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Louis J. Sirico, Jr.

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* Professor of Law, Villanova University School of Law. B.A. Yale University, 1967; J.D. University of Texas, 1972. I wish to thank my research assistants, Andrew Soto and Lisa Kakaty.

CHURCH PROPERTY DISPUTES: CHURCHES AS SECULAR AND ALIEN INSTITUTIONS

LOUIS J. SIRICO, JR. *

INTRODUCTION

PROTECTING the autonomy of churches is a primary goal of the first amendment's religion clauses.[1] Central to the notion of autonomy is the right of a church to devise its own structure for governance.[2] A court's assumption that church organizational structures fit convenient stereotypes violates the first amendment.

Cases concerning church property disputes illustrate the peril of an unrefined understanding of church autonomy. When a dispute within a church leads to litigation, ownership of church property frequently is an issue. In a typical case, a local church withdraws from a denomination or splits into factions. The denomination, the local church, or a faction within the local church may claim the local church's assets. The free exercise clause requires a court to resolve the matter without ruling on any religious controversy that lies at the heart of the dispute.[3]

In the past few years, church property disputes have generated a number of significant cases. In 1979, the Supreme Court made clear that courts have at their disposal more than one method for resolving these cases.[4] Since then, supreme courts and appellate courts in at least

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1. *See, e.g.*, Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 119 (1952); Everson v. Board of Educ., 330 U.S. 1, 16 (1947); M. Howe, The Garden and the Wilderness 5-10 (1965); L. Tribe, American Constitutional Law § 14-1, at 812 (1978); Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1373 (1981).

The religion clauses state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

2. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976).

3. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447, 449 (1969).

4. *See* Jones v. Wolf, 443 U.S. 595, 602-06 (1979) (a court may employ either the neutral principles of law or deference approaches). For a brief description of the approved methods, see *infra* text accompanying notes 13 & 14. In addition to *Jones*, the leading Supreme Court cases on this issue are Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970) (per curiam); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church, 363 U.S. 190 (1960) (per curiam); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

For scholarly discussions on the issue published since *Jones v. Wolf* see, 3 R. Rotunda,

twenty-five states have published opinions in which they either have reaffirmed their traditional methods for resolving church property disputes or have adopted new methods.[5] Most courts have failed to give a de-

J. Nowak & J. Young, Treatise on Constitutional Law § 21.12 (1986); Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291 (1980); Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 Calif. L. Rev. 1378 (1981); Laycock, *supra* note 1, at 1394-98, 1403-06; Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 Calif. L. Rev. 847, 858-68 (1984); Oaks, *Trust Doctrines in Church Controversies*, 1981 B.Y.U. L. Rev. 805; Sirico, *The Constitutional Dimensions of Church Propery Disputes*, 59 Wash. U.L.Q. 1 (1981); Young & Tigges, *Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction Over Ecclessiastical Disputes*, 47 Ohio St. L.J. 475 (1986); Note, *Church Property Disputes in the Age of "Common-Core Protestantism": A Legislative Facts Rationale for Neutral Principles of Law*, 57 Ind. L.J. 163 (1982).

5. *See* Harris v. Apostolic Overcoming Holy Church of God, Inc., 457 So. 2d 385, 387 (Ala. 1984); Trinity Presbyterian Church v. Tankersley, 374 So. 2d 861, 866 (Ala. 1979), *cert. denied*, 445 U.S. 904 (1980); Skelton v. Word Chapel, Inc., 130 Ariz. 543, 545, 637 P.2d 753, 755 (Ct. App. 1981); Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 614-15, 171 Cal. Rptr. 541, 549, *cert. denied*, 454 U.S. 864 (1981); Bishop & Diocese v. Mote, 668 P.2d 948, 950 (Colo. Ct. App. 1983), *rev'd en banc*, 716 P.2d 85 (Colo.), *cert. denied*, 107 S. Ct. 102 (1986); New York Annual Conference of the United Methodist Church v. Fisher, 182 Conn. 272, 283, 438 A.2d 62, 68 (1980); Mills v. Baldwin, 377 So. 2d 971, 971 (Fla. 1979) (per curiam), *cert. denied*, 446 U.S. 983 (1980); Jones v. Wolf, 244 Ga. 388, 388, 260 S.E.2d 84, 84 (1979), *cert. denied*, 444 U.S. 1080 (1980); Werling v. Grace Evangelical Lutheran Church, 139 Ill. App. 3d 496, 498-99, 487 N.E.2d 990, 992 (1985); Grace Evangelical Lutheran Church v. Lutheran Church-Missouri Synod, 118 Ill. App. 3d 151, 156, 454 N.E.2d 1038, 1042 (1983), *cert. denied*, 469 U.S. 820 (1984); Galich v. Catholic Bishop, 75 Ill. App. 3d 538, 548, 394 N.E.2d 572, 575 (1979), *cert. denied*, 445 U.S. 916 (1980); Hinkle Creek Friends Church v. Western Yearly Meeting of Friends Church, 469 N.E.2d 40, 43 (Ind. Ct. App. 1984); Grutka v. Clifford, 445 N.E.2d 1015, 1018 (Ind. Ct. App. 1983), *cert. denied*, 465 U.S. 1006 (1984); Marich v. Kragulac, 415 N.E.2d 91, 96 (Ind. Ct. App. 1981); Fonken v. Community Church, 339 N.W.2d 810, 818 (Iowa 1983); Fluker Community Church v. Hitchens, 419 So. 2d 445, 447 (La. 1982); Graffam v. Wray, 437 A.2d 627, 634 (Me. 1981); Parent v. Roman Catholic Bishop, 436 A.2d 888, 890 (Me. 1981); Babcock Memorial Presbyterian Church v. Presbytery of Baltimore, 296 Md. 573, 588-89, 464 A.2d 1008, 1016 (1983), *cert. denied*, 465 U.S. 1027 (1984); Antioch Temple, Inc. v. Parekh, 383 Mass. 854, 868, 422 N.E.2d 1337, 1346 (1981); Bennison v. Sharp, 121 Mich. App. 705, 713, 723-24, 329 N.W.2d 466, 470, 474-75 (1982); Piletich v. Deretich, 328 N.W.2d 696, 701 (Minn. 1982); Struemph v. McAuliffe, 661 S.W.2d 559, 564 (Mo. Ct. App. 1983), *cert. denied*, 467 U.S. 1216 (1984); Zaiser v. Miller, 656 S.W.2d 312, 316-17 (Mo. Ct. App. 1983); Tea v. Protestant Episcopal Church, 96 Nev. 399, 402, 610 P.2d 182, 184 (1980); Diocese of Newark v. Burns, 83 N.J. 594, 598-99, 417 A.2d 31, 33-34 (1980), *cert. denied*, 449 U.S. 1131 (1981); Protestant Episcopal Church v. Graves, 83 N.J. 572, 580, 417 A.2d 19, 24 (1980), *cert. denied*, 449 U.S. 1131 (1981); First Presbyterian Church v. United Presbyterian Church, 62 N.Y.2d 110, 120, 464 N.E.2d 454, 459-60, 476 N.Y.S.2d 86, 92, *cert. denied*, 469 U.S. 1037 (1984); Walters v. Braswell, 49 N.C. App. 589, 593, 272 S.E.2d 363, 365 (1980), *review denied*, 301 N.C. 727, 276 S.E.2d 289 (1981); Matz v. Salem Church, No. 1222, slip op. at 10 (Ohio Ct. App. Sept. 23, 1986); Presbytery of Beaver-Butler v. Middlesex Presbyterian Church, 507 Pa. 255, 265-66, 489 A.2d 1317, 1323, *cert. denied*, 106 S. Ct. 198 (1985); Board of Bishops of the Church of the Living God v. Milner, — Pa. Commw. —, 513 A.2d 1131, 1133 (1986); Mikilak v. Orthodox Church, — Pa. Commw. —, 513 A.2d 541, 545 (1986); Presbytery of Donegal v. Wheatley, —Pa. Commw. —, 513 A.2d 538, 539 (1986); Presbytery of Donegal v. Calhoun, —Pa. Commw. —, 513 A.2d 531, 534 (1986); Foss v. Dykstra, 342 N.W.2d 220 (S.D. 1983);

tailed justification for choosing one approach over another. I believe that this failure has occurred because the available methods are intellectually unsatisfactory. Each test requires assuming that a church fits an organizational stereotype that may or may not be accurate.

In a previous Article,[6] I raised constitutional objections to the tests that the Supreme Court currently approves, and I offered an alternative proposal. In this Article, I deal with a different, but related concern. According to my argument, the judicial tests are legitimate only if one assumes that they are based on accurate descriptions of church structure. I argue that each test rests on a description that may be inaccurate in a given case and, therefore, has detrimental consequences for churches and society.

I also argue that church property cases are but one illustration of the Supreme Court's reliance on questionable assumptions about church structure. According to my argument, the Court uses assumptions to resolve intractable problems in the church-state field. I call for less reliance on these legal fictions, even when it requires the Court to admit that its decisions are imperfect.

This Article illustrates the problem of characterizing church structures by focusing on a controversy that recently spawned litigation. The dispute arose when the Protestant Episcopal Church authorized the ordination of women, and a number of parishes consequently withdrew from the denomination.[7] This illustration involves an established church with a familiar structure and a religious controversy that is not esoteric. I thus emphasize that the problem of characterizing church structure faces all religious institutions, not merely small sects beset with controversies that outsiders view as inconsequential.

In Part I of this Article, I briefly describe the use of structural stereotypes to resolve church property disputes. I also describe the formal structure of the Protestant Episcopal Church. In Part II, I analyze the standard judicial tests for resolving church property disputes and show

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Church of Christ v. Carder, 105 Wash. 2d 204, 713 P.2d 101, 104 (1986); Southside Tabernacle v. Pentecostal Church of God, 32 Wash. App. 814, 822, 650 P.2d 231, 236 (1982).

Courts also have employed these methods in dealing with other types of intrachurch disputes. *See, e.g.*, Smith v. Riley, 424 So. 2d 1166, 1170-71 (La. Ct. App. 1982) (enjoining pastor from performing church functions until an election of the board of trustees could be called based on interpretation of articles of incorporation under neutral principles test); Reardon v. Lemoyne, 122 N.H. 1042, 1048-49, 454 A.2d 428, 432-33 (1982) (affirming court's jurisdiction to determine secular contract rights of parochial school teachers); Zimbler v. Felber, 111 Misc. 2d 867, 878-79, 445 N.Y.S.2d 366, 373-74 (Sup. Ct. 1981) (requiring board of trustees to extend rabbi's employment contract in accordance with membership vote).

6. *See* Sirico, *supra* note 4. That Article offers a detailed analysis of the Supreme Court cases, a critical evaluation of the constitutionality of the judicial tests, and a proposal. The present Article offers my reflections after several years of thinking about the issue. Here I deal with what I see as the essential underlying issues and place them in the broad context of church-state relations.

7. *See infra* text accompanying notes 37-41.

that they rest on questionable assumptions about church organization. I then propose an alternative test. Finally, in Part III, I discuss how this approach may be useful in the broader context of church-state relations.

I. OVERVIEW

A. *Church Autonomy and Structural Stereotypes*

Concern for institutional church autonomy dictates that any judicial resolution of an internal dispute conform to the disposition by an authoritative church body or with the disposition mandated by internal church rules. Concern for the rights of church members, however, dictates that any judicial resolution conform to the reasonable expectations of those members. The results dictated by the former and latter concerns may conflict. Fraud, collusion, or arbitrariness may taint the decision of the authoritative church body.[8] Church rules as well as civil and religious documents reflecting property ownership may be ambiguous.[9] The church body and the disaffected church members, therefore, may honestly disagree over the proper disposition. Conflict, then, may arise between the concern for institutional church autonomy and the concern for the rights of church members.

In a parallel dispute involving a secular voluntary association, a court would resolve the conflict by interpreting the relevant rules, agreements, and conduct of the parties.[10] The court then would assert that its interpretation reflects what should have been the parties' reasonable expectations. In a religious dispute, however, the constitutional ban on deciding doctrinal issues prevents a court from entertaining all the evidence and all the substantive arguments. According to the Supreme Court, the free exercise clause even forbids a court from ruling on charges of a church's arbitrariness and perhaps fraud or collusion.[11] Incomplete evidence and excluded arguments render a court unable to ascertain the reasonable expectations of the parties.

Courts nevertheless must resolve the conflict with persuasive argument. To do so, they have employed three tests that purport to permit determinations without the need to rely on forbidden evidence and arguments: the departure-from-doctrine test, the deference test, and the neutral principles test. The departure-from-doctrine test awards church

8. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 706-08 (1976) (plaintiff alleging arbitrariness by church's governing authority).

9. *See, e.g.*, New York Annual Conference of the United Methodist Church v. Fisher, 182 Conn. 272, 273-74 , 438 A.2d 62, 64 (1980); Piletich v. Deretich, 328 N.W.2d 696, 698 (Minn. 1982).

10. *See, e.g.*, Iowa Ass'n of the Blind v. Nemmers, 339 N.W.2d 835, 840, 842-43 (Iowa Ct. App. 1983); Grand Lodge v. Van Camp Lodge No. 140 IOOF, 330 Pa. Super. 267, 270-72, 479 A.2d 544, 546-47, (1984).

11. *See* Jones v. Wolf, 443 U.S. 595, 609 n.8 (1979) (Court declines to discuss the issue of fraud or collusion); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (Court holds that first amendment precludes inquiry into charges of arbitrariness). For discussion of this issue, see *infra* note 61.

property to the faction adhering to authentic church doctrine.[12] By assuming that a court can adjudge doctrinal matters, the test permits it to evaluate a church controversy by using the same criteria that it might apply to a secular association. The departure-from-doctrine test thus places churches in the mold of the secular institution.

The deference test calls for a court to resolve the dispute according to the determination of the church's highest authority.[13] Deference is so complete that it requires ignoring charges of fraud, collusion and arbitrariness. By relying exclusively on an autonomous church ruling, this test treats churches as alien from secular society.

The neutral principles test permits a court to ascertain who holds legal title to the property by interpreting and applying secular provisions of the church's governing documents.[14] The test attempts a compromise between the secular and alien models. It fails, however, because of its excessive formalism. The neutral principles test assumes that a church allocates property rights according to the language in selected provisions of church documents and legal papers.

The assumptions underlying the respective tests offer insight into how society views the church's role in the community. The two most disparate tests illustrate the point. The deference tests permits characterizing churches as utterly different from other societal institutions and thus marks churches as alien. Society may accord alien institutions minimal influence in ethical and political decisionmaking. The departure-from-doctrine test, conversely, permits characterizing churches as indistinguishable from other societal institutions and may accord limited respect to their role in society. A church's influence derives in part from its claim to base its convictions on nonsecular values. Viewing a church as no different from other institutions implicitly denies its claim to have something special to offer society. A court, then, may improperly assume that a church's organizational structure is either extremely different or no different from that of other American voluntary associations.

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12. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449-50 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727-29 (1872); Attorney General *ex rel.* Mander v. Pearson, 3 Mer. 353, 36 Eng. Rep. 135, 147-48 (Ch. 1817).

In 1969, the Supreme Court held the test unconstitutional, because it permits courts to resolve doctrinal matters in violation of the first amendment. *See Mary Elizabeth Blue Hull Memorial*, 393 U.S. at 449-50 (1969). In Watson v. Jones, 80 U.S. (13 Wall.) 679, 727-29 (1872), the Court had rejected the test under the federal common law. Many state courts, however, continued to accept the test as part of their respective state laws. *See* Holiman v. Dovers, 236 Ark. 211, 366 S.W.2d 197, 206-07 (1963) (in 1963, the test prevailed in 28 states, including Arkansas).

13. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710-11 (1976) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 727, 728-29 (1872)).

14. Jones v. Wolf, 443 U.S. 595, 599-604 (1979); Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring).

These assumptions are consistent with the view that churches have minimal influence on society or, at least, no special claim to be heard.

For those who believe that churches make a significant societal contribution[15] and who also favor consistency between reality and the assumptions underlying legal doctrine, the tests for resolving internal church disputes are defective. For those who also believe that the assumptions underlying specific legal doctrines influence other legal doctrines and, perhaps, societal viewpoints, the tests are even more troublesome.

B. *The Episcopal Church as an Illustration*

A recent controversy within the Episcopal Church furnishes a concrete factual background against which to analyze the difficulties in resolving church property disputes. The Protestant Episcopal Church in the United States of America[16] has three levels of government: the national church, the diocese, and the local parish. The national church, which currently includes 116 dioceses,[17] is governed by the General Convention and the Presiding Bishop.[18] The General Convention is comprised of the House of Bishops and the House of Deputies.[19] The House of Bishops consists of all the bishops of the Church.[20] The House of Deputies consists of representatives from the dioceses. Each diocese sends equal numbers of clergy and lay people as representatives.[21] The House of Bishops elects the Presiding Bishop from its membership, subject to confirmation by the House of Deputies.[22] Governance of a diocese lies with a bishop and a diocesan convention, which is comprised of parish clergy and elected lay representatives.[23]

A parish normally is incorporated as a nonprofit corporation.[24] Parish

15. *See, e.g.*, Sirico, *The Secular Contribution of Religion to the Political Process: The First Amendment and School Aid*, 50 Mo. L. Rev. 321, 325-28 (1985) (religion contributes to society by urging virtuous decisionmaking and checking abuses in the political process); Smith, *The Special Place of Religion in the Constitution*, 1983 Sup. Ct. Rev. 83, 100-03, 113-16 (religion is part of the spiritual traditions of American society and contributes to its pluralism).

16. The denomination, also known as the Episcopal Church, is a constituent member of the Anglican Communion, a fellowship in communion with the See of Canterbury. Its constitution was adopted in Philadelphia in 1789 and has been amended in subsequent years. *Constitution of the General Convention of the Protestant Episcopal Church in the United States of America*, preamble. For a history of the church's formation from the remnants of the Anglican Church in the American colonies and its reconciliation with the Church of England after the American Revolution, see F. Mills, Bishops by Ballot: An Eighteenth Century Ecclesiastical Revolution (1978).

17. F. Mead, Handbook of Denominations in the United States 106 (S. Hill rev. 8th ed. 1985). Seventeen of the dioceses are overseas missionary dioceses.

18. *Constitution of the General Convention of the Protestant Episcopal Church in the United States of America* art. I.

19. *Id.* at art. I, § 1.

20. *Id.* at art. I, § 2.

21. *Id.* at art. I, § 4

22. *Id.* at art. I, § 3.

23. *See* Bennison v. Sharp, 121 Mich. App. 705, 710, 329 N.W.2d 466, 468 (1982).

24. *See, e.g.*, Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 604, 606,

members elect wardens and members of the vestry.[25] Vestry members are the parish's agents and legal representatives in all matters concerning its corporate property and the relations of the parish to its clergy.[26] The rector presides at vestry meetings.[27]

Secular laws and diocesan rules affecting church structure vary according to state and diocese.[28] Nonetheless, some generalizations are possible. The diocesan constitution contains an acknowledgment that the diocese is a constituent part of the national church. The constitution may state that the diocese "accedes to the doctrine, discipline, worship, constitution, canons and authority" of the Episcopal Church.[29] Diocesan documents require some affirmation of allegiance on the part of the parishes comprising the diocese. In like manner, the parish articles of incorporation may declare that the parish forms a constituent part of the diocese in the national church and that the constitutions, canons, and discipline of the diocese and national church will always form a part of its articles and laws.[30]

The diocesan canons may state that parish by-laws "shall be consistent" with the constitutions and canons of the General Convention and the diocese.[31] They may further require that a parish be forever bound by the ecclesiastical authority of the diocesan bishop and the national church, that the parish incoporate into its by-laws the constitutions and canons of the diocese and national church, and that the parish accede to the constitution, canons, doctrine, and worship of the national church

171 Cal. Rptr. 541, 544 (California parishes are normally nonprofit corporations), *cert. denied*, 454 U.S. 864 (1981). *See* Bennison v. Sharp, 121 Mich. App. 705, 709, 329 N.W.2d 466 (1982) (citing Michigan statute providing for incorporation of Episcopal churches).

25. *See Canons of the Protestant Episcopal Church in the United States of America* Title I, Canon 13 § 1.

26. *Id.* at Title I, Canon 13 § 2.

27. *Id.* at Title I, Canon 13 § 3.

28. With the exceptions of Virginia and West Virginia, all states provide some form of corporate status for church organizations. In some states, churches may incorporate either under a general corporation act or under a general nonprofit corporation act. In other states, special statutes are designed for the incorporation and governance of certain specific denominations. Examples of statutes regulating the Episcopal Church include Mass. Gen. Laws Ann. ch. 67, § 39 (Law. Co-op. 1978); N.J. Stat. Ann. §§ 16:12-1 to 16:12-31 (West 1984 & Supp. 1986); N.Y. Relig. Corp. Law §§ 40-49, 55 (McKinney 1952 & Supp. 1986). These statutes seek to conform the corporate law to the particular structure of the church. For a comprehensive treatment of state laws governing the corporate status of churches, see Kauper & Ellis, *Religious Corporations and the Law*, 71 Mich. L. Rev. 1499 (1973). If a statute required a church to deviate from its religious beliefs regarding internal church affairs, the legislation would be vulnerable to attack under the free exercise clause. *Id.* at 1566-68.

29. *See, e.g.*, Bennison v. Sharp, 121 Mich. App. 705, 719, 329 N.W.2d 466, 472 (1982).

30. *See, e.g.*, Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 607-10, 171 Cal. Rptr. 541, 544-46, *cert. denied*, 454 U.S. 864 (1981).

31. *See, e.g.*, Bennison v. Sharp, 121 Mich. App. 705, 719, 329 N.W.2d 466, 472 (1982).

and the constitutions and canons of the diocese.[32]

In 1980, an amendment to the denomination's canon on business affairs became effective. It provides that all real property held by any local parish is held in trust for the national church and the diocese in which it is located.[33] Since then, dioceses have adopted similar statements in their governing documents.[34] Prior to 1980, some dioceses already included statements about parish property in these documents. Some required written permission of diocesan authorities before the vestry could sell, convey, or mortgage a parish's real property.[35] Others declared that when a parish dissolves, it must convey its property to the diocese.[36]

In 1976, the national church's General Convention amended its canons to institute various changes in the church. The most prominent changes were revising the Book of Common Prayer[37] and authorizing the ordination of women.[38] The majority of members in a number of

32. *See, e.g.*, Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 607-10, 171 Cal. Rptr. 541, 544-46, *cert. denied*, 454 U.S. 864 (1981).

33. The amendment reads:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Canons of the Protestant Episcopal Church in the United States of America Title I, Canon 6 § 4. Even prior to this amendment, the canon long had contained a provision that arguably asserted diocesan ownership of parish property:

> No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese.

Id. at Title I, Canon 6 § 3.

34. The 1980 amendment implicitly states that it is confirming the existing state of affairs. The canon thus does not require a diocese to revise its documents to incorporate the amendment: "The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust." *Id.* at Title I, Canon 6 § 5.

35. *See, e.g.*, Bennison v. Sharp, 121 Mich. App. 705, 719, 329 N.W.2d 466, 473 (1982). *See also Canons of the Protestant Episcopal Church in the United States of America* Title I, Canon 6 § 3 (property cannot be alienated without the written consent of the Bishop and Standing Committee of the diocese) (quoted *infra* note 33).

36. *See, e.g.*, Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 608, 171 Cal. Rptr. 541, 545, *cert. denied*, 454 U.S. 864 (1981).

37. The General Convention approved usage of the Proposed Book of Common Prayer. *See* Lyles, *Common Prayer and an Uncommon Convention*, 93 Christian Century 829 (1976). In 1979, the General Convention approved it as the Standard Book of Common Prayer. *See Canons of the Protestant Episcopal Church in the United States of America* Title II, Canon 3 § 1.

38. *See, e.g.*, Lyles, *Episcopalians: Wounded Healers*, 93 Christian Century 803 (1976) (discussing church division over ordination of women); Plowman, *The Episcopal Church: Women are Winners*, 21 Christianity Today 44 (1976) (describing the contro-

parishes objected to the changes and voted to withdraw from the denomination.[39] In several instances, the seceding parishes claimed ownership of parish property and engaged in litigation with the diocese. Some parishes won,[40] and some lost.[41]

In this Article, I illustrate my analysis with the type of dispute that might arise in such a case. To simplify the analysis, I assume that the ordination of women was the issue that triggered the parish's secession. I also assume that at the time of secession, the governing documents of the national church, the diocese, and the parish did not expressly place ownership of parish property in the hands of the diocese or parish.

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versy raging over ordination of women); Raeside, *Episcopal Reconciliation in Minneapolis?*, 36 Christianity & Crisis 232 (1976) (describing the convention that approved ordination of women).

This issue has been one of continuing controversy within the church. The 1970 General Convention included women for the first time. It permitted women to become deacons, an order below that of priests, but refused to permit them to become priests. *See* Politzer & Chandler, *The Episcopal Church Convention*, 15 Christianity Today 143 (1970). In 1973, the House of Bishops approved a resolution allowing the ordination of women, but the House of Deputies narrowly defeated it. *See* Politzer & Forbes, *The Episcopal Church: Renewal on the Right*, 18 Christianity Today 115 (1973); Rogers, *Episcopalian Convention: "Thou Shalt Not Polarize,"* 90 Christian Century 1046 (1973). In 1974, three retired bishops nontheless ordained women to the priesthood and ignited a controversy over the validity of the ordinations. For an exploration of the controversy, see 34 *Christianity & Crisis* 187-99 (1974) (special issue devoted entirely to the controversy). The Church of England continues to delay confronting the issue. *See* Slack, *No Women's Ordination for Anglicans—Yet*, 103 Christian Century 700 (1986).

39. *See, e.g., Distress Among Episcopalians*, 21 Christianity Today 361 (1976) (describing various movements within the Church against ordination of women); Hyer, *Who Owns Ascension Church?* 96 Christian Century 876 (1979) (describing the legal fight over ownership of local church's property after secession). Some disaffiliated churches joined the newly formed Anglican Church of North America. *See* F. Mead, *supra* note 17, at 109. Other associations also have formed. *See* Letter from Alexander Seabrook, 104 Christian Century 68 (1987).

40. *See, e.g.*, Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 625-26, 171 Cal. Rptr. 541, 555-56, *cert. denied*, 454 U.S. 864 (1981) (three of four local churches entitled to the parish property over the Episcopal Church); Bishop & Diocese v. Mote, 668 P.2d 948, 954 (Colo. Ct. App. 1983) (awarding church property to majority members of parish), *rev'd en banc*, 716 P.2d 85 (Colo.), *cert. denied*, 107 S. Ct. 102 (1986).

41. *See, e.g.*, Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 626, 171 Cal. Rptr. 541, 556, *cert. denied*, 454 U.S. 864 (1981) (one of four local churches lost in this consolidated proceeding to determine ownership of parish property); Bennison v. Sharp, 121 Mich. App. 705, 720, 329 N.W.2d 466, 473 (1982) (although majority of the parish may secede, it has no right to use the parish property, because minority properly represents the congregation); Tea v. Protestant Episcopal Church, 96 Nev. 399, 401-03, 610 P.2d 182, 184 (1980) (under deference test diocese is entitled to parish property); Protestant Episcopal Church v. Graves, 83 N.J. 572, 582, 417 A.2d 19, 25 (1980) (defendants may leave parish but may not take church property), *cert. denied*, 449 U.S. 1131 (1981); Diocese of Newark v. Burns, 83 N.J. 594, 417 A.2d 31 (1980) (same), *cert. denied*, 449 U.S. 1131 (1981).

II. THE JUDICIAL TESTS

A. *The Departure-from-Doctrine Test*

Under the departure-from-doctrine test, church property is held in an implied trust for those who continue to follow the doctrine to which the church's founders adhered.[42] In a hierarchical church,[43] the implied trust benefits the general church, provided it continues to adhere to the doctrines espoused when the local church became an affiliate.[44]

If this now unconstitutional test[45] were applied to the recent Episcopal cases in which the ordination of women was at issue, a local church dissenting from the new practice would argue that the hierarchical denomination[46] had broken a condition of an implied trust. According to the argument, the local church joined the denomination and implicitly entrusted property to it on the condition that the denomination continue to adhere to the fundamental doctrines it espoused at the time the trust was created. The local church would maintain that those doctrines include limiting ordination to men and that the ordination of women is a deviation sufficiently radical to constitute a departure from doctrine and a violation of the trust. The local church, therefore, would claim ownership of the local property.[47]

The departure-from-doctrine test, thus, requires three assumptions about a church and its members. First, it assumes that the local church founders did not make outright gifts, but created an implied trust that placed restrictions on the use of their contributions. Second, the test assumes that the founders intended their gifts to support the church only as long as the church's doctrines remained unchanged. Third, the test assumes that the founders' intent must prevail over the intent of subse-

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42. *See supra* note 12. For further discussion of the doctrine, see Kauper, *Church Autonomy and the First Amendment: The* Presbyterian Church *Case*, 1969 Sup. Ct. Rev. 347, 349-56; Oaks, *supra* note 4, at 826-29, 832-39; Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 Harv. L. Rev. 1142, 1145-54, 1161-62, 1167-75 (1962).

43. The Court has classified churches as either congregational or hierarchical. In a congregational church, the local church is self-governing and fully autonomous in doctrinal matters. Authority may lie with majority rule or some other internal decisionmaking mechanism. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 723-25 (1872); Church of Christ v. Carder, 105 Wash. 2d 204, 208, 713 P.2d 101, 104 (1986). In a hierarchical church, the local church is a subordinate member of a general church, which enjoys ultimate authority. *See Watson*, 80 U.S. at 722-27; Fonken v. Community Church, 339 N.W.2d 810, 816-17 (Iowa 1983). The Court has not yet acknowledged the possibility of a hybrid organization in which the general church enjoys spiritual authority, but not control, over a local church's property.

44. *See* Kauper, *supra* note 42, at 349-56.

45. *See supra* note 12 .

46. The Episcopal Church is widely recognized as a hierarchical church. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-15 n.8 (1976) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872)).

47. *See* Hyer, *supra* note 39 (reporting on attorney making this argument in church property litigation).

quent donors, who are presumed to have made contributions to support the founders' implied trust.

These assumptions, of course, may or may not comport with reality. The test ignores the possibility that the founders contributed to the church not only because of its doctrinal positions, but also for other reasons, such as its value to its members and to society, social pressure to contribute, or the likelihood of advancing the donor's reputation. It also ignores the possibility that the founders made unrestricted gifts. It further ignores the possibility that subsequent donors intended to support the church as they envisioned it and not as the founders did.

The departure-from-doctrine test, then, requires a court to treat a church as a stereotype, namely a trust-based organization based on the preceding, possibly erroneous, assumptions. To return to the Episcopal example, this model might accurately describe some local churches, but common experience and intuition suggest that it does not describe most of them. Most local church members probably would be surprised to learn that their church is controlled by the strictures of an implied trust in favor of the diocese and the national church.

The test also indulges in assumptions about judicial competence to interpret religious doctrine, to determine which doctrines are fundamental to a church, and to decide which deviations from doctrine are sufficiently radical to constitute a departure from doctrine under the test.[48]

By imposing on churches a trust-based organizational model and by making assumptions about judicial competence, the departure-from-doctrine test enables courts to treat churches like secular institutions. The test presupposes that churches conform to a familiar model employed by some secular organizations and that courts are as capable of grappling with a church dispute as they are of grappling with an analogous dispute in a secular organization.

Use of this secular model has obvious detrimental consequences. Any change or refinement of religious doctrine carries the risk of financial loss to the church regardless of its actual structure. To the extent courts impose a structure, the church is incapable of defining its own organization.

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48. The classic confession of limited judicial competence in this matter came from Lord Eldon, who authored the test. In a case turning on a refined doctrinal distinction, he wrote:

> I have had the mortification, I know not how many times over, to endeavour myself to understand what these principles were, and whether they have, or have not, deviated from them; and I have made the attempt to understand it, till I find it, at least, on my part to be quite hopeless. . . . [A]fter racking my mind again and again upon the subject, I really do not know what more to make of it.

Craigdallie v. Aikman, 2 Bligh 529, 543-44, 4 Eng. Rep. 435, 440-41 (H.L. 1820) (Scot.). *See also* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-15 n.8 (1976) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872)) (decisions of a hierarchical church that has a body of constitutional and ecclesiastical law are not open to judicial review).

Moreover, the risk of judicial error in interpreting religious doctine is inevitable.

The departure-from-doctrine test, however, suffers from a more central flaw: it fails to recognize the degree to which our society protects religious autonomy. Two hypothetical cases furnish an illustration. In the first case, the Episcopal Church conforms to the trust-based organizational model and a local church claims property rights on the ground that the ordination of women constitutes a substantial departure from traditional doctrine. In the second case, a secular male fraternal organization also conforms to the trust model and has just voted to admit women to membership. A local chapter then claims property rights in its facilities and asserts that the general organization breached the implied trust.

In the church litigation, the court might inaccurately determine whether the doctrine of male ordination is a fundamental doctrine and whether the ordination of women is so substantial a departure from the doctrine that the denomination has forfeited property to the local church. In the litigation concerning the fraternal organization—assuming arguendo that no civil rights laws apply—a court might inaccurately determine the importance of the all male policy to the organization's founders. The court also might misunderstand the policy or decide incorrectly whether the new admissions rule constitutes so substantial a change in policy that it violates the founders' intent. Given these risks, a court might prove reluctant to involve itself in either dispute. If the court dealt directly with the substantive issue in the secular dispute, however, its good faith resolution would be viewed as an acceptable exercise in judicial decisionmaking.[49] A parallel decision on the church dispute, however, would be constitutionally improper.

Lack of judicial competence is not the reason for the unconstitutionality of the departure-from-doctrine test. Controversies that beset a fraternal organization might be just as subtle and arcane as those that beset a church.[50] The risk of error arises in deciding either a secular or religious issue. The constitutional error arises in the church case because our society requires a lower risk of judicial error in deciding controversies within churches than in deciding controversies within secular organizations.

The central flaw in the departure-from-doctrine test, then, is its failure to recognize the protection that our society accords religious autonomy. In rejecting the test in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[51] the Supreme

49. *See, e.g.*, Zelenka v. Benevolent & Protective Order of Elks of the United States, 129 N.J. Super. 379, 383, 324 A.2d 35, 37 (noting judicial reluctance to intervene, but nonetheless intervening), *certification denied*, 66 N.J. 317, 331 A.2d 17 (1974). The classic discussion of such cases is Chafee, *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930).

50. *See* Chafee, *supra* note 49, at 1021, 1023 (identifying a "dismal swamp" policy that discourages courts from intervening in such cases).

51. 393 U.S. 440 (1969).

Court focused on the threat to religious freedom: "If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[52] Churches, then, are different from secular organizations. Our society gives them a greater right to autonomy and therefore offers them greater protection from the risk of judicial error.

The *Presbyterian Church* opinion goes no further to justify the additional autonomy than to celebrate the notion of religious freedom and to cite the Constitution's free exercise clause.[53] If pressed for a more complete explanation, the Court presumably would explain that religious autonomy better enables churches to perform their salutary roles in society and that the collective religious conscience is inherently valuable to church members and to society.[54]

Up to three assumptions, then, may underlie the constitutional ban on the departure-from-doctrine test. First, churches need a great degree of religious autonomy to function properly. Second, the church's role in society is more important than the role of its secular counterparts. Third, the religious conscience is more inherently valuable than the nonreligious conscience. Realistically, the first of these assumptions seems the most likely to garner general judicial acceptance.[55]

In any case, the departure-from-doctrine test fails to provide an acceptable tool for resolving internal church disputes. It treats churches like secular organizations and fails to recognize that they have an additional dimension that warrants special treatment.[56]

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52. *Id.* at 449. In a concurring opinion, Justice Harlan stated that a donor still could impose conditions that limit doctrinal change: "If, for example, the donor expressly gives his church some money on the condition that the church never ordain a woman as a minister or elder . . . he is entitled to his money back if the condition is not fulfilled." *Id.* at 452 (Harlan, J., concurring). Presumably a donor must phrase the condition so that interpretation does not require doctrinal inquiry. In some cases, complete elimination of the possibility of doctrinal inquiry may prove impossible. *See* Mansfield, *supra* note 4, at 866-68. Existing trusts conditioned on fidelity to a doctrinal principle, moreover, may not authorize redrafting to eliminate the religious criterion. *See id.* at 866.

53. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445-49 (1969).

54. *See* Sirico, *supra* note 15, at 342-50; Smith, *supra* note 15, at 91-105, 113-32.

55. For a discussion of these assumptions, see Sirico, *supra* note 15, at 330-32.

56. The departure-from-doctrine test nonetheless continues to rule in Britain and some Commonwealth countries. *See, e.g.*, Attorney General v. Grant, 135 C.L.R. 587, 603 (1976) (applying the test in Australia); Chong v. Lee, 29 B.C.L.R. 13, 23 (1981) (form of baptism is not of doctrinal significance, so departure from old baptism method does not breach implied trust); L. Sheridan & G. Keeton, The Modern Law of Charities 284-88 (3d ed. 1983) (stating the English law). In these countries, no constitutional restrictions prohibit government intervention in church affairs. *See, e.g.*, United Church of Canada Act, 1924, 14 & 15 Geo. 5, ch. 100 (consolidating three major denominations into the United Church of Canada at their request and detailing disposition of the property of local churches who do or do not elect to become part of the new church).

B. *The Deference Test*

Under the deference test, a court identifies the locus of authority in a church and defers to its determination concerning property rights.[57] The Supreme Court cases classify churches as either hierarchical or congregational.[58] According to the Court, in a hierarchical church, the local church body "is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization."[59] As applied to a hierarchical church, the deference test requires a court to defer to the resolution of a property dispute by the general church's highest authority.[60] A court, moreover, may not reject this determination by finding that the authoritative body acted beyond its jurisdiction or failed to comply with church laws and regulations.[61]

The Court has yet to apply the test to a congregational church, a local church that governs itself. Presumably the Court would conform to the practice of state courts by deferring to that church's decisionmaking authority, whether it is a majority vote of the members or an appointed internal body.[62]

To satisfy the deference test the Episcopal Church would argue that it is hierarchical. According to the argument, the court therefore should defer to the decision of the internal church authority, generally the diocesan bishop or other diocesan authority. Church documents and the testimony of experts undoubtedly would support the denomination's

57. *See supra* note 13. For further discussion of the doctrine, see Sirico, *supra* note 4, at 8-15, 51-68.

58. *See supra* note 43.

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

60. *Id.* at 727.

61. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712-13 (1976). Dicta in Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929) stated that a court need not defer to church authorities when fraud, collusion, or arbitrariness is charged. *Id.* at 16. *Serbian* declared that inquiry into allegations of arbitrariness entails an unconstitutional examination of church procedural or substantive law. *Serbian*, 426 U.S. at 713. *Serbian* made clear that it was not evaluating the constitutionality of inquiries into fraud or collusion. *See id.* at 713 n.7. The constitutionality of such inquiries remains an open question. *See* Jones v. Wolf, 443 U.S. 595, 609 n.8 (1979) (in the absence of fraud or collusion, the Constitution requires accepting the decisions of a hierarchical church's highest tribunal on issues of doctrine and polity). Fraud and collusion both involve bad faith. I suspect that in most cases, those accused of bad faith could offer at least a good faith rationalization for the questioned conduct. Such a rationalization might permit the court to treat the conduct as arguably arbitrary and, therefore, not an appropriate subject for judicial inquiry.

62. *See, e.g.*, Skelton v. Word Chapel, Inc., 130 Ariz. 543, 546-47, 637 P.2d 753, 756-57 (Ariz. Ct. App. 1981) (implying that courts are willing to defer to a church's authoritative body); Antioch Temple v. Parekh, 383 Mass. 854, 860, 422 N.E.2d 1337, 1341-42 (1981) (first amendment does not bar court from deferring to a congregational church's governing body); Church of Christ v. Carder, 105 Wash. 2d 204, 208, 713 P.2d 101, 104 (1986) (although church is congregational, decisions of a governing body other than majority may control).

position.[63] The local church would maintain instead that the denomination might be hierarchical concerning doctrinal and spiritual matters, but that it is congregational concerning property matters.[64] Alternatively, it would argue that a judicial determination concerning the locus of authority requires an examination of church polity and administration so searching that it would be constitutionally impermissible.[65] The local church, therefore, would conclude that the court must use an alternative method of resolution, presumably the neutral principles test.

The local church also might argue that the method for dispute resolution appropriate in an intradenominational controversy does not necessarily apply when a local church withdraws from the denomination. It might maintain that an impermissibly searching inquiry is required to determine the right of a local church to withdraw and to identify the authority designated to resolve a property dispute when a local church withdraws.[66] The denomination would deny the claim and assert that only a brief review of the church's polity discloses that plenary authority in these cases lies with the denomination.[67]

Even if the local church believed that the denomination had exceeded its jurisdiction or acted arbitrarily, it could not make this argument successfully before a court.[68] The denomination would respond that, according to the Supreme Court, these claims require an unconstitutional examination of church polity.[69]

If the deference test is to be perceived as a fair method of resolution, a court must agree to certain assumptions about a church and its members. The test requires assuming that church members submit totally to the church's internal authority. That authority is assumed to be so plenary that it enjoys immunity from challenges of acting arbitrarily, acting beyond its jurisdiction, being the subject of political domination, and perhaps engaging in fraud or collusion. According to the Court, "it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria."[70] The Court, therefore, has found that "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are . . . hardly relevant to such matters of ecclesiastical cognizance."[71]

Some courts seem to assume that a church that is hierarchical in spiri-

63. *See supra* note 46.

64. *See* Bennison v. Sharp, 121 Mich. App. 705, 718, 329 N.W.2d 466, 472 (1982) (argument of defendants rejected by the court).

65. *See id.* at 720, 329 N.W.2d at 473 (argument of defendants).

66. *See* Protestant Episcopal Church v. Graves, 83 N.J. 572, 589, 417 A.2d 19, 28 (1980) (Schreiber, J., dissenting), *cert. denied*, 449 U.S. 1131 (1981).

67. *See* Bennison v. Sharp, 121 Mich. App. 705, 720, 329 N.W.2d 466, 473 (1982).

68. *See supra* note 61 and accompanying text.

69. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712-13 (1976).

70. *Id.* at 714-15 (footnote omitted).

71. *Id.* at 715.

tual and ecclesiastical matters is necessarily hierarchical in matters concerning property rights.[72] The Supreme Court has yet to reject the possibility of a hierarchical church that is not hierarchical with respect to local property. It has not afforded the possiblity much discussion, however. The Court generally has discussed hierarchical churches as if they conform to the model of plenary authority.[73] Few courts have found instances in which a hierarchical church lacks authority over local property.[74]

Judicial reluctance to depart from the model of the plenary hierarchical church may stem from two sources. The first is a belief that a natural consequence of ecclesiastical decisions is the disposition of property disputes. Therefore, the argument goes, a decision by a hierarchical authority on a religious controversy incidentally determines property ownership. The second source is a reluctance to examine the evidence closely enough to depart from the stereotypical hierarchical model. In the controversial cases, the church documents will not explicitly disavow the denomination's authority over the property, but, at best, will implicitly disavow it by not mentioning it.[75] To resolve the resulting ambiguity may require an inquiry that a court views as excessively intrusive.

The deference test also makes assumptions about judicial competence. It assumes that courts are competent to determine where a church's decisionmaking authority lies, whether it has made a decision, and what the decision is. The test, however, tolerates no further judicial intrusion. It denies a court's competence to evaluate charges that the church authority acted arbitrarily and, perhaps, charges that it acted fraudulently or

72. *See supra* note 43. The assumption has been the subject of critical comment. *See, e.g.*, Adams & Hanlon, *supra* note 4, at 1333-35, 1337-38; Note, *Judicial Resolution of Intrachurch Disputes*, 83 Colum. L. Rev. 2007, 2023-25 (1983); Note, *supra* note 4 , at 171-74, 180-82.

73. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710-11 (1976) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1872)) (members of hierarchical church must submit to all decisions of the governing body without appeal to the civil courts).

74. *See, e.g.*, Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 249 Md. 650, 663-66, 241 A.2d 691, 699-703 (1968) (Church of God did not use any of the methods, outlined by the court, by which a hierarchical church may maintain control of local church property), *vacated & remanded*, 393 U.S. 528 (1969). *Cf.* Marich v. Kragulac, 415 N.E.2d 91, 100 (Ind. Ct. App. 1981) (admitting the possibility of such an arrangement). *See also* Casad, *The Establishment Clause and the Ecumenical Movement*, 62 Mich. L. Rev. 419, 440 n.69 (1964) (collecting cases in which a congregationally organized church affiliates with a hierarchical denomination and later withdraws).

75. *See, e.g.*, Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 249 Md. 650, 664-65, 241 A.2d 691, 699-700 (1968) (failure to mention ownership of local church property was a deliberate omission), *vacated & remanded*, 393 U.S. 528 (1969). On remand, the court asserted that its prior analysis had been consistent with the neutral principles analysis. *See* Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 254 Md. 162, 166, 254 A.2d 162, 165 (1969), *appeal dismissed per curiam*, 396 U.S. 367 (1970).

collusively.[76]

These assumptions about the nature of church organization and about judicial competence describe an extremely autonomous organization that courts treat as more immune from judicial review than any other organization in American society. The deference test thus treats churches as alien institutions.[77]

A comparison of the Episcopal Church hypothetical and an analogous dispute within a secular association illustrates the point. In the church dispute, a court applying the deference test probably would have a strong tendency to find for the denomination, amounting to an overwhelming presumption of plenary hierarchical authority.[78] A secular association with an elaborate body of rules, however, would be subject to judicial review if a member or local chapter claimed the association had acted arbitrarily or beyond its jurisdiction.[79] Though courts tend to show deference to internal decisionmaking in these cases, they still recognize that the degree to which members submit to an association's authority has limits.[80]

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76. *See supra* note 61.

77. *See supra* text accompanying notes 70 & 71.

In Watson v. Jones, 80 U.S. (13 Wall.) 679, 724-26 (1872), the Court stated that the deference test treats a congregational church like a secular voluntary association. The inability of a court to decide on the issue of arbitrariness and perhaps fraud and collusion, however, requires a court to treat a church as a unique institution. *See supra* note 61. Analogies to a secular voluntary association thus fail. A court might even determine that an inquiry into a congregational church's conformity with its internal procedures would intrude impermissibily into matters of church doctrine. *See* Chavis v. Rowe, 93 N.J. 103, 110, 459 A.2d 674, 678 (1983) (refusing to resolve a dispute over proper procedures for removing a deacon).

78. *See, e.g.*, Bennison v. Sharp, 121 Mich. App. 705, 720, 329 N.W.2d 466, 473 (1982) (deferring to hierarchy of Episcopal Church); Protestant Episcopal Church v. Graves, 83 N.J. 572, 580, 417 A.2d 19, 24 (1980) (same), *cert. denied*, 449 U.S. 1131 (1981). *See generally* Howe, *supra* note 1, at 83-87 (discussing historical roots of the deference test).

79. *See, e.g.*, Ruolo v. Schiller Bund, 172 Mich. 557, 563-64, 138 N.W. 244, 246-47 (1912) (imposing duty, based on association's constitution, to notify plaintiff's decedent of delinquency in paying premiums). As the next few footnotes suggest, reported cases rarely deal directly with a secular association property dispute parallel to an intrachurch property dispute. The secular organizations seem to have disposed of property ownership issues quite clearly in their internal documents. Perhaps church documents have been frequently ambiguous on the subject because until recently churches did not expect the documents to turn up as evidence in litigation. *See* Kauper, *supra* note 42, at 378 (a religious body's organic law was elevated to a new level of importance by the invalidation of the departure-from-doctrine test and reaffirmation of the deference test).

80. *See, e.g.*, Peters v. Minnesota Dep't of Ladies of the Grand Army of the Republic, 239 Minn. 133, 136, 58 N.W.2d 58, 60 (1953) (equity, as opposed to statute or internal rule, requires giving members notice and hearing prior to expulsion); Zelenka v. Benevolent & Protective Order of Elks of the United States, 129 N.J. Super. 379, 387, 324 A.2d 35, 39 (1974) (public policy forbids regulation prohibiting member from circulating any writing concerning Elks without first getting approval from the national Grand Exalted Ruler); International Union of Operating Eng'rs v. Pierce, 321 S.W.2d 914, 917-18 (Tex. Civ. App. 1959) (error refused—n.r.e.) (against public policy for by-laws to permit international union to place local member union under supervision without a hearing).

According to the argument, members expect an association's internal authority to act according to its own rules and in good faith. Therefore, a disappointment of these expectations breaches the understanding underlying the member-group relationship and gives the injured member a cause of action. If the association claims that members agree to submit completely to its authority and waive any right to challenge decisions on the basis of arbitrariness or lack of jurisdiction, a court at least would evaluate the accuracy of the claim. Even if the association's formal documents indicated total submission by members, a court is likely to find such a submission troublesome.[81] If it did not reject such an agreement as contrary to public policy, it probably would eschew formalism and inquire into the realistic expectations of members based on the surrounding circumstances.[82]

In contrast, a court would reject a claim that diocesan authorities exceeded their powers or flouted church laws in depriving a local church of its property.[83] The court would hold that an inquiry into church procedures and substantive criteria for deciding ecclesiastical questions results in a decision over a religious controversy and therefore violates the first amendment. The court would defend the reasonableness of the constitutional prohibition by noting that church members completely submit to church authority and therefore have no basis for a claim.

As this comparison demonstrates, the deference test assumes churches conform to an organizational model that is different from the models of virtually all other organizations in this country. The model's alien quality derives from its extreme authoritarianism. Though this country's citizens are free to submit to extreme authority, societal expectations run to the contrary.

In a country that extolls democracy, most citizens would find it permissible but curious if all members of hierarchical churches engaged in complete submission to authority. Such submission might be more likely in a congregational church in which the majority rules or the members elect an authoritative body and exercise a check on it. Presumably, however, members still would expect to enjoy the right to challenge such practices as the illicit "packing" of a congregation's general meeting or election irregularities in choosing the members of the internal authoritative body.[84]

This extremely authoritarian model suffers from numerous drawbacks. Most important, it probably fails to describe accurately the relationship

81. *See id.*

82. The extent to which such a nondemocratic organization is alien to the American culture, despite the consent of the members, is made clear in Note, *The Rule of Law in Residential Associations*, 99 Harv. L. Rev. 472, 478-85 (1985).

83. For the basis of the following argument, see *supra* notes 61 & 68-71 and accompanying text.

84. For the argument that the average American church member's expectations are congregationalist— that governance be democratic at the local level, see Note, *supra* note 4, at 171-74.

between most churches and their members. Deference to the organizational authority almost certainly results in most judicial determinations upholding the denomination or the faction controlling the church's administrative machinery.[85] The deference test, therefore, may frustrate the expectations and religious freedom of the losing faction.

Because the deference test characterizes the church as alien to the rest of society, it may weaken the church's credibility. A church, therefore, may prove less persuasive in its efforts to influence society and the political system, because its assumed structure and antidemocratic values seem so alien to the society it purports to advise. To be sure, one reason a church may be persuasive is that it is in the world, but not of it.[86] The unique character of some churches may increase their effectiveness in playing prophetic roles, that is, in challenging the current social order in the name of religious truth.[87] For churches that do not fit this prophetic model, however, a completely alien characterization may impair the church's witness by making the church appear neither in the world nor of it.

Casting churches in the alien mode thus may give the deference test the illusion of fairness, but the characterization is highly artificial. As a result, the test rests on assumptions that may fail to comport with the expectations of church members and may impair the effectiveness of a church in witnessing to society.

C. *The Neutral Principles Test*

Under the neutral principles test, a court determines property ownership by identifying and applying secular provisions of the church's governing documents as well as deeds, articles of incorporation, statutes, and similar materials.[88] The formal title version of the test permits a court to rely exclusively on legal documents and statutes without considering internal church documents.[89]

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85. *See* Paradise Hills Church, Inc. v. International Church of the Four Square Gospel, 467 F. Supp. 357, 360 (D. Ariz. 1979); Ellman, *supra* note 4, at 1403-04.

86. *See John* 17:6-23.

87. On the prophetic role of churches, see Sirico, *supra* note 15, at 327-28.

88. *See supra* note 14. For further discussion of the test, see Sirico, *supra* note 4, at 43-48, 51-68. Under the neutral principles test, courts generally have refused to find property ownership on the basis of evidence of the parties' intentions unless they are disclosed in an express statement of property ownership. I have not found a recent case in which a court has relied solely on an implicit statement of property ownership. Perhaps the decision coming closest to doing so is Bishop & Diocese v. Mote, 716 P.2d 85 (Colo.), *cert. denied*, 107 S. Ct. 102 (1986). The dissent in Jones v. Wolf, 443 U.S. 595 (1979) seems to understand the majority as precluding reliance on an implicit statement under the neutral principles test. *See id.* at 612-13 (1979) (Powell, J., dissenting). This interpretation is not persuasive to me. *See* Adams & Hanlon, *supra* note 4, at 1326-29. At the same time, I would not expect a court to award ownership on the basis of very general circumstantial evidence.

89. In Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970), Justice Brennan stated that the formal title doctrine permits courts to determine ownership "by studying deeds, reverter clauses, and

Recent cases dealing with the Episcopal controversy illustrate application of the test. In *Bishop & Diocese v. Mote*, the Colorado Court of Appeals referred to the state's general corporation laws under which the local church was incorporated and found a presumption that majority rule determines control of property.[90] Applying a formal title version of the neutral principles test, the court examined the local church's property deed, articles of incorporation, and by-laws as well as the canons and constitutions of the diocese and denomination. Though the court acknowledged that the local church formally acceded to the canons and constitutions of the diocese and denomination in its by-laws and articles of incorporation, it found no language creating a trust in the property favoring the latter organizations.[91] The state supreme court reversed the decision. It applied the neutral principles test, but interpreted the evidence to find that a trust favoring the general church was imposed on the local church's property.[92]

In *Protestant Episcopal Church v. Barker*,[93] the California Court of Appeal considered the property claims of four local churches. Three of the churches were incorporated prior to 1958. Their articles of incorporation declared that the constitutions, canons, and discipline of the diocese and denomination always would form a part of the church by-laws and articles of incorporation. In 1958, a diocesan canon requiring conveyance to the diocese of a dissolved parish's property became effective. The court refused to find that the pre-1958 declarations of the local churches constituted acceptance in advance of any rules that the general church might promulgate about the disposition of local church property when a local church dissolves or disaffiliates.[94] Applying the neutral principles test, the court found in favor of the three local churches because of the lack of an express trust benefiting the general church.[95]

The fourth church was incorporated after the 1958 amendment to the

general state corporation laws." *Id.* at 370 (Brennan, J., concurring). Exactly which documents are open to examination under the doctrine is unclear. Colorado courts, for example, have examined internal church organizational documents in applying the formal title test. *See* Bishop & Diocese v. Mote, 668 P.2d 948, 952-53 (Colo. Ct. App. 1983), *rev'd en banc*, 716 P.2d 85 (Colo.), *cert. denied*, 107 S. Ct. 102 (1986); Bernson v. Koch, 35 Colo. App. 257, 263-66, 534 P.2d 334, 338-39 (1975).

The proposed secular documents test is a version of the formal title test. *See infra* Part II.D. The secular documents test would limit courts to examining only those secular provisions appearing in deeds, corporation papers, and other secular legal documents. It would permit reference to a secular provision in an internal church document when a secular document incorporates it by reference for the sake of convenience—for example, to reduce the frequency of necessary revisions to secular documents. For further explanation, see Sirico, *supra* note 4, at 68-70.

90. 668 P.2d 948, 953 (Colo. Ct. App. 1983), *rev'd en banc*, 716 P.2d 85 (Colo.), *cert. denied*, 107 S. Ct. 102 (1986).

91. *See id.* at 948, 953.

92. 716 P.2d 85 (Colo.), *cert. denied*, 107 S. Ct. 102 (1986).

93. 115 Cal. App. 3d 599, 171 Cal. Rptr. 541, *cert. denied*, 454 U.S. 864 (1981).

94. *See id.* at 622-23, 171 Cal. Rptr. at 554.

95. *See id.* at 625, 171 Cal. Rptr. at 555.

diocesan canons. Its articles of incorporation identified the church as a subordinate body and integral unit of the denomination and as a subordinate body of the diocese, within the meaning of provisions of the state corporations code. The code, in turn, provided that the national body of a nonprofit corporation acquires the assets of a subordinate incorporated body when the latter body surrenders its charter or the national body revokes it. The articles of incorporation also provided that upon the local church's liquidation or dissolution, its property would inure to the benefit of the diocese. The court, therefore, found an express trust favoring the diocese.[96]

In *Bennison v. Sharp*,[97] the Michigan Court of Appeals employed the deference test to find for the diocese,[98] but argued that the neutral principles test would yield the same result.[99] The local church corporation held legal title to the property. The majority of the church's members formed a new corporation and purported to transfer the property to it. The court reasoned that under the neutral principles test the property would remain in the hands of the original corporation.[100] The court distinguished the *Barker* decision by noting that the disaffected church members in *Barker* continued to operate under the original corporate form.[101] According to the *Bennison* court, the property in *Barker* remained with the original corporation, which the disaffected members controlled, while the property in *Bennison* remained with the corporation that was loyal to the diocese.[102]

In *Protestant Episcopal Church v. Graves*,[103] the New Jersey Supreme Court ruled in favor of the diocese on the basis of the deference test,[104] but, like the *Bennison* court, argued that the same result would flow from the neutral principles test.[105] In applying the latter test, the court relied on a state statute providing that the conveyance or mortgage of real estate belonging to an incorporated parish of the Protestant Episcopal Church is subject to the diocesan bishop's consent.[106] The court noted that the same requirement appears in the canons of the denomination.[107] As the dissent pointed out, the court ignored the possibility that the provision would not apply when a parish disaffiliates.[108]

96. *See id.* at 625-26, 171 Cal. Rptr. at 555-56.
97. 121 Mich. App. 705, 329 N.W.2d 466 (1982).
98. *See id.* at 722, 329 N.W.2d at 474.
99. *See id.* at 724, 329 N.W.2d at 475.
100. *See id.*
101. *See id. See supra* text accompanying notes 93-96.
102. *See* Bennison v. Sharp, 121 Mich. App. 705, 725, 329 N.W.2d 466, 475 (1982).
103. 83 N.J. 572, 417 A.2d 19 (1980), *cert. denied*, 449 U.S. 1131 (1981).
104. *See id.* at 580, 417 A.2d at 24.
105. *See id.*
106. *See id.* at 580-81, 417 A.2d at 24.
107. *See id.*
108. *See id.* at 588-90, 417 A.2d at 28-29 (Schreiber, J., dissenting). Prof. Laycock suspects that before a particular dispute arises, most churches and church members would prefer internal dispute resolution to secular adjudication. He therefore believes

Though the facts of the cases differ, the judicial decisions demonstrate the flexibility that courts enjoy in applying the neutral principles test. In each case, the focus is on finding an express provision that locates property ownership. Courts can differ over which provisions are sufficiently express. In *Mote*, for example, the intermediate appellate court could have decided that a local church's declaration of submission to the general church's rules allocates property control to the general church. The state supreme court could have declared that provisions in the church documents lacked the specificity necessary to create a trust favoring the general church. In *Barker*, the date of a church's incorporation was the decisive factor.[109] Yet, the court could have found that a local church becomes an integral part of a denomination—particularly one with a parliamentary style of decisionmaking.[110] It could have rejected the notion that the rules of a denomination applicable to a local church become frozen on the date of incorporation. In *Bennison*, the court could have found that a church's disaffected majority enjoys the right to transfer property from one corporation to another. In *Graves*, the court could have found that no statute or provision addressed the issue of property ownership when the church withdrew from the denomination, and that property ownership therefore should remain with the local church's corporation, whether or not it seceded from the denomination.

The decisions thus rest on formal, sometimes technical grounds. All are open to question. Moreover, they fail to discuss the expectations of the respective parties. The case results can be attributed to a number of factors, ranging from a court's notion of the most equitable solution to a wooden reading of statutes and church rules.

The test, then, rests on certain assumptions. It assumes that the secular provisions, deprived of their context, reflect the expectations of the church and its members. It thus assumes that the parties have agreed to be bound by these formal documents and not by extrinsic writings, words, or conduct. It further assumes that such secular documents as deeds and articles of incorporation actually reflect the allocation of control over property rather than merely serving as a convenient way of locating legal title to property for secular purposes. The test also assumes that courts are competent to identify which provisions are secular, and which are infected with religious words and concepts.

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that the desire for secular adjudication typically arises after one group has lost internally. For him, this empirical suspicion militates in favor of internal resolution and judicial deference. *See* Laycock, *supra* note 1, at 1403-05. Accepting internal resolution for even a serious dispute, however, does not support internal resolution when the dispute has reached the point of precipitating schism. The latter situation is too different from the former to permit a simple extrapolation of the parties' expectations.

109. *See* Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 625-26, 171 Cal. Rptr. 541, 555-56, *cert. denied*, 454 U.S. 864 (1981).

110. *See supra* notes 16-41 and accompanying text. Since the Revolutionary era, the Episcopal Church has had a more republican structure than its English counterpart. *See* F. Mills, *supra* note 16, at 302-05.

To decide a dispute within a secular association, a court would look to deeds, articles of incorporation, and like documents to determine property ownership. Though the documents might serve as the primary data on which the court based its decision, the court also might consider a wide variety of extrinsic evidence. Even if the extrinsic evidence were ambiguous, technical, or esoteric, the court might feel obliged to entertain it. In a religious dispute, however, a court using the neutral principles test would apply its analytic tools to a limited body of evidence. The neutral principles test, then, treats religious disputes and secular disputes differently by limiting the evidence admissible in the former.

The neutral principles test thus is based on a hybrid organizational model with characteristics of the secular model and the alien model. It assumes that the church has translated into familiar secular terminology its organizational characteristics, no matter how secular or alien they may be. The hybrid model fails to comport with reality, however, because it assumes that selectively culled provisions accurately reflect the expectations of the parties. It thus permits dispute resolution only by positing an artificial formalism on the church's part.[111]

D. *The Secular Documents Test*

My analysis of the judicial tests demonstrates that no test can accurately reflect church structure and the expectations of the parties with any consistency. Both limited judicial competence and constitutional restrictions on the admissibility of evidence render a perfect test unattainable. Courts nonetheless must resolve church property disputes.[112] These realities indicate the need for a different approach.

I have previously advocated a variant on the neutral principles test, which I call the secular documents test.[113] Under this test, courts allocate property on the basis of secular provisions appearing in deeds, corporation papers, and other legal documents. The secular documents test thus differs from the neutral principles test in that it relies on a more restricted evidentiary basis. Like the neutral principles test, it considers provisions in legal documents. The test, however, refuses to consider provisions in church documents, such as church constitutions and ca-

111. The neutral principles test also may encourage courts to view churches as too much like secular organizations. In Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 623, 171 Cal. Rptr. 541, 554, *cert. denied*, 454 U.S. 864 (1981), the court acknowledged that the articles of incorporation of three local churches declared that the governing documents of the denomination and diocese always would form part of the local church articles. The court, however, rejected the contention that these general provisions were an acceptance in advance of any rules that the general church later might adopt. The court bolstered the argument by analogizing to similar agreements that a General Motors dealer or a political club might make. One who finds the intrachurch relationship different from the analogous secular relationship might argue that the emphasis on secular rules of interpretation leads to an overly secular perception of churches.

112. *See* Mansfield, *supra* note 4, at 868 n.70.

113. *See* Sirico, *supra* note 4, at 68-77.

nons, except for one limited purpose. A court may consider a secular provision in a church document if the legal document incorporates the provision by reference and it is not so general or ambiguous that its consideration defeats the purpose of having a very narrow test.[114]

Even legal documents sometimes include ambiguous provisions. A court employing the secular documents test therefore must interpret ambiguous provisions on occasion. These instances, however, should occur less frequently than under other tests. If legal documents fail to furnish a resolution, a court could rely on a presumption. For example, it could invoke a presumption that majority rule by the local congregation prevails.[115]

The most significant attribute of the secular documents test is its rationale. The test does not assume that a court can ascertain church structure and the parties' expectations on the basis of limited evidence. Instead, it forthrightly presents itself as a test of judicial convenience designed to fix property ownership. Churches still may draft their legal documents to make clear their decisions about property ownership. This softening factor reduces the test's harshness.

To return to the example of the Episcopal Church, I find it difficult to sympathize with the dioceses and denomination in the recent spate of cases. Judicial reliance solely on express secular language concerning property ownership has been a real possibility since at least 1970.[116] As a well established institution, the church had sufficient notice and resources to revise its documents to avoid any risk that a court might decide property disputes contrary to the wishes of the general church.[117] I acknowledge that not all churches have had the sophistication to recognize the shift in currents of legal thinking.

The test has a bias favoring those in control of a church's legal apparatus. They have the ability to draft legal documents that reflect their interests. This bias, then, normally should favor the denomination, diocese, or analogous body. I point out the bias not because it is desirable but because it is inevitable. Perhaps every legal test has some bias. A bias favoring those with both power and a longstanding, intense interest in

114. *See id.* at 69-70. On the relation of this test to the formal title test, see *supra* note 89.

115. The Court has made clear that such presumptions are permissible. Jones v. Wolf, 443 U.S. 595, 607-08 (1979). For further discussion of the use of presumptions, see Ellman, *supra* note 4, at 1439-44; Sirico, *supra* note 4, at 59 n.272, 71 n.296.

116. In Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) the Court asserted: "States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." *Id.* at 449. In Maryland & Virginia Eldership of the Churches of God v. Church of God, Inc., 396 U.S. 367 (1970), the Court approved a state court decision purporting to apply neutral principles. *See id.* at 368 (1970). On the problem of ambiguity in church documents, as opposed to internal documents of secular associations, see *supra* note 79.

117. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 715-17 (1976) (looking to written constitution to determine church hierarchy).

the subject is a very common one. The same bias infects the neutral principles test. It also affects the deference test since the court consults church documents to determine church structure.[118] The bias, then, is not peculiar to the proposed test.

In some cases, at least, one consideration mitigates concern over the bias. If a church's structure includes a democratic or representational mechanism—as does the Episcopal Church, for example[119]—church members possess the ability to influence any clarification or revision in the method for determining property rights. In a truly autocratic church, the political risks attendant on acting contrary to the membership's desires may check the discretion of church leaders.

Both the conventional neutral principles test and the secular documents test recognize that a church possesses both secular and alien dimensions. Instead of assuming that a church has translated its unique organizational characteristics into secular language, the secular documents test merely acknowledges that the church may undertake this translation. It assumes only that the church possesses the ability to seize the opportunity.

The resulting model comes as close as possible to accurately reflecting the true nature of the church and its relationship to society. The church enjoys the privilege of being alien; it may choose its own unique values and polity. At the same time, a church is part of a secular society and can speak to it in a secular tongue. It uses secular language when it participates in public decisionmaking to influence society with its values. Sometimes self-preservation obligates it to conduct itself in a manner comprehensible to the nonbeliever. For example, it uses secular language in carrying on routine business affairs. Self-preservation should prompt a church to explain its internal affairs in secular language. Society's courts then can more comfortably resolve those aspects of church disputes that affect the secular world.

III. Church Property Disputes in Constitutional Context

In the church property cases, the conventional judicial tests rely on questionable assumptions to make difficult cases easier to resolve. The departure-from-doctrine test assumes that a church is like a trust-based secular institution and that its rules are open to competent interpretation by a secular court. The deference test assumes that a church's members submit to such plenary authority that the church constitutes an extremely autonomous, alien institution. The neutral principles test assumes that a church conforms to a model with both alien and secular qualities. The test recognizes that a church's organizational characteristics can be secular or alien, but it ascertains those characteristics in a

118. *See supra* notes 16-41 and accompanying text and note 111.

119. *See* Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. Rev. 1195, 1223 n.183 (1980); Sirico, *supra* note 15, at 363.

highly formalistic manner. It assumes that the church translates its rules into written secular language that accurately and completely reflects the expectations of the parties. My proposal, the secular documents test, claims only to be a test of judicial convenience. It assumes only that a church has the opportunity to describe its organization in secular language accessible to the courts.

The Supreme Court frequently has relied on questionable assumptions to permit the resolution of other difficult cases in the church-state field. Cases dealing with religious institutions illustrate the point.

In cases dealing with government aid to religious schools, the Court has stereotyped primary and secondary schools as pervasively religious institutions. Individual schools, however, may or may not fit the model. In contrast, the Court, consistently has found that church related colleges and universities are not pervasively religious.[120] These stereotypes have assisted the Court in upholding government aid to the latter institutions and frequently invalidating aid to the former institutions.

In *NLRB v. Catholic Bishop*,[121] the issue was whether the National Labor Relations Act covered lay teachers employed at Roman Catholic secondary schools. The Court relied on the school aid cases to classify the schools as pervasively religious.[122] To avoid the constitutional issue of excessive church-state entanglement, it construed the Act not to cover the lay teachers.[123] If the Court had not relied on its stereotypical classification of religious secondary schools, it might have found that the Act covered employees at some schools, but not at others.

In *Bob Jones University v. United States*,[124] the Court upheld revocation of the university's tax exempt status, because of religiously based, racially discriminatory policies.[125] In rejecting the university's claim that its free exercise rights had been violated, the Court explained that its decision applied only to religious schools and not to churches or other purely religious institutions.[126] The Court thus lightened its burden by categorizing the university as an educational institution instead of a religious one.[127]

The Court, with seeming disingenuousness, has relied on questionable assumptions in other religion cases. For example, with respect to Sunday closing laws and government sponsored creches, the Court has assumed that their "reason or effect merely happens to coincide or harmonize with

120. *See* Sirico, *supra* note 15, at 363.
121. 440 U.S. 490 (1979).
122. *See id.* at 501.
123. *See id.* at 507.
124. 461 U.S. 574 (1983).
125. *See id.* at 605.
126. *See id.* at 604 n.29.
127. For further discussion of this point in *Bob Jones*, see Note, *The Unseen Regulator: The Role of Characterization in First Amendment Free Exercise Cases*, 59 Notre Dame L. Rev. 978 (1984).

the tenets of some . . . religions."[128]

The use of highly questionable assumptions not only has helped the Court decide difficult cases; it also has permitted the Court to portray the church-state separation principle as more workable than it actually is. The separation principle fails to offer a universally acceptable solution to any of these cases. In church property disputes, it requires excluding essential evidence. In other types of controversies, it offers only general guidance. Different lawyers and scholars, moreover, understand the guidance differently. Their understandings range from highly accommodationist to strictly separationist.[129]

Neither a strict separationist nor a nearly theocratic interpretation of state policy reflects the American reality.[130] Our society accepts church-state separation, but it also accepts religion's role as a force in political and other societal matters. The interrelationships of church and state, therefore, are complex, because churches are both secular and alien institutions. Government aid or regulation of religious organizations is sometimes acceptable and sometimes unacceptable. No general principles offer solutions. When the Court has faced an intractable dispute, it frequently has summoned up unwarranted assumptions to justify the claim that the dispute is tractable.

As this Article demonstrates, church property disputes are intractable because of constitutional restrictions and the limits of judicial competence. I therefore decline to introduce a new test that promotes the illusion that the secular legal system always can resolve these disputes fairly. Any such test would rely on a distorted understanding of church institutions. In proposing an imperfect test, I acknowledge the complex reality of church-state relationships.

Perhaps even imperfect tests are not readily available for many other types of religious disputes. The effort to devise such tests, however, might prove salutary. An increased emphasis on avoiding legal fictions might produce decisions that more thoughtfully assess the role of religion in American life.

IV. CONCLUSION

The judicial tests for resolving church property disputes rest on assumptions about churches that permit courts to resolve the disputes, purportedly without violating church autonomy. The departure-from-doctrine test assumes that churches are indistinguishable from secular

128. Lynch v. Donnelly, 465 U.S. 668, 682 (1984) (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

129. For one effort at classifying the various views on church-state relationships, see Esbeck, *Five Views of Church-State Relationships in Contemporary American Thought*, 1986 B.Y.U. L. Rev. 371.

130. For a similar viewpoint, see Gerety, *Legal Gardening: Mark DeWolfe Howe on Church and State: A Retrospective Essay*, 38 Stan. L. Rev. 595 (1986) (review essay of M. Howe, *supra* note 1).

institutions. The deference test treats them as alien institutions. The neutral principles test views them as a curious hybrid with secular and alien characteristics. Nevertheless, in the absence of these assumptions, a perfect test cannot be devised. I therefore offer an imperfect test based on judicial convenience. This test offers the best hope for resolving most cases fairly, because it encourages churches to translate their expectations about property ownership into secular language accessible to the courts.