, as do all Catholics. But in the early nineteenth century, many parishes were administered by boards of lay trustees and organized through secular state trust instruments. Because of a mix of ethnic tensions in the immigrant Catholic population and the infusion of republican enthusiasm, some lay trustees (and a few sympathetic priests) decided that, if they held title to property under common law, they would use their legal position to assert their preferences over church policy and personnel, even over the bishops objections.

State courts, which leaned towards Protestant congregationalism and were suspicious for historical and political reasons (being also infected by the republican spirit) of Papist hierarchy, often sided with the trustees. After two decades of dispute, the Vatican became involved, and threatened the insurgent lay trustees with heresy (the heresy of "trusteeism"). In the United States, the Third Plenary Council of Baltimore laid down regulations that effectively ended the controversy. They recommended that all diocesan property in common law countries be vested in a trust whose only trustee was a corporation sole in the person of the Bishop. This effectively eliminated formal lay participation in the management of church property and made the American Church far more hierarchical than it had been even in countries with a formal concordat or an established Roman Catholicism.

[The other side of the argument would be cases in which a hybrid approach allowed for greater flexibility and decentralization, a ratcheting down" of hierarchy. I am working on this. The period of reorganization of the American Episcopal Church immediately after independence provides one possible example. The organization of the Baptist churches in the United States suggests how ratcheting of hierarchy may be avoided by explicit ecclesiastical norms. The broader point is that whether the hierarchy has the power to increase its authority or not is a matter of law—ecclesiastical law—and is not in this sense any different from the possibilities of centralization in, say, a federal system. Clearly written canon laws that require local control or allow for local vetoes may be as effective as strict adherence to secular trusts.]

Moreover, adherence to a strict neutral principles approach may force a clearly hierarchical church to ratchet down its form of property towards a congregational model, even when this is contrary to its theology or traditions. Consider the assessment that McConnell and Goodrich give of the so-called Dennis canon of the Episcopal Church. The Canon has been interpreted by its critics as a unilateral and illegal amendment of the trusts of countless congregations in favor of the national hierarchy. But it has been forcefully defended by its advocates as a mere exposition of the constitutive principles of the church itself.

The history of the Episcopal Church in the United States shows that ecclesiastical authority was contested in the early days of the republic, but settled into a stable form in which bishops, in council, eventually constituted a national body justified theologically on the ground that episcopal authority exists by mutual recognition of the conclave [unclear, look for references%%%]. There was no doubt, however, that the church was hierarchical, all the way though to its name. What distinguished Episcopalians from Baptists, for instance was the local congregation's subjection to a bishop.

A strict interpretation of the trusts which vest property in the local congregation does not settle the property question practically, because (with few exceptions) it is impossible to know whether property given in trust to a local Anglican parish, without mention of the diocese or the national church, was given preferentially *to the local church* or to *a church in communion* with the larger religious body. [NB. The Canadian courts solve this well. %%% But, regardless of the language of the trust, if the schismatic church is part of an episcopal church, one under the authority of a bishop, it would be a violation of that church's tenets to demand consultation of the lower order. In other words, it would turn an episcopal church into a congregational one, by presumptive fiat of the grantor of the trust. [Need more %%%

* * *

[Still missing: the Canadian approach (which shall be praised, except when it is not) and the problems of consistency among different fields of law—labor, property, torts, etc.]

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I'VE LEFT THIS TABLE HERE FOR REFERENCE. I WILL CLARIFY THE ARGUMENT IN THE TALK.