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SECULARIZATION BY INCORPORATION: RELIGIOUS ORGANIZATIONS AND CORPORATE IDENTITY

BRUCE B. JACKSON*

INTRODUCTION

An early twentieth-century fable tells the story of a man who climbed to the top of a high mountain, stood on his tiptoes and grabbed hold of the Truth.¹ After an alarmed demon notified him, Satan is said to have responded by “institutionalizing” the Truth, an event that has had quite an influence on the various religious traditions in America.² When a religious organization incorporates under a state law, it adopts a secular corporate form, and, by taking on a corporate form, a quintessential institutional characteristic, it has “institutionalized” its Truth.³

Corporate form is at the core of Supreme Court developed Religion Clause jurisprudence when considering internal disputes of

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² Id.
³ See WILLIAM W. BASSETT ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW xxiii (2011) (“There are more than one thousand religious denominations in the United States . . . [that] employ or use the services of hundreds of thousands of people and manage and control billions of dollars in assets.”) (citing the U.S. Dep’t of Commerce, Bureau of the Census, Statistical Abstract of the United States 67 (113th ed. 1993)); see also PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGION LANDSCAPE SURVEY: SUMMARY OF KEY FINDINGS 5 (2008) (reporting that 78.4% of Americans are Christian. Out of the Christian grouping, 51.3% are Protestants, 23.9% are Catholics, 1.7% are Mormons, 0.7% Jehovah’s Witnesses, and 0.9% making up Orthodox (Greek, Russian and Other), and Other Christian).
religious corporations. A normative First Amendment Religion Clause doctrinal analysis of an internal dispute within a religious corporation emphasizes internal organizational structure and corporate form.\textsuperscript{4} This emphasis leads to a bifurcated consideration of the dispute. The bifurcation, however, is a function of the religious corporation’s internal organizational structure which is either hierarchical or congregational. A hierarchically structured religious organization is governed by an ecclesiastical tribunal that exercises authority over the membership.\textsuperscript{5} Mainline Christian Protestant religious organizations (e.g., Anglicans, Presbyterians, and Methodists),\textsuperscript{6} and Catholics are hierarchically structured and so governed.\textsuperscript{7} This is in contrast to non-Mainline Christian groups like Baptists and Quakers, and non-Christian groups like Jews, Muslims, Hindus, and Buddhists, whose internal organizational structures are congregational,\textsuperscript{8} where the internal affairs of

\textsuperscript{4} See Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

\textsuperscript{5} In religious organizations governed by an ecclesiastical tribunal, the tribunal holds “general and ultimate power of control . . . over the whole membership of” its subordinate member organizations. \textit{Id.} at 722–23.

\textsuperscript{6} In this Article, I rely on the Pew Forum on Religion & Public Life’s \textit{U.S. Religion Landscape Survey} (2008) description of Mainline Christian Protestant: Baptist, Methodist, Lutheran, Presbyterian, Anglican/Episcopal, Restorationist (e.g., Disciples of Christ), Congregationalist (e.g., United Church of Christ), Reformed (e.g., Reformed Church of America), Anabaptist, and Friends. According to the survey, of the 78.4% Christians in the United States, 18.1% are Mainline Protestants. \textit{See PEW FORUM ON RELIGION & PUBLIC LIFE, supra} note 3, at 5, 10, 12. Of this 18.1%, 5.4% are Methodist, 2.8% are Lutheran, 1.9% are Presbyterian, and 1.4% are Anglican/Episcopal. \textit{Id.}

\textsuperscript{7} BASSETT ET AL., supra note 3, \textsection 3:7 nn.9–10, at 3-28 (“The major hierarchical churches in America are the Roman Catholic Church, the various Eastern Orthodox Churches, the Episcopal Church [Anglican], the Church of Jesus Christ of Latter-day Saints (Mormons), and some Lutheran (Missouri Synod) and Brethren churches.” “Churches using a connectional [presbyterial] polity include the Presbyterian Church (USA), the Reformed Church in America, the Evangelical and Reformed Church, the Christian Reformed Church, and other Calvinist and some Lutheran churches.”). \textit{See also id.} at n.11 (“The United Methodist Church and the Church of the United Brethren in Christ use a hybrid form of presbyterial and episcopal polity, but because ultimate authority is placed above the local congregation, they are generally considered hierarchical.”).

\textsuperscript{8} See, e.g., BASSETT ET AL., supra note 3, \textsection 3:7 n.8, at 3-28 (providing examples of religious organizations adhering to the non-hierarchical congregational model of polity: “United Church of Christ, Unitarian Universalists, Disciples of
each organization are governed exclusively by its members independently from any other religious tribunal or institution.\textsuperscript{9}

The significance of the hierarchical-congregational distinction was emphasized for the first time in the wake of the Civil War in \textit{Watson v. Jones}.\textsuperscript{10} The distinction continues today as a vibrant centerpiece of Religion Clause doctrine applicable to a religious corporation’s internal property disputes.\textsuperscript{11} As a substantive part of the doctrine, it shapes analysis. It does so by the effect it has on the doctrinal options available to civil courts when considering internal organizational disputes.

A civil court has two options when considering a religious organization’s internal dispute. It may either defer to the decision made by the religious corporation’s internal governing body on the matter, or, provided the dispute does not involve ecclesiastical issues, it may engage and resolve the matter by applying neutral principles of law.\textsuperscript{12} To understand how the hierarchical-congregational distinction affects the analysis, consider its application to a hierarchical religious corporation. In a hierarchically organized and governed religious corporation, a normative analysis considering an internal property dispute offers a court the option to either defer to the decision of the organization’s highest religious tribunal on matters of religious discipline, faith, governance, custom or doctrine,\textsuperscript{13} or, if the matter does not involve these issues, it may choose to resolve the matter by the application of “neutral principles of law.” The “neutral principles of law” approach allows civil courts to

\begin{footnotesize}

9. See Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970) (per curiam); see also \textit{Watson}, 80 U.S. (13 Wall.) at 722 (“[W]hen the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as the church government is concerned, owes no fealty or obligation to any higher authority.”).


11. \textit{See e.g.} Erdman v. Chapel Hill Presbyterian Church, 286 P.3d 357, 369–70 (Wash. 2012) (finding that because of hierarchical structure of defendant Presbyterian church, its decisions were entitled to deference from the civil court).


\end{footnotesize}
fact find by consulting a corporation's secular documents such as deeds, charters, and organizational bylaws, as well as state statutes and constitutions, and then apply well-known legal rules to settle the matter. Similarly, for congregationally organized and governed religious corporations, a court has the option to either defer to the decision of a majority of the members of the congregation on ecclesiastical matters, or, decide the matter by the application of "neutral principles of law." Ironically, this normative analysis that is designed to keep a court from unwarranted involvement in a religious organization's ecclesiastical affairs (those involving faith, doctrine, governance, polity, administration, or the organization's right to choose who will carry out its ecclesiastical and spiritual functions) often leads to a contrary result for congregational organizations. Given

14. See Wolf, 443 U.S. at 603; Md. & Va. Eldership, 396 U.S. at 370 (Brennan, J., concurring) (per curiam).
15. Wolf, 443 U.S. at 603.
16. Watson, 80 U.S. (13 Wall.) at 727; Md. & Va. Eldership, 396 U.S. at 368-69 (Brennan, J., concurring) (per curiam). A court may decide to ignore the organizational distinctions and principles of deference and instead apply, "neutral principles of law," provided, that is, in the application of "neutral principles", there is no reliance on ecclesiastical matters. See Wolf, 443 U.S. at 602 ("[A] State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters . . . .") (quoting Md. & Va. Eldership, 396 U.S. at 368 (Brennan, J., concurring) (per curiam) (emphasis in original)); see also id. at 604 ("In undertaking such an examination [using 'neutral principles' to examine a religious organization's non-secular documents], a civil court must take special care to . . . not . . . rely on religious precepts . . . .").
17. Cf. Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church, 344 U.S. 94, 117 (1952) ("The Court of Appeals of New York recognized, generally, the soundness of the philosophy of ecclesiastical control of church administration and polity but concluded that the exercise of that control was not free from legislative interference.").
18. See, e.g., Serb. E. Orthodox Diocese, 426 U.S. at 710 ("[T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. This principle applies with equal force to church disputes over church polity and church administration." (quoting Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969)).
20. Compare Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006) (noting that the Catholic Church is hierarchically organized and governed and
the option of either deferring to the religious corporation’s institutional internal governing body to avoid the risk of becoming entangled in prohibited ecclesiastical affairs, or, tangling with the matter by application of “neutral principles of law,” all too often an organization of congregational polity\(^2\) will find itself less likely to benefit from a court’s deference and more likely to be subject to the more intrusive “neutral principles of law.”

One of the primary reasons for this is that civil courts frequently fail to recognize or acknowledge the ecclesiastical nature of internal disputes within congregational polities in the same way they do for those with a hierarchical polity.\(^2\) All too often, civil courts presume the controversy within religious corporations of hierarchical polity involves ecclesiastical doctrine while considering like issues within congregational polities to be corporate contractual matters subject to a “neutral principles of law” approach.\(^2\) The most significant contributing

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\(^2\) \textit{Brady v. Reiner, }198 S.E.2d 812, 827 n.3 (W. Va. 1973) (“Polity refers to the general governmental structure of a church, the organs of authority and the allocation and locus of its judicatory powers as defined by its own organic law.”); BASSETT \textit{et al., supra note }3, §3:6, at 3-21 (“The internal organizational framework of religious organizations, their patterns of association, cooperation, and governance, the structures by which they implement their doctrine and live their religious commitment, are called church polity.”).

\(^2\) \textit{See supra note }20.

\(^2\) \textit{Compare Dowd v. Soc’y of St. Columbans, }861 F.2d 761, 764 (1st Cir. 1988) (recognizing a Catholic (hierarchically organized and governed) priest’s previous breach of contract claim against his religious order, the Society, as
factor to this aberration is the corporate form of the congregational religious organization. While most religious organizations are organized under one form or another of a state's incorporation statute, the form most common to the congregational religious organization is that of a not-for-profit corporation. As a creature of a state's not-for-profit incorporation statute, the organization is required to follow the statute's operational requirements by adopting bylaws for the governance of its affairs, passing resolutions to authorize its corporate acts, and documenting corporate decisions with minutes. Many bind their clergy by contract. This blend of corporate process and procedure with religious practice has a tendency to turn religious tradition and doctrine into mere circumstance. When this happens, civil courts are often seduced by the corporate side of the congregational corporation, and internal disputes of the type that are normally handled by hierarchical tribunals are, in the case of congregational polities, handled by a civil court judge as a corporate matter. When a court decides to take the road most familiar and follow its corporate instincts, religious freedoms are often put in peril; rules are followed, but injustice is done.

Involving “rules, policies and decisions which should be left to the exclusive religious jurisdiction of the church and the Society”), with Ervin v. Lilydale Progressive Missionary Baptist Church, 813 N.E.2d 1073 (Ill. App. Ct. 2004) (applying “neutral legal principles” in deciding that trial court could exercise jurisdiction over Baptist (congregationally organized and governed) pastor’s claim that his termination was not in keeping with church’s bylaw procedures).

24. See infra Part V.
25. See infra Part I.
26. See infra Part I.
27. See infra Part I.
28. See John Locke, A Letter Concerning Toleration 40–41 (James H. Tully ed., Hackett Pub’g Co. 1983). Locke explains this concept by using the example that, whereas the Jewish Sabbath on Saturday is rooted in worship, for Christians, it is a circumstance. Id. at 41.
29. See infra Part V.
30. John T. Noonan, Jr., Persons & Masks of the Law 6 (1976) (“It is no accident that in those trials which have been celebrated in literature and in the history of our consciousness—the trial of Socrates, the trial of Thomas More, the trial of Jesus—the rules were followed and yet the human judgment has always been that injustice was done, the person condemned to death was not given his due, the paradigm of justice was violated.”).
This Article considers how corporate form and internal organizational structure affect a normative First Amendment Religion Clause analysis of a dispute within a religious corporation. It considers how the Janus-like face of a religious corporation, pious on one side and corporate on the other, often clouds the analysis when a court is seduced into focusing more on the organization’s corporate side rather than its religious side. Part I of this Article highlights the significant role of a religious organization’s corporate form by identifying and describing the predominant corporate forms used by most of the religious organizations in the United States. Part II describes the origin of the First Amendment’s Religion Clauses. Part III unpacks and describes Religion Clause doctrine as it has evolved out of the common law between 1871 and 1940. Part IV describes the doctrine’s subsequent evolution pursuant to constitutional principles. Part V argues that, because most religious organizations of congregational polity are not-for-profit corporations with a secular corporate form and organizational structure, they are seen and treated more like secular corporations than like religious organizations. The Article concludes that the more constitutionally sound First Amendment Religion Clause doctrinal analysis should focus on whether the essence of the controversy is ecclesiastical, rather than on corporate form.

PART I. THE VARIETIES OF RELIGIOUS ORGANIZATIONAL CORPORATE FORM

Corporations have figured prominently in the evolution of religion in America. As early as 1606, at a time when England was still an “emerging market,” the Virginia Company, organized as a joint

31. The term “emerging market” was coined during the 1980s by World Bank economist Antoine van Agtmael. See NIALL FERGUSON, THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD 288 (2009); see also Chuan Li, What Are Emerging Markets?, UNIV. OF IOWA CENTER FOR INT’L FIN. & DEV., http://blogs.law.uiowa.edu/ebook/facts/what-are-emerging-markets (last visited Feb. 24, 2012) (“Emerging markets are countries that are restructuring their economies along market-oriented lines and offer a wealth of opportunities in trade, technology transfers, and foreign direct investment.”).
stock company by English merchants\textsuperscript{32} to capitalize on what they were calculating would be a profitable economy in the New World,\textsuperscript{33} was headed for a destiny with William Bradford and the \textit{Mayflower} Pilgrims. Jamestown, Virginia became the Virginia Company's flagship for creation of a new market economy and economic development in North America.\textsuperscript{34} By 1620, though, the Company was nearly bankrupt, having lost over £200,000 and nearly three-quarters of its immigrants.\textsuperscript{35} Desperately seeking ways to salvage its investment, the Company was more than receptive to inquiries by a band of Dutch Puritans who wanted to leave Holland and resettle in the New World.\textsuperscript{36} Subsequently, those whom we now embrace as the "Pilgrim Fathers" set sail on the \textit{Mayflower}\textsuperscript{37} to settle within a land grant belonging to the Virginia Company in Jamestown.\textsuperscript{38} Two months later they landed instead, by accident, far north of their Virginia destination within a sparsely populated land grant of the Council for New England, known today as Plymouth, Massachusetts.\textsuperscript{39}

Over the next decade, the Plymouth colony stagnated.\textsuperscript{40} But, another corporate venture changed all of that with the 1630 arrival of John Winthrop in Salem, Massachusetts, as the advance party of "England's largest colonial migration."\textsuperscript{41} As head of a newly created

\textsuperscript{32.} SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 104–05 (2d ed. 2004) (stating that the arrival at the mouth of the James River on May 2, 1607 of three ships was "an effort by a group of London and Plymouth merchants to establish a trading outpost in the New World. Having organized a joint-stock company, they obtained in 1606 a charter which designated two tracts of land along the Virginia coast . . . for colonization.").

\textsuperscript{33.} See id.

\textsuperscript{34.} Id.

\textsuperscript{35.} Id. at 105 ("The cost of the experiment was high. The company lost over £200,000 in the enterprise, and finally collapsed in bankruptcy . . . . By 1618 the population had grown to about 1,000, yet in 1623, despite the immigration of 4,000 more, the population still numbered only 1,200. Ravaged by Indian massacres, pestilence, misgovernment, sloth, avarice, disorderliness, and neglect, the Jamestown settlement all but expired.").

\textsuperscript{36.} See id. at 137.

\textsuperscript{37.} Id. at 137–38.

\textsuperscript{38.} Id. at 105.

\textsuperscript{39.} Id.

\textsuperscript{40.} Id. at 105–06.

\textsuperscript{41.} Id. at 144, 146–47.
corporate entity, the Massachusetts Bay Company, formed by a group of wealthy Puritans in Dorchester, England, Winthrop's ship, the Arbella, was the first of eleven Bay Company ships that would arrive within the year. It was on the deck of the Arbella that Winthrop, armed with a new corporate charter, coined the now famous "city on a hill" metaphor. He was expressing a sentiment at the core of the Puritan ethos: that God was in a covenant relationship with the people of England that made them His "chosen people" and the New World was their promised land, a "city on a hill." Robert Bellah points out that in Roger Williams' view, the "hill" Winthrop was making reference to "was somebody else's hill!"

Empirical evidence suggests that today Winthrop's "hill" is a dynamic and religiously plural landscape, populated by religious traditions diversified and subdivided along denominational lines and made up of thousands of independent churches, temples, and mosques, most organized and incorporated as either a not-for-profit corporation or

42. Id. at 106.
43. See id. at 144, 147.
44. See Jeffrey A. Brauch, John Winthrop: Lawyer As Model of Christian Charity, 11 Regent U. L. Rev. 343, 343 (1999) (Winthrop "called his remarks, 'A Model of Christian Charity.' In them, Winthrop reminded his fellow travelers that they had left their home in England, not for riches or their own glory, but for the glory of God. They had left to establish a people devoted to the service of God and to model for all the world a people that lived in a holy covenant with their God. The travelers were to form a 'city on a hill.'") (citation omitted)).
45. Richard T. Hughes, Myths America Lives By 22–23 (2003); see also Jon Meacham, American Gospel: God, the Founding Fathers, and the Making of a Nation 37–39 (2006); Michael B. Oren, Power, Faith and Fantasy 84 (2007) ("The Puritans concluded that they were the heirs to that contract [covenant], a New Israel embarked on a second Exodus from slavery to freedom, destined for a Promised Land. Impelled by that sense of chosenness, the Pilgrims journeyed from England to Holland and from there to Plymouth Rock, their stepping-stone to salvation.").
46. Robert N. Bellah, Is There a Common American Culture?, 66 J. Am. Acad. Religion 613, 618 (1998) ("The hill belonged to the native Americans, and if the other Puritans were inclined to overlook that, Roger Williams wasn't.").
47. In the form of Protestant, Catholic, Mormon, Jehovah's Witness, and Orthodox Christians; Reform, Reconstructionists, Conservative, and Orthodox Judaism; Sunni and Shia Muslims; Zen, Theravada, and Tibetan Buddhism; as well as Baha'i, Zoroastrians, Unitarians, Native Americans, and New Age groups. Pew Forum on Religion & Public Life, supra note 3, at 5–11.
as a corporation sole.\textsuperscript{48} Often lead by charismatic leaders and business-minded trustees and directors surrounded by bankers, lawyers, accountants, and consultants, these religious organizations operate as lucrative corporate enterprises driven by market principles of growth and sustainability. Those formed under not-for-profit statutes bear state charters, articles of incorporation, constitutions, bylaws, and Internal Revenue Code section 501(c)(3) tax exemptions, and, at the organizational level, are virtually indistinguishable from secular corporations. Those not careful to maintain the "wall of separation" between their ecclesiastical and secular sides risk slipping into the stream of commerce where their theology becomes a packaged, marketed, and distributed commodity, and their internal disputes take the shape of the kinds of internecine conflicts that infect the internal affairs of private, for-profit corporations. The internal disputes of religious organizations have long mirrored those in corporate America and secular society. Historically, the nation's court dockets have been pockmarked with claims arising out of internal disputes within religious organizations for breach of contract,\textsuperscript{49} wrongful discharge,\textsuperscript{50} breach of fiduciary duty,\textsuperscript{51}

\textsuperscript{48} Bassett et al., supra note 3, § 3:2, at 3-11 to -12 ("The DePaul Center for Church/State Studies surveyed 261 national level religious organizations in the United States to determine what type of legal structure these groups use to carry out their affairs. This study found that 87% of religious organizations in the United States use a religious nonprofit corporation legal form in some manner.") (citations omitted). See also William S. Bassett, Religious Organizations and the State: The Laws of Ecclesiastical Polity and the Civil Courts, in Christianity and Law: An Introduction 293, 296 (John Witte, Jr. & Frank S. Alexander eds., 2008) ("Few American churches or religious organizations now are unincorporated associations. Most are incorporated under state statutes as non-profit corporations, as religious corporations, or as corporations sole.").

\textsuperscript{49} See, e.g., Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) (involving a minister who sued his church for breach of contract and age discrimination).

\textsuperscript{50} See, e.g., Vann v. Guildfield Missionary Baptist Church, 452 F. Supp. 2d 651 (W.D. Va. 2006) (involving a pastor who sued his church for wrongful termination).

\textsuperscript{51} See, e.g., Askew v. Trs. of Gen. Assembly of the Church of Lord Jesus Christ of the Apostolic Faith, Inc., 644 F. Supp. 2d 584 (E.D. Pa. 2009), aff'd, 684 F.3d 413 (3d Cir. 2012) (regarding allegations by a congregational church member that the pastor and trustees misappropriated and wasted church assets and funds).
discrimination, defamation, trademark infringement, invasion of privacy, intentional or negligent infliction of emotional distress, conversion, fraud, theft, and sexual abuse. In a secular, corporate context, these types of disputes amount to nothing more than a routine day at the office for a court. When a religious corporation is a party to the litigation, however, the routine is interrupted by the consideration courts must give to the Constitution's First Amendment Religion Clauses that prohibit courts from unwarranted involvement in religious affairs. This consideration is shaped by the corporate form of the religious organization. For example, a religious organization formed as a trustee corporation has an internal governing structure different from one that is

52. See, e.g., Petruska v. Gannon Univ., 462 F.3d 294, 295 (3d Cir. 2006) (discussing a former chaplain of private college’s suit claiming “gender discrimination and retaliation in violation of Title VII,” as well as “civil conspiracy, negligent retention and supervision, fraudulent misrepresentation, and breach of contract”).

53. See, e.g., Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468 (8th Cir. 1993) (involving an ordained minister who sued Synod for placing false information in his personnel file that affected his employment opportunities); see also Orugua v. Archdiocese of Omaha, 2008 WL 818935 (D. Neb. March 24, 2008) (involving claims by a priest that he was reassigned based on false accusations).

54. See, e.g., Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402 (6th Cir. 2010) (addressing a church’s trademark infringement action against a former member).

55. See, e.g., Ogle v. Church of God, 153 F.App’x. 371 (6th Cir. 2005) (not recommended for publication) (involving Bishop who claimed that the church, inter alia, invaded his privacy in refusing to reinstate him to the ministry following investigation for his alleged misconduct).

56. See, e.g., Connor v. Archdiocese of Phila., 975 A.2d 1084 (Pa. 2009) (discussing parents’ claims against their child’s parochial school for many violations including intentional infliction of emotional distress after their child was expelled for possessing a penknife).

57. See, e.g., Abrams v. Watchtower Bible & Tract Soc’y of N.Y., Inc., 723 N.E.2d 1161 (Ill. 1999) (unpublished table decision) (addressing plaintiff’s claims that the defendants engaged in a “conspiracy to defraud”).

58. See, e.g., Doe v. Liberatore, 478 F. Supp. 2d 742 (M.D. Pa. 2007) (involving claims by plaintiff that he was sexually abused by a priest when he was a teen parishioner).

formed as a membership corporation. An organization formed as a corporation sole will have an internal organizational structure different from both. Because a First Amendment Religion Clause analysis is driven by an organization’s internal organizational structure, it is essential to distinguish the more common and traditional corporate forms of religious organizations. The most common forms are, as mentioned, the trustee corporation, the membership corporation, and the corporation sole.

A. The Trustee Corporation

The trustee corporation is one of the first corporate forms adopted for use by religious organizations in this country. Its advent was the result of a shift in the paradigm that dominated the relationship between Church and State prior to the American Revolution. Prior to the Revolution, the relationship between Church and State largely mirrored that of England where the Church was an establishment of the State. In this paradigm, the King had the sole and exclusive right to grant corporate charters as a privilege and no religious corporation could exist without his approval. The same winds that fanned the flames of

60. BASSETT ET AL., supra note 3, §§ 3:22, at 3-72 to -74, 4:3, at 4-117 to -118. (discussing how trustee forms of church organization concentrates power into the upper levels of church hierarchy, while membership corporations are the most democratic forms of church organization).

61. Id. § 3:56, at 3-162 ("The corporation sole is the incorporation of the office of the bishop of a local diocese. The corporation sole lacks the usual trappings of a corporation. . . . It does not have a board of directors, officers, stock, bylaws, official minutes, seal, or even a corporate name.").


63. See Kauper & Ellis, supra note 62, at 1511.

64. Id. at 1509-10; see also MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 43-47 (1965).


66. Kauper & Ellis, supra note 62, at 1504. See also Douglas Arner Development of the American Law of Corporations, 55 SMU L. Rev. 23, 28–31 (2002) (discussing the analysis of Sir Edward Coke, Chief Justice of the King’s Bench, in the 1612 Case of Sutton’s Hospital, wherein Coke set forth four ways in
freedom and independence during the Revolution, however, caused a shift in the paradigm from incorporation by special privilege to incorporation by general incorporation laws and acts.\textsuperscript{67} One of the first outcomes of this paradigm shift was the trustee corporation.\textsuperscript{68}

which a corporation could be created: "(1) by common law, as by the King himself; (2) by the authority of Parliament; (3) by the King himself through a charter; and (4) by prescription").

67. Kauper & Ellis, supra note 62, at 1510 ("The old system of special charters had proven to be a means of establishing favored religious bodies, and states began to enact statutes that granted the corporate form to all bodies that could comply with certain minimal prerequisites. Such incorporated bodies were no longer seen as favorites of the state but as sectarian agencies that had been accorded the benefit of a secular legal form with which they might more effectively achieve their stated goals and purposes.").

One of the earlier general incorporation laws was the New York Act of 1784, the preamble of which set forth reasons that are representative of the reasons state legislatures subscribed to the paradigm shift:

\begin{quote}
Whereas by the thirty-eighth Article of the Constitution of the State of New York, it is ordained, determined and declared, that free capital Exercise and Enjoyment of religious Profession and Worship, without Discrimination or Preference should forever thereafter be allowed within this State to all Mankind, provided that the Liberty of Conscience thereby granted, should not be so construed, as to excuse Acts of Licentiousness, or justify Practices inconsistent with the Peace or Safety of this State.
And whereas, many of the Churches, Congregations, and religious Societies in this State (while it was a Colony) have been put to great Difficulties to support the public Worship of God, by reason of the illiberal and partial Distribution of Charters of Incorporation to religious Societies, whereby many Charitable and well disposed Persons have been prevented from Contributing to the Support of Religion, for want of proper Persons authorized by law to take charge of their pious Donations, and many Estates purchased and given for the Support of religious Societies, now rest in private hands, to the great Insecurity of the Societies for whose Benefit they were purchased or given, and to the no less Disquiet of many of the good People of this State.
And whereas, it is the duty of all Wise, Free and Virtuous Governments to countenance and encourage virtue and religion, and to remove every Lett or Impediment to the Growth and Prosperity of the People, and to enable every
As progeny of the new general incorporation laws, the trustee corporation not only eliminated favored status of the state as a precondition to receiving a corporate charter, but it also offered unincorporated religious organizations the right and privilege to hold property. Prior to the passage of general incorporation laws, unincorporated religious bodies could gather and worship, but they could not hold title to property. Traditionally, property of unincorporated religious organizations and associations was held in trust by individuals (trustees) for the benefit of the organization. This arrangement worked fine as long as the relationship between the individuals acting as trustees and the body of worshipers on whose behalf the trustees were holding the property was on good terms. If the relationship soured or a trustee died, questions of who was entitled to the trustee’s interest in the property arose.

The trustee corporation offered a ready solution to this dilemma. The solution was to incorporate the trustees who were already in title to the property, or, where no trustees previously existed, religious Denomination to provide for the Decent and Honorable Support of Divine Worship, agreeable to the dictates of Conscience and Judgment.

Id. (quoting 1784 N.Y. Laws 21); see also Howe, supra note 64, at 45–46.
68. Kauper & Ellis, supra note 62, at 1510–11.
69. Id.
70. Id. (Under the common law, an unincorporated religious associations were “incapable of taking or holding property in its own name”); see also Carl Zollman, Classes of American Religious Corporations, 13 Mich. L. Rev. 566, 573 (1914–1915) (“When early in our history territorial parishes began to disintegrate, voluntary societies for religious worship were formed by those who severed their connection with the parishes. These societies generally existed for a time in an unincorporated form. This arrangement worked well enough as long as no property was acquired. When, however, property accumulated the question who was to hold it was at once presented. It could not be held in the name of all the members as they were too numerous and changing. It could not be held in the name adopted by the society as that was not recognized by law.”).
71. Kauper & Ellis, supra note 62, at 1511–12; see also Zollman, supra note 70, at 573.
72. Kauper & Ellis, supra note 62, at 1511–12; see also Zollman, supra note 70, at 574.
73. Kauper & Ellis, supra note 62, at 1511–12; Zollman, supra note 70, at 574.
74. Kauper & Ellis, supra note 62, at 1511–12; see also Zollman, supra note 70, at 574.
have the membership of the religious organization elect a body of trustees who would then be incorporated under state law. As a formal corporation, the trustees then held the organization's property and conducted the affairs of the religious organization pursuant to statutory authority and limitations. Today, the trustee corporation is more common in hierarchical religious organizations and is recognized in thirty jurisdictions, including the District of Columbia.

B. The Membership Corporation

By the middle of the nineteenth century, the limitations of the trustee corporate form began to show. Courts that were called upon to consider intra-organizational controversies between the trustees and their congregations were increasingly put in a position of resolving these issues by interpreting religious theology. The implied trust doctrine is an outgrowth of the courts' consideration of these controversies. Essentially, the implied trust doctrine meant that the property held in trust by the trustees of a trustee corporation was obliged to be applied to the uses of the theology of the religious organization when it was first created. This meant that if the organization was incorporated when the membership was all Methodist, a change in a majority of the membership over time to Presbyterian, the trustees were bound by trust doctrine to continue to allow the property to be used only for Methodist worship.

As it had in 1784 when it was one of the first states to pass a general incorporation law, in 1854, New York once again assumed a vanguard role. This time, it was the New York Court of Appeals

75. Kauper & Ellis, supra note 62, at 1511; see also Zollman, supra note 70, at 574–75; BASSETT ET AL., supra note 3, § 3:22, at 3-72 to -73.
76. BASSETT ET AL., supra note 3, § 1:30, at 1-62.
77. Id. § 4:2, at 4-8.
78. Id. § 3:22, at 3-72.
79. Kauper & Ellis, supra note 62, at 1511; see also Zollman, supra note 70, at 576–77.
80. See Kauper & Ellis, supra note 62, at 1511 (“[T]he legislatures of the states that adopted this form granted perpetual succession without the necessity of a transfer of property to some different entity and without a change in existing relationships.”); see also infra Parts II, III.A, IV.A.
81. HOWE, supra note 64, at 46.
82. See id.
contradicting decades of jurisprudence interpreting its 1784 statute. The court said that the better interpretation of the statute which provided for the formation of corporations was that the members of the religious body actually constitute the corporation with the trustees acting as its officers, not the trustees as the actual corporation with the members forming no part of it. This decision essentially described and defined a membership corporation, where it is the membership that is incorporated, and the membership holds and controls organizational property and conducts the affairs of the organization in accordance with the organization’s custom and rules, charter or articles of incorporation, and bylaws.

Today, the membership corporation is recognized in a majority of jurisdictions and is found more often in religious organizations of congregational polity. The Revised Model Nonprofit Corporation Act uses the membership corporate form as a general model for religious corporations. The membership corporation is recognized by thirty-eight states and the District of Columbia.

C. The Corporation Sole

The third, and least used, of the three most common corporate religious forms is the corporation sole. The corporation sole has a governing structure vastly different from that of the trustee corporation and the membership corporation. As mentioned, in the trustee corporation the elected trustees control the corporation, and in the

83. Robertson v. Bullions, 11 N.Y. 243 (1854). See also Kauper & Ellis, supra note 62, at 1512; Howe, supra note 64, at 46–47.
84. See Robertson, 11 N.Y. at 247–48.
85. Kauper & Ellis, supra note 62, at 1512.
86. See id. at 1512–13.
87. Id.; Basset et al., supra note 3, § 3:20, at 3–69.
89. Id.
90. The Revised Model Nonprofit Corporation Act has been adopted in twenty-one states with some form of modification. See id. § 1:23, at 1-52.
91. Id. § 3:53, at 3-145.
92. Id. § 1:23, at 1-52.
93. See id. § 3:56, at 3-162 ("The first corporate forms adopted were trustee corporations, in which title vested in an appointed or elected board of trustees.").
membership corporation, the congregation controls.94 The corporation sole, in stark contrast to the arguably elitist structure of the trustee corporation and the more egalitarian structure of the membership corporation, is literally a “one-man corporation”95 in which the office of a titled position is incorporated.96 The corporate property and powers are then controlled and exercised by the individual holding the office.97 Subsequent office holders inherit the corporation’s property and power.98

The corporation sole is particularly attractive to hierarchical religions where authority is concentrated in an office,99 such as Roman Catholicism, Episcopalianism, Eastern Orthodox, and the Church of Jesus Christ of Latter-Day Saints.100 The corporation sole is strictly a creation of positive state law.101 This means that a corporation sole can only be created by a specific legislative act.102 Currently, seventeen states statutorily recognize the corporation sole while a minimum of eight have specially chartered corporations sole.103

PART II. THE FIRST AMENDMENT’S RELIGION CLAUSES: ORIGINS AND EVOLUTION

In September 1789, a joint committee of the House and Senate of the First Congress approved a draft copy of the Bill of Rights that

94. Id. § 1:23, at 1-49 to -50.
95. Kauper & Ellis, supra note 62, at 1540.
96. BASSETT ET AL., supra note 3, § 3:56 at 3-162 (“The corporation sole is the incorporation of the office of the bishop of a local diocese.”).
97. Id. § 3:56, at 3-162.
98. Id.
99. Id. § 3:56, at 3-159.
100. Id. (“Ab]out one-third of the Roman Catholic diocesan bishops in the United States are corporations sole. The corporation sole is also used by Episcopal dioceses, various other [sic] Orthodox dioceses in this country, as well as the presiding bishop of the Church of Jesus Christ of Latter-Day Saints.”).
101. Id. § 3:56, at 3-160 & n.11 (“The only federally incorporated corporation sole is the Roman Catholic Archdiocese of Washington, D.C., established by special act of Congress in 1948.”) (citing 62 Stat 355 (1948)).
102. Id. § 3:56, at 3-160.
103. Id. §§ 3:56, at 3-163; 3:56, at 3-160 to -161.
contained twelve amendments. The third of these twelve amendments, the result of a summer filled with debates and consideration of over twenty-five different drafts, would ultimately become the U.S. Constitution’s First Amendment, containing the Religion Clauses.

The First Amendment opens with the phrase that contains the two Religion Clauses: “Congress shall make no law respecting an establishment of religion, [(“Establishment Clause”)] or prohibiting the free exercise thereof [(“Free Exercise Clause”)]. . . .” While the original intent of these clauses continues to be debated among jurists and scholars, the general consensus is that the purpose of the Religion

105. WITTE, supra note 104, at 89.
106. AMAR, supra note 104, at 20.
107. U.S. CONST. amend. I.
108. WITTE, supra note 104, at 89 (“What is the original understanding of the First Amendment? Is there one interpretation, or many? Is it even useful to probe such questions? The final text of the First Amendment itself has no plain meaning. The congressional record holds no Rosetta Stone for easy interpretation; there is no ‘smoking gun’ that puts all evidentiary disputes to rest. Congress considered twenty-five separate drafts of the religion clauses . . . ten different ones tendered by the states, ten debated in the House, five more debated in the Senate, and the final draft forged by the joint committee of the House and Senate. The congressional record holds no dispositive argument against any one of the drafts and few clear clues on why the sixteen words that comprise the final text were chosen.”); see also Mark David Hall, Jefferson Walls and Madisonian Lines: The Supreme Court’s Use of History in Religion Clause Cases, 85 OR. L. REV. 563 (2006) (using empirical data to analyze how history has affected Supreme Court’s interpretation of the Religion Clauses); Vincent Phillip Muñoz, The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress, 31 HARV. J.L. & PUB. POL’Y 1083 (2008); Steven H. Shrifrin, The Pluralistic Foundations of the Religion Clauses, 90 CORNELL L. REV. 9, 14 (2004) (“[T]he Framers themselves did not agree upon the appropriate relationship between religion and government. And furthermore, even if they had agreed, it is not clear that a legal theory requiring us to be bound in the twenty-first century by the will of a group of eighteenth century white male agrarian slaveholders would have a lot to recommend it.”). One scholar also wrote:

[T]he scope of the religion clauses are more simply answered than some distinguished scholars have suggested. Two corollaries are that the Supreme Court has not committed a gross blunder in developing the scope of those clauses, and
Clauses was to protect religion from the national government. However, in its first Free Exercise case a hundred years after ratification, the Supreme Court seemingly failed to recognize this protection when it held that a federal law could prohibit the free exercise of religion. Twenty years later, when considering its first Establishment Clause case, the Supreme Court, in like fashion, decided that the use of a congressional appropriation to fund construction at a hospital run by nuns affiliated with a Catholic religious society was not a violation of that clause.

that the widely held view of the clauses as having a dual character is sound.

Kent Greenawalt, Common Sense About Original and Subsequent Understandings of the Religion Clauses, 8 U. PA. J. CONST. L. 479, 480 (2006). See also STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18 (1995) ("Judges and scholars have assumed that the religion clauses contain both a federalist element and a substantive principle or right . . . ").

109. Witte, supra note 104, at 53–54 ("The concern was to protect church affairs from state intrusion, the clergy from the magistracy, church properties from state encroachment, and ecclesiastical rules and rites from political coercion and control."). See also United States v. Balsys, 524 U.S. 666, 674–75 (1998) ("The currently received understanding of the Bill of Rights as instituted 'to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches' of the National Government defined in the original constitutional articles . . . ." (quoting New York Times Co. v. United States, 403 U.S. 713, 716 (1971) (Black, J., concurring) (per curiam))); Stephen L. Carter, Reflections on the Separation of Church and State, 44 ARIZ. L. REV. 293, 294 (2002) ("The purpose of the separation was not to protect the state from religious believers but to protect the church in its work of salvation from the corruption of the state."); Carl H. Esbeck, Religion and the First Amendment: Some Causes of the Recent Confusion, 42 WM. & MARY L. REV. 883, 883–87 (2001).

110. Reynolds v. United States, 98 U.S. 145, 162 (1878) (validating a congressional ban on the practice of polygamy). Chief Justice Morrison Waite, delivering the opinion of the Court, stated, "[i]he inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong." Id.

111. Bradfield v. Roberts, 175 U.S. 291 (1899) (rejecting claim of taxpayer-citizen that government funding of non-profit hospital operated by order of Roman Catholic nuns was a violation of the Establishment Clause).
The Religion Clauses were originally applicable to only regulate Congress and not the states, because religious issues were viewed as purely state matters. The result was that some states supported churches, some banned non-Christian religious organizations, and others had religious qualifications to hold public office. John Witte describes the scene as a "patchwork quilt of laws on religious liberty." Part of this "patchwork quilt" was state-required congregationalism whose tenets of majority-rule interfered with the governance rights of hierarchical organizations. Fundamental to a religious organization of hierarchical polity is an ecclesiastical tribunal that is superior to its membership. When such an organization is compelled to adopt a congregational, majority-rule model of governance, its religious liberties are affected. Another part of this "patchwork" was the application by some states of the laws of "'implied trust' and the 'departure-from-

112. See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 435–36 (2002). See also Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws . . . .' ); Barron v. City of Balt., 32 U.S. (7 Pet.) 243, 250 (1833) ("Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."). Cf. Greenawalt, supra note 108, at 481 (describing three theories regarding the scope of the Religion Clauses: that they "created ordinary substantive constraints, set jurisdictional limits, withdrew the subject of religion from Congress altogether, or performed some combination of these legal operations.'").

113. Witte, supra note 104, at 109; see also Howe, supra note 64, at 70.

114. Amar, supra note 104, at 32–33 ("In 1789, at least six states had government-supported churches—Congregationalism held sway in New Hampshire, Massachusetts, and Connecticut . . . while Maryland, South Carolina, and Georgia each featured a more general form of establishment in their respective state constitutions") (citation omitted).


116. Howe, supra note 64, at 41–47; see also Jay Alan Sekulow, WITNESSING THEIR FAITH: RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES AND THEIR OPINIONS 77 (2006).


118. Howe, supra note 64; see also Sekulow, supra note 116, at 77.
doctrine”’ standard. Under this standard, property contributed to a church was held in trust for the benefit of the person(s) making the contribution and those departing from traditional church doctrine forfeited any rights to the property. In Watson v. Jones, the Supreme Court found that these laws abridge religious liberties when courts, in keeping with the doctrine, “[inquired] and [decided] . . . not only . . . the nature and power of . . . church judicatories, but what is the true standard of faith . . .”

In 1940, a significant change occurred when the Supreme Court applied the Free Exercise Clause to a state for the first time. It did this in a creative, unusual, and controversial way: by incorporating the First Amendment into the Fourteenth Amendment, and then asserting the state had abridged the claimant’s Fourteenth Amendment right to “liberty” without due process. The linchpin to make this method work was the notion that the rights embodied in the First Amendment’s Religion Clauses are religious “liberties” protected by the Fourteenth Amendment’s liberty guaranties. Seven years later, the Court repeated the incorporation process, this time subjecting a state law to the Establishment Clause. There has been no dearth of comment and


120. See Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 ARIZ. ST. L.J. 1085, 1111 (1995) for a good explanation of the how the implied trust/departure-from-doctrine standard evolved from an English legal principle known as the Pearson Rule and how the Pearson Rule was ultimately rejected by American courts.

121. Watson, 80 U.S. (13 Wall.) at 727.

122. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the Establishment Clause applies to states because “[t]he Fourteenth Amendment has rendered legislatures of the states as incompetent as Congress to enact such laws”).

123. U.S. CONST. amend. XIV, § 1 (“No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).


125. See Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15–16 (1947) (holding that a state law authorizing reimbursement to Catholic parents for bus transportation of their children on busses operated by the public transportation system was not an establishment of religion issue).
criticism on the use of the Fourteenth Amendment in this way. According to Witte, it was the abridgement of religious rights by the states that motivated the Supreme Court to discover a way to make states subject to First Amendment religious guaranties. The “way,” it turns out, was to use the Fourteenth Amendment to apply the protections of the First Amendment to the states. Accordingly, in Cantwell v. Connecticut, the Supreme Court agreed with the plaintiff/appellant Newton Cantwell, a Jehovah’s Witness, that the state statute prohibiting him from soliciting contributions for a religious cause without a license was “offensive to the due process clause of the Fourteenth Amendment,” denying him and his co-defendants their freedom of speech and free exercise of religion. Relying on the Free Exercise Clause, the Supreme Court said:

126. Mark DeWolfe Howe’s position was that the drafters and adopters never considered that the Fourteenth Amendment would have any impact on religious organization. Howe, supra note 64, at 72–73. The Supreme Court had considered it to be primarily a “protection of the Negro against abusive state action.” Id. at 132. See also Amar, supra note 104, at 139–40 (discussing the three main approaches to interpreting the relationship between the Bill of Rights and the Fourteenth Amendment: (1) the Fourteenth Amendment never incorporated any of the Bill of Rights (advocated by Justice Felix Frankfurter); (2) the Fourteenth Amendment incorporated all of the Bill of Rights (advocated by Justice Hugo Black); (3) whether or not the Fourteenth Amendment incorporates any of the Bill of Rights should be determined on a right by right basis (the position of Justice William Brennan)).

127. Witte, supra note 104, at 109–10; see also Hamburger, supra note 112, at 448.

128. See Witte, supra note 104, at 109–10; Hamburger, supra note 112, at 122–23. See also Adamson v. California, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring) (discussing the opinions of Supreme Court justices who dealt with incorporation issues following the passing of the Fourteenth Amendment); Hamburger, supra note 112, at 439 (noting the argument among justices as to whether the Fourteenth Amendment incorporated the Bill of Rights to the states or whether it secured fundamental rights of individuals from the states); Smith, supra note 108, at 35. Cf. Witte, supra note 104, at 126 (referencing the argument that the incorporation of the religion clauses is contrary to the text and intent of both the First and Fourteenth Amendments). But see Amar, supra note 104, at 33–34 (arguing that a mechanical incorporation of the First Amendment by way of the Fourteenth Amendment is to make the states subject to a prohibition the First Amendment exempts them from).

129. 310 U.S. 296 (1940).
130. Id. at 303.
131. Id. at 300.
We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.132

It was not until 1952 in Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America,133 though, that the Supreme Court first submitted an internal church dispute to a First Amendment Religion Clause analysis.134 Applying the Free Exercise Clause, the Supreme Court held that a New York statute granting control of property owned by the Russian Orthodox Church headquartered in Moscow to an American faction at odds with the Mother Church in Russia violated the Free Exercise Clause.135

The three internal dispute cases considered by the Court prior to Kedroff were each decided on common law, not constitutional, principles.136 In Kedroff, the Supreme Court, for the first time, relied on the First Amendment in its consideration of a religious organization’s

132. Id. at 303.
133. 344 U.S. 94 (1952).
134. Id. See also Serb. E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 730 (1976) (Rehnquist, J., dissenting) (“The year 1952 was the first occasion on which this Court examined what limits the First and Fourteenth Amendments might place upon the ability of the States to entertain and resolve disputes over church property.”).
135. Kedroff, 344 U.S. at 119. See also Serb. E. Orthodox Diocese, 426 U.S. at 730 (Rehnquist, J., dissenting) (“This Court . . . held [in Kedroff] that the statute was a violation of the Free Exercise Clause . . . .”).
136. Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 15–19 (1929); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 137–40 (1872); Watson v. Jones, 80 U.S. (13 Wall.) 679, 702 (1871); WITTE, supra note 104, at 244 (“The Supreme Court’s earliest cases on religion, beginning in 1815, were based on federal common law, not on the First Amendment . . . .”).
internal dispute, and, in so doing, transformed those common law principles into a principle of constitutional law.\footnote{137}

PART III. RELIGION CLAUSE DOCTRINE IN THE COMMON LAW ERA

As a whole, Religion Clause doctrine applicable to disputes within religious corporations has grown out of cases involving only those that are hierarchically organized and governed.\footnote{138} Since first considering an internal religious dispute over one hundred and forty years ago, only one case has involved a dispute with a religious corporation of congregational polity, making the doctrine rather hierarchical-centric.\footnote{139} The genesis of the Court's hierarchical-centric journey to development of the doctrine began with its choice of solutions. Prior to the Civil War, the individual states had used one of three approaches when considering intra-church disputes.\footnote{140} Some states used trust law principles, some deferred to the religious organization's hierarchy, while others subscribed to a congregational model of majority rule.\footnote{141} In the aftermath of the Civil War, the Supreme Court chose to mark its first consideration of an intra-church dispute by reliance on a common law rule of deference to the religious organization's hierarchy.\footnote{142} The

\footnote{137. HOWE, supra note 64, at 89 ("The Kedroff case established a rule of constitutional law, a rule, that is, which compels all states and the federal government, through whatever agency they may act, to abide by its requirements.")); WITTE, supra note 104, at 249 ("Kedroff thus converted Watson into a constitutional principle . . . ").


139. Bouldin, 82 U.S. (15 Wall.) 131. Except for Bouldin, all other United States Supreme Court First Amendment Religion Clause cases considering internal disputes of religious organizations have involved only religious corporations that are hierarchically organized and governed.

140. HOWE, supra note 64, at 82.

141. Id.

142. Id. at 83.
doctrinal analysis that sprung from this rule was based squarely on organizational structure.

A. Watson v. Jones

The organizational structure of religious corporations has been a key component in First Amendment Religion Clause analysis of intra-church disputes since first being introduced by Justice Samuel Freeman Miller in the 1871 case, Watson v. Jones. In Watson, the Supreme Court declared that courts must abide by the decisions of the highest tribunal within the religious organization regarding ecclesiastical matters such as questions of discipline, faith, governance, custom, or law. Relying exclusively on common law principles with no reference to the First Amendment or its Religion Clauses, the Supreme Court’s opinion laid out the rules a court must observe when considering internal disputes of religious organizations. Structurally, it rested its analysis squarely on the polity of the religious organization. In religious corporations with

143. Watson, 80 U.S. (13 Wall.) at 679. The Supreme Court has since considered internal disputes within religious corporations in many cases. See, e.g., Little v. First Baptist Church, Crestwood, 475 U.S. 1148 (1986), cert. denied; Jones, 443 U.S. 595; Serb. E. Orthodox Diocese, 426 U.S. 696; Md. & Va. Eldership, 396 U.S. 367; Presbyterian Church in the U.S., 393 U.S. 440; Gonzalez, 280 U.S. 1; Kedroff, 344 U.S. 94; Bouldin, 82 U.S. 131.

144. Watson, 80 U.S. (13 Wall.) at 727.

145. Id. When the form of government is a congregation, distinguishing legal principles apply: “[T]he rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control . . . .” Id. at 725. When the form of government is hierarchical, the following legal principals apply:

[We] think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Id. at 727.
a congregational form of government, a court is bound by the decision of a majority of its members.\textsuperscript{146} In those with a hierarchical form of government, a court must heed the decision of the highest governing body within the corporation.\textsuperscript{147} \textit{Watson} was the Supreme Court’s initial entry into an area that was heretofore the exclusive domain of the states.\textsuperscript{148} A domain that was as congregational-centric in its analysis of internal disputes of religious organizations as today’s is hierarchical-centric.\textsuperscript{149}

The horrors of the Civil War left no area of American life untouched. Religious life was no exception. Pulpits in both the North and the South proclaimed the righteousness of their respective takes on slavery and did so with an intensity matched only by their religious beliefs.\textsuperscript{150} The Presbyterian Church in the United States, a hierarchically organized and governed religious organization,\textsuperscript{151} was no less vocal. When its General Assembly, its national ruling body, expressed its support for the North and President Abraham Lincoln’s Emancipation Proclamation, a schism resulted along proslavery and antislavery lines.\textsuperscript{152} A month after the Civil War ended,\textsuperscript{153} this schism became even more pronounced when the General Assembly directed the Presbyteries, Board of Missions, and Church Sessions to require any persons who had sided with the Confederacy to “repent and forsake these sins” as a precondition

\textsuperscript{146} Id. at 725.
\textsuperscript{147} Id. at 727.
\textsuperscript{148} Howe, supra note 64, at 80; see also Sekulow, supra note 116, at 69.
\textsuperscript{149} Howe, supra note 64, at 82 (noting that before the Civil War, there was a “startling tendency of state courts and state legislatures to build doctrine upon a congregational principle—to let today’s majority decide a church’s immediate destiny, without regard to the wishes and expectations of its founders or the preferences of its hierarchy”).
\textsuperscript{150} See Ahlstrom, supra note 32, at 670–90.
\textsuperscript{151} The Presbyterian Church in the United States was a hierarchically organized Christian religious organization governed by “a written Confession of Faith, Form of Government, Book of Discipline, and Directory for Worship.” Watson, 80 U.S. (13 Wall.) at 681. As such, it consisted of several “judicatories” consisting of, in descending order, a General Assembly, the national level judicatory, followed by Synods, Presbyteries, and Church Sessions. Id.
\textsuperscript{152} Id. at 690–93.
to admission as members, ministers or missionaries. A few months later, in September 1865, the Presbytery of Louisville, Kentucky repudiated these instructions in its own publication. The General Assembly of 1866 responded by offering it an opportunity to repent and conform or risk being dissolved. With the Louisville Presbytery entrenched in its position, by June 1867, the General Assembly declared that both the Presbytery of Louisville and the Synod of Kentucky were "in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America." This led to a division within the Louisville Presbytery, with the proslavery adherents leaving the Presbyterian Church of the United States and joining the Presbyterian Church of the Confederate States.

Thus, in January 1866, the congregation of the Walnut Street Presbyterian Church in Louisville, Kentucky had become divided along the same proslavery-antislavery lines, with a majority of its members supporting the General Assembly's stance against slavery, while a minority of its members embraced the proslavery position. Each faction claimed that it was the rightful owner of the church and its property. The General Assembly declared that the majority of the congregation was the lawful church. The minority faction objected, arguing that pursuant to the laws of "implied trust and the departure from doctrine" standard applicable to religious societies, the minority faction should be considered the true owner of the church and its property. The essence of this argument was that, under the "'implied trust' and 'departure-from doctrine' standard,” church property was held in trust to benefit the growth and development of the church and any departure

154. Watson, 80 U.S. (13 Wall.) at 691.
155. Id.
156. Id. at 691–92.
157. Id. at 692.
158. Id.
159. Id.
160. Id. at 694.
161. Id. at 694–97.
162. Id. at 694.
163. See Lash, supra note 120, at 1115.
from traditional church doctrine resulted in a forfeiture of rights to the property. Therefore, argued the minority, the antislavery stance of the majority was a departure from doctrine which should result in them forfeiting all rights to the church’s property.


166. Adams & Hanlon, supra note 119, at 1299. See also Kurt Lash for a similar argument:

In the 1813 English case, Craigdallie v. Aikman, Chancellor Lord Eldon ruled that church property was held in trust for the persons who had contributed money for the original acquisition of the church. Developing this principle in the later case Attorney-General ex rel. Mander v. Pearson, Lord Eldon declared that church property was held in trust for the propagation of certain religious doctrines and that it was the duty of the court to award the property to the faction adhering to the traditional doctrines of the church. The so-called “Pearson Rule” was soon adopted in the new world by way of state common law. Although application of the Pearson Rule required detailed examination of church doctrine, such inquiries fit well in a world where courts routinely decided issues of blasphemy and proper deportment on the Sabbath. However, just as theological rationales grew less routine in blasphemy cases, so the Pearson Rule came under fire as a remnant of “establishment England.” By the 1840s, litigants on the side of doctrinal innovation began to cite both the state and federal constitutions for the principle that the state had no power—and the courts no jurisdiction—to interfere in matters involving religious doctrine and church government. As early as 1842, Kentucky courts had rejected the Pearson Rule, noting that “[t]he judicial eye of the civil authority of this land of religious liberty, cannot penetrate the veil of the Church, nor can the arm of this Court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excsinded members.”

Lash, supra note 120, at 1111–12 (alteration in original) (citations omitted).
1. Court Deference to Hierarchical Judicatory

In rejecting this argument, Justice Miller's opinion pointed out that, historically, cases involving the property rights of religious organizations have fallen into one of three categories: (1) where the use of the property is subject to express terms limiting its use to a specific form of religious doctrine or belief; (2) where property is held by a religious organization of congregational polity; and, (3) where the "religious congregation or ecclesiastical body holding the property 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."\(^{167}\) According to Justice Miller, the third category, where the dispute involves the property rights of hierarchically organized and governed religious organizations (like the Presbyterian Church of the United States), is the one that is in "every way the most important."\(^{168}\) This is so, he declared, because the cases that fall within this third category showed up more often in the courts and presented the more difficult questions.\(^{169}\) After so declaring, he went on to announce the rule of *Watson*:

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.\(^{170}\)

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168. *Id.* at 726.
169. *Id.*
170. *Id.* at 727.
The rationale for the rule, while making no reference to the Constitution, was based, nonetheless, on constitutional principles of religious liberty.\textsuperscript{171} In rejecting the English doctrine that allowed courts to “inquire and decide . . . not only . . . the nature and power of . . . church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard,”\textsuperscript{172} Justice Miller stated that

[i]n this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of

\begin{footnotes}
\footnotetext{171}{HOWE, supra note 64, at 82–83.}
\footnotetext{172}{Watson, 80 U.S. (13 Wall.) at 727.}
\end{footnotes}
ecclesiastical cognizance, subject only to such
appeals as the organism itself provides for.\footnote{Id. at 728–29.}

The reasoning behind this rationale was that hierarchically
organized and governed religious organizations\footnote{Id.} have their own body
of esoteric laws that civil courts would potentially be incompetent to
adjudicate.\footnote{Id. at 724–25.} When it comes to ecclesiastical matters having to do with
a religious organization’s discipline, faith, governance, custom, or law,
so the reasoning goes, only those who are seasoned in the faith and its
tradition, and not the courts, are qualified to render decisions affecting
these matters. And those of sound mind who voluntarily join such
organizations are considered to have consented to the organization’s
authority and are bound by the organization’s ecclesiastically lawful
decisions. In these circumstances, these individuals, like the court, must
abide by the decision of the organization’s highest tribunal.

2. Court Relationship to Congregational Polities

The focus of the Court’s decision was clearly on the principles
and doctrine applicable to hierarchically organized and governed
organizations. However, Justice Miller briefly mentioned religious
organizations of congregational polity.\footnote{Id. at 729.} He described these religious
organizations as independent organizations “governed solely within
[themselves], either by a majority of its members or by such other local
organism as it may have instituted for the purpose of ecclesiastical
government . . . .”\footnote{Id. at 724.} He continued that “[i]n such cases where there is a
schism [within a religious organization of congregational polity] which
leads to a separation into distinct and conflicting bodies, the rights of
such bodies to the use of the property must be determined by the

\footnote{Id. at 728–29.}
\footnote{Id.}
\footnote{Id. at 724–25.}
\footnote{Id. at 724.}
ordinary principles which govern voluntary associations.” In other words, “the majority rules.”

The congregational model of polity was quite familiar to the judiciary of the day when it came to resolving intra-church property disputes. After the Revolutionary War, the church affiliated municipalities in Massachusetts followed a “congregational tradition” where each was an autonomous, “self-sufficient” and “self-governing” majority-rule jurisdiction. The South Carolina Constitution, established in 1778, not only established Protestantism as the state religion and expected that each Protestant denomination would become a state chartered corporation, it mandated that all church ministers be elected by a majority of its members. In 1784, New York adopted a statute allowing religious organizations to incorporate. An 1854 ruling by the New York Court of Appeals interpreting that statute held that the trustees of a religious corporation were bound by the decision of a majority of the members who benefited by the corporation. Mark DeWolfe Howe suggests, as did Justice Miller, that the preference of the judiciary for majority-rule, the staple of congregational polities, was because of its awareness of its incompetence to rule on matters buried in theology.

Nonetheless, the takeaway of Watson is that courts are bound to abide by the decisions of the highest judicatory within a religious organization of hierarchical polity when it comes to questions of discipline, faith, ecclesiastical rule or governance, custom, or law. In religious organizations of congregational polity, however, it is the majority that rules, unless there are officers within the organization.

178. Id. at 725.
179. Id.
180. Howe, supra note 64, at 82.
181. Id. at 34–35.
182. Id. at 41–42.
183. Act of Apr. 6, 1784, 1 Laws of the State of New York (Samuel Jones & Richard Varick eds., 1789).
185. Watson, 80 U.S. (13 Wall.) at 729.
186. Howe, supra note 64, at 37, 49.
invested with powers of government superior to those of the congregation. 188

B. Bouldin v. Alexander

A year after Watson, the Supreme Court refined the common law rule announced in Watson by holding that it could determine, as between competing individuals or judicatories, who is the lawful authority of a religious organization. In Bouldin v. Alexander, 189 an 1872 appeal from the Supreme Court of the District of Columbia, the Court was confronted with a property dispute within a church of congregational polity. 190 The dispute arose when Albert Bouldin, leader of the Third Colored Baptist Church of the City of Washington, along with fifteen or so members loyal to him, took control of the church and locked out trustees adverse to him. 191 The eleven affected trustees representing the interests of a majority of the membership of the church (ca. 200), filed suit against Bouldin for, inter alia, return of control of the property to them, the lawful trustees of the church. 192 The trial court agreed with the plaintiffs and Bouldin appealed. 193

In affirming the trial court, the Supreme Court expressly recognized that, consistent with the general principles laid down in Watson, it had no power to consider or rule on ecclesiastical matters such as who should be members, officers or trustees of the church. 194 It did, however, have the power to inquire into the organizational structure of a religious organization in order to determine whether the individuals or judicatory purporting to act on behalf of the religious organization was actually authorized to do so. 195 In other words, courts may review whether a church followed its own internal rules and regulations. Bouldin represents the first, last, and only time the Supreme Court has

188. Id.
189. 82 U.S. (15 Wall.) 131 (1872).
190. Id. at 133.
191. Id. at 134.
192. Id. at 135.
193. Id.
194. Id. at 137, 139–40.
195. Id. at 140.
considered First Amendment Religion Clause doctrine within the context of a congregational religious organization.196

C. Gonzalez v. Roman Catholic Archbishop of Manila

Following Bouldin, the Supreme Court did not consider its next internal church dispute until 1929. In Gonzalez v. Roman Catholic Archbishop of Manila,197 Raul Rogerio Gonzalez, a ten-year old, contended that he was entitled to a chaplaincy founded by the terms of an ancestor’s will.198 Affirming the decision of the Supreme Court of the Philippine Islands on common law grounds consistent with Watson, the Court found that Gonzalez’s suit against the Archbishop of Manila for refusal to appoint him to the chaplaincy was a canonical act outside the purview of the secular courts.199 In deferring to the decision of the Archbishop, the Supreme Court said that absent “fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive . . . .”200 Forty-seven years later in the 1976 case of Serbian Eastern Orthodox Diocese for the U.S. & Canada v. Milivojevich,201 the Court would declare that this “fraud, collusion, or arbitrariness” exception to the Watson rule was nothing more than dictum.202

PART IV. RELIGION CLAUSE DOCTRINE IN THE CONSTITUTIONAL ERA

On the heels of Cantwell and Everson v. Board of Education of Ewing203 in the 1940s, and their application of the Religion Clauses

196. Ellman, supra note 20, at 1387 n.27 (“Although the Supreme Court has not decided any other cases involving congregational churches, it has explicitly relied on the hierarchical nature, rather than congregational nature, of the churches involved in the cases it has decided.”).
197. 280 U.S. 1 (1929).
198. Id. at 14.
199. Id. at 16.
200. Id.
202. Id. at 712.
against the states by incorporation of the First Amendment into the Fourteenth Amendment, came *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America.*\(^{204}\) *Kedroff* constitutionalized the common law principles of religious freedom the Court found pervasive in *Watson.*\(^{205}\)

A. *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America*

*Kedroff* is remarkable not only for it being the first time an internal church dispute was submitted to a First Amendment Religion Clause analysis,\(^{206}\) but also for the time period and context within which it was decided. In 1952, the year *Kedroff* was decided, the United States was in the grips of the Red Scare, a pathological form of anti-communism fueled by McCarthyism.\(^{207}\) McCarthyism is named after Wisconsin Senator Joseph McCarthy who served in the United States Senate from 1947 to 1957.\(^{208}\) During the 1950s, McCarthyism demonized Soviet Russia and its brand of communism.\(^{209}\) Consequently, thousands of American citizens were investigated by the Federal Bureau of Investigation and accused and charged by the House Un-American Activities Committee of either being a Communist or Communist sympathizer.\(^{210}\) Being branded a communist or communist sympathizer often led to ruined careers, job loss, and in some cases, imprisonment.\(^{211}\) The Supreme Court’s decision in *Kedroff* in the midst of this kind of social and political climate was extraordinary.

\(^{204}\) 344 U.S. 94 (1952).


\(^{206}\) See *Kedroff*, 344 U.S. 94; *Serb. E. Orthodox Diocese*, 426 U.S. at 730 (“The year 1952 was the first occasion on which this Court examined what limits the First and Fourteenth Amendments might place upon the ability of the States to entertain and resolve disputes over church property.”).


\(^{208}\) Id. at 6, 131.

\(^{209}\) Id. at 131.

\(^{210}\) Id. at 3–4.

\(^{211}\) Id. at 3.
The case history of *Kedroff* is lengthy and complex and tells of the effects of the 1917 Kerensky and Bolsheviki revolutions in Russia on the Russian Orthodox Church and how that in turn affected the control of the Church’s American diocese and cathedral in New York.\(^{212}\) The controversy pitted the Supreme Church Authority of the Russian Orthodox Church in Moscow against the Archdiocese of North America. At stake was who had the right to use and occupy the Saint Nicholas Cathedral of the Russian Orthodox Church in North America located at 15 East 97th Street, New York City.\(^{213}\) The Russian Orthodox Church in Moscow claimed that it had the right to occupy the Cathedral on the basis of its superior hierarchical authority.\(^{214}\) The Russian Orthodox Church of America, alleging that the Church in Moscow was tainted and controlled by the communist Russian government, based its claim on statutes passed by the New York Legislature in 1945 and 1948 declaring all Russian Orthodox churches in the state to be the property of the Russian Church in America.\(^{215}\) Deciding in favor of the American contingent, the Court of Appeals of New York justified the actions of the New York Legislature with language that was representative of the anti-communist Russian ideology of that time:

> The Legislature of the State of New York, like the Congress, must be deemed to have investigated the whole problem carefully before it acted. The Legislature knew that the central authorities of the Russian Orthodox Church in Russia had been suppressed after the 1917 revolution, and that the patriarchate was later resurrected by the Russian Government. The Legislature, like Congress, knew the character and method of operation of international communism and the Soviet attitude toward things religious.\(^{216}\)


\(^{214}\) *Id.* at 66–67.

\(^{215}\) *Id.* at 69.

\(^{216}\) *Id.* at 73–74.
On appeal to the United States Supreme Court, the Russian Orthodox Church in Moscow argued that the New York statute unconstitutionally interfered with its free exercise of religion. In the face of McCarthyism and the prevailing American animus toward communism and Russia, the Supreme Court reversed the Court of Appeals of New York. It found the New York statute, which transferred control of the Russian Orthodox Churches from the governing hierarchy in Russia to the Russian Church in America, to be in violation of the Fourteenth Amendment's protection of religious liberty. The Court determined that the question as to who has the right to use and occupy the Cathedral to be one of "ecclesiastical government," and, as such, should be answered by the principles of *Watson v. Jones.* The Court explained its position by stating that

>[the opinion [in Watson] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.]

Thus, *Kedroff* raised *Watson*’s common law principle of court deference to religious organizational hierarchy to that of a constitutional principle—that the Free Exercise Clause protected religious organizations from "secular control or manipulation." This rule of constitutional law did what *Watson*’s common law rule did not, nor, could it, do. It made deference of the courts to the decisions of religious organizations pertaining to ecclesiastical matters, such as internal

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217. *Kedroff,* 344 U.S. at 100.
218. *Id.* at 107.
219. *See id.* at 115–16.
220. *Id.* at 116.
221. *Id.; see also Witte,* supra note 104, at 249.
government, faith, and doctrine, the law of the land. Still, some states persisted in holding onto the old English "implied trust" and 'departure-from-doctrine' standard, where church property was held in trust to benefit the growth and development of the church and any departure from traditional church doctrine resulted in a forfeiture of rights to the property. Georgia was one of those states.

B. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church

In 1966, two local Presbyterian church congregations in Georgia voted to withdraw from the hierarchically organized and governed Presbyterian Church in the United States, of which they were a part, alleging the general church had "abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." The Presbyterian Church in the United States, reminiscent of the hierarchical structure in Watson v. Jones, consists of Church Sessions, Presbyteries, Synods, and a General Assembly. Local church congregations are known as Church Sessions. All Church Sessions within a particular geographical area are part of a Presbytery. The Presbyteries within a state are part of a Synod. Overall governance is carried out by the General Assembly.

Subsequent to the withdrawal of the two local churches, the Presbyterian Church in the United States, the general church, conducted an investigation and ultimately acquiesced to the withdrawal and took control of the local church property on behalf of the general church. The two local churches responded by suing to enjoin the general church's possession and control of the property. The general church

222. Howe, supra note 64, at 89.
224. See Lash, supra note 120, at 1111; see also Kauper, supra note 165, at 349–52.
226. Id. at 442.
227. Id. at 442–43.
228. See id. at 443.
filed a motion to dismiss, arguing that the court was without power to rule on whether it had “departed from its tenets of faith and practice.” The motion was dismissed, and, ultimately, the case went to trial. At trial, consistent with prevailing Georgia law, a jury found that the general church had abandoned the original tenets and doctrines upon which the general church was originally founded thereby forfeiting its rights to the local church property. The Supreme Court of Georgia affirmed. The United States Supreme Court granted certiorari on the First Amendment issues raised by the general church’s objection to the trial court hearing and ruling on whether it had abandoned its tenets of faith.

In reversing the Georgia Supreme Court, the Court expressly rejected Georgia’s “implied trust” and “departure-from-doctrine” standard and validated the deference principles embodied in Watson, Gonzalez, and Kedroff. Then, in a surprising statement, it said that not every court decision involving an intra-church property dispute implicates deference to the First Amendment. On those occasions, said the Court, “neutral principles of law” may be relied on to resolve the matter. No further explanation for this statement was offered. A fuller meaning of what the Court meant by this statement would come ten years later in Jones v. Wolf. Meanwhile, a year after Presbyterian Church, the Supreme Court gave a wink and a nod to the use of “neutral principles” in a Maryland case involving a question of who, as between two local churches and the regional church, should control the local church property. In a per curiam decision, the Court dismissed an appeal from a decision of the Maryland Court of Appeals affirming the

229. Id.
230. See id.
231. Id. at 443–44.
232. Id. at 444.
233. Id.
235. See Presbyterian Church, 393 U.S. at 448–49 (adhering to the principle that the civil court must abstain from considering ecclesiastical matters).
236. Id. at 449.
237. Id.
trial court's use of neutral principles in examining state statutes, property deeds, church constitution, and church charter in deciding the intra-church property dispute.\textsuperscript{240} In his concurring opinion, Justice William Brennan made a statement that would find its way into a later Supreme Court case\textsuperscript{241} validating the use of the "neutral principles of law" approach in the resolution of intra-church property disputes: "[A] State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters . . . .\textsuperscript{242}

C. Serbian Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevich

Those who concluded from Presbyterian Church's outlier statement on "neutral principles" and the Supreme Court's specious countenance of that statement in \textit{Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.}\textsuperscript{243} that the "neutral principles of law" approach had supplanted the deference principles of \textit{Watson, Gonzalez,} and \textit{Kedroff} raised their eyebrows when the Court handed down its decision in \textit{Serbian Eastern Orthodox Diocese for the U.S. & Canada v. Milivojevich} seven years after \textit{Presbyterian Church}.\textsuperscript{244} In no uncertain terms, the Court confirmed its earlier holdings in \textit{Watson, Gonzalez,} and \textit{Kedroff} that in matters involving intra-church property disputes, civil courts must accept the decision of the highest ecclesiastical tribunal regarding doctrine, discipline, polity and practice.\textsuperscript{245}

\textit{Serbian Eastern Orthodox Diocese} involved the defrockment of the Bishop of the Serbian Eastern Orthodox Diocese for the United States and Canada by the Serbian Orthodox Church in Yugoslavia ("Mother Church") and reorganization of the United States Diocese into

\textsuperscript{240} Id. at 367–68.
\textsuperscript{241} See Jones, 443 U.S. at 602.
\textsuperscript{242} \textit{Md. & Va. Eldership}, 396 U.S. at 368 (Brennan, J., concurring) (per curiam) (emphasis omitted).
\textsuperscript{243} Id. at 370 (Brennan, J., concurring) (per curiam).
\textsuperscript{245} Id. at 711–14.
three Dioceses. The defrocked Bishop filed suit asking for an injunction against the Mother Church from interfering with the assets of the United States Diocese and for a declaration that he was the true Bishop of the United States Diocese. On appeal from the trial court, the Illinois Supreme Court found that the Mother Church had not followed its constitution and penal code in disciplining the Bishop and that the reorganization had exceeded its authority. Consequently, the Illinois Supreme Court, finding the conduct of the Mother Church to be "arbitrary," held its actions invalid. On grant of certiorari, the United States Supreme Court, in an opinion by Justice William Brennan, reversed. The Court held that the inquiries of the Illinois Supreme Court leading to the conclusion that the Mother Church had failed to follow its own rules and procedures in defrocking the United States Bishop had violated the First and Fourteenth Amendments. According to the Court, civil courts are prohibited from engaging in an inquiry that assesses whether the governing body of a hierarchical religious organization has authority to decide an intra-church dispute. The Court found that such an inquiry requires an impermissible probing into religious law and polity. When it comes to matters involving religious law and polity, explained the Court, civil courts must abide by the decisions of the "highest ecclesiastical tribunal within a church of hierarchical polity." The Court went on to say that because the "arbitrariness" exception mentioned in Gonzalez was only "dictum," its use by the Illinois Supreme Court to justify "marginal civil court review" was invalid. Echoing Watson, the Court reiterated and emphasized that civil courts "must accept the ecclesiastical decisions of church tribunals as it finds them." Therefore, concluded the Court, an inquiry into whether or not the Mother Church had strayed from its own laws

246. Serb. E. Orthodox Diocese, 426 U.S. at 696.
247. Id. at 706-07.
248. Id. at 708.
249. Id. at 698.
250. Id. at 697-98.
251. Id. at 708.
252. Id. at 709.
253. Id.
254. Id. at 712.
255. Id. at 713.
and procedures in defrocking its Bishop, and reorganizing the United States Diocese is an ecclesiastical action which civil courts are incompetent to adjudicate. 256

D. Jones v. Wolf and the “Neutral Principles of Law”

Three years after Serbian Eastern Orthodox Diocese, the Supreme Court again considered an intra-church property dispute in Jones v. Wolf. 257 In a 5-4 decision, the Jones Court specifically identified the issue as “whether civil courts, consistent with the First and Fourteenth Amendments,” resolve intra-church property disputes by application of “neutral principles of law.” 258 In Jones, the Court dealt head-on for the first time with the application of “neutral principles of law” in intra-church property disputes. 259 In doing so, it reached back to its passing mention of the “neutral principles of law” in Presbyterian Church 260 and Justice Brennan’s brief discussion of “neutral principles” in his concurrence in the per curiam decision, Md. & Va. Eldership. 261

Like Watson, Jones involved controversy over property growing out of a schism within a local congregation of the hierarchically organized Presbyterian Church in the United States. 262 In Jones, a majority of the Vineville Presbyterian Church of Macon, Georgia voted to separate from the Presbyterian Church in the United States and joined the Presbyterian Church in America. 263 The majority continued to occupy and worship in the local church property while the minority removed themselves to another location for worship. 264 After a three year investigation, a presbytery appointed commission of the Presbyterian Church in the United States declared the minority

256. Id. at 713, 720–721.
258. Id. at 597.
259. Id.
262. Jones, 443 U.S. at 595.
263. Id. at 598.
264. Id.
congregants to be "the true congregation." The minority faction then initiated legal proceedings to establish its rights to the local church property. The trial court applied Georgia's "neutral principles of law" and awarded the local church property to the majority. On appeal, the Supreme Court granted certiorari.

Upon review, the Court noted the use of "neutral principles of law" by the Georgia courts was consistent with its reversal of Presbyterian Church where it stated that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." The Court then went on to describe how the Georgia Supreme Court, in response to the reversal and remand of Presbyterian Church, subsequently applied and refined the "neutral principles of law" approach by validating the review of property deeds, corporate charters, state statutes, and religious documents in the resolution of intra-church property disputes. In approving Georgia's application of "neutral principles of law," the Court explained that even though the First Amendment puts significant restraints on civil courts becoming involved in intra-church property disputes, there is nothing in the First Amendment that requires "compulsory deference to religious authority in resolving church property disputes." As a matter of fact, said the Court, "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." On the contrary, "neutral principles of law" is an alternative means for a court to

265. Id.
266. Id.
267. Id. at 599.
268. Id. at 598–99.
269. Id. at 599.
270. Id.
271. Id. at 600–01. On remand of Presbyterian Church, the Georgia Supreme Court reviewed not only real property deeds and state statutes, it also reviewed the Book of Church Order. Id. at 600. In Carnes v. Smith, 222 S.E.2d 322, cert. denied, 429 U.S. 868 (Ga. 1976), a controversy involving The United Methodist Church, the Georgia Supreme Court reviewed not only property deeds, corporate charter and state statutes, it also reviewed the constitution of The United Methodist Church and its Book of Discipline. Jones, 443 U.S. at 600.
273. Id. at 602.
resolve an intra-church property dispute.\textsuperscript{274} Finding “neutral principles of law” to be secular, flexible, objective, and familiar to lawyers and judges, and obviating the need to rely on internal organizational structure in the resolution of intra-church property disputes,\textsuperscript{275} the Court held “neutral principles of law” to be an acceptable method for adjudicating church property disputes.\textsuperscript{276} “The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.”\textsuperscript{277}

E. Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission and the “Ministerial Exception”

In January 2012, the United States Supreme Court for the first time acknowledged and affirmed the “ministerial exception,” a doctrine created and nurtured in the lower courts over a span of four decades.\textsuperscript{278} First introduced by the Fifth Circuit in 1972,\textsuperscript{279} the “ministerial

\textsuperscript{274} Id. at 602–03 (referencing Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring) (per curiam)).

\textsuperscript{275} Id. at 603 (“The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges.”). \textit{See also id.} at 605 (“The neutral-principles approach . . . obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.”).

\textsuperscript{276} Id. at 604. \textit{See also Md. & Va. Eldership of Churches of God,} 396 U.S. at 370 (“Under the ‘formal title’ doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws.”).

\textsuperscript{277} \textit{Jones,} 443 U.S. at 605. \textit{See also Md. & Va. Eldership,} 396 U.S. at 370 (“Again, however, general principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues.”).

\textsuperscript{278} Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 133 S. Ct. 694 (2012).

\textsuperscript{279} McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). While the Fifth Circuit was the first to carve out the principle in \textit{McClure,} it was over a decade before the term “ministerial exception” was actually used. \textit{See} \textit{Hosanna-Tabor,} 132 S. Ct. at 714 (Alito, J., concurring).
exception” grants immunity to religious organizations from discrimination claims made by their ministerial employees.\textsuperscript{280}

The 1972 Fifth Circuit case that first introduced the concept of the “ministerial exception” was \textit{McClure v. Salvation Army}.\textsuperscript{281} In \textit{McClure}, Mrs. Billie M. McClure, a commissioned officer and minister\textsuperscript{282} in the Salvation Army, filed an employment discrimination claim against the Salvation Army under Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a),\textsuperscript{283} alleging that she was terminated by the Salvation Army in retaliation for her complaints that she was paid less and received fewer benefits than her male counterparts.\textsuperscript{284} The Salvation Army responded that because it is a “religious corporation,” any attempts to subject it to the requirements of Title VII would be in violation of the First Amendment.\textsuperscript{285} The Fifth Circuit agreed and, after reminiscing on

\begin{itemize}
\item \textsuperscript{281} \textit{McClure}, 460 F.2d at 558–59 ("The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.").
\item \textsuperscript{282} Id. at 556 ("On appeal, neither Mrs. McClure nor the EEOC, as amicus curiae, question the Salvation Army's status as a religion or her status as a minister engaged in the religious or ecclesiastical activities of the church.").
\item \textsuperscript{283} The statute says:
\begin{itemize}
\item (a) Employer practices
\begin{itemize}
\item It shall be an unlawful employment practice for an employer--
\item (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
\item (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
\end{itemize}
\end{itemize}
\end{itemize}


\item \textsuperscript{284} \textit{McClure}, 460 F.2d at 555.
\item \textsuperscript{285} Id. at 555–56.
the deference principles of Watson,286 Gonzalez,287 Kedroff,288 and Presbyterian Church,289 concluded that the relationship between the Salvation Army and Mrs. McClure, that between “minister” and the religious organization served, was the “lifeblood” of the religious organization.290 Consequently, opined the court, an application of Title VII to this “lifeblood” relationship would be a violation of the First Amendment’s Free Exercise Clause.291 During the forty years following McClure, each of the Circuits considered and recognized a First Amendment based “ministerial exception.”292 It was not until 2012, however, that the United States Supreme Court finally weighed in on the “ministerial exception” in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC.293 In Hosanna-Tabor, the Supreme Court considered whether or not the “ministerial exception” immunized a Lutheran church and school from a discrimination claim made by one of the school’s teachers.294

286. See supra Part III.A.
287. See supra Part III.C.
288. See supra Part IV.A.
289. See supra Part IV.B.
290. See McClure, 460 F.2d at 558–59 (“The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.”).
291. McClure, 460 F.2d at 560.
294. Id.
and School is a hierarchical religious corporation whose congregation is subordinate to the Lutheran Church-Missouri Synod. The school, which provides education from kindergarten through eighth grade, is staffed with teachers referred to by the Synod as either “called” or “lay.” “Called” teachers are those who, after successfully completing a church required regimen of theological training and examination, are eligible to be “called” by their congregation to teach. If “called,” the teacher receives the title “Minister of Religion, Commissioned,” and may only be terminated by a supermajority vote of the congregation. “Lay” teachers, on the other hand, are not required to complete theological training and are hired by the school board only if there are no “called” teachers available to fill a position. The events giving rise to the Supreme Court granting certiorari to consider Hosanna-Tabor’s appeal were precipitated by events regarding Cheryl Perich, one of Hosanna-Tabor’s “called” teachers. 

At the beginning of the 2004-2005 school year, Cheryl Perich went on disability leave resulting from a sleep disorder. At midterm, January 2005, she announced that she was significantly cured of her disability and capable of returning to gainful employment. The school refused to allow her return to work and justified its refusal on the fact that her position had been filled with a “lay” teacher for the remainder of the school year and on its disagreement with her health assessment. Perich’s continued insistence that she be allowed to return to work and a stated intent to take legal action against the school resulted in the school

295. Id.; see also BASSETT ET AL., supra note 3.
297. Id.
298. Id.
299. Id.
300. Id. at 700.
301. Id.
302. Id. (noting that in June 2004, Perich was diagnosed with narcolepsy, whose symptoms cause “sudden and deep sleeps from which she could not be roused”).
303. Id.
304. Id. (“The congregation voted to offer Perich a ‘peaceful release’ from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher.”).
board and congregation voting to terminate her employment.\textsuperscript{305} Perich responded by filing a claim with the Equal Employment Opportunity Commission alleging that she had been terminated in violation of the Americans with Disabilities Act.\textsuperscript{306} The Equal Employment Opportunity Commission subsequently filed a retaliatory discharge suit against Hosanna-Tabor for allegedly terminating Perich for her threat to file an Americans with Disabilities Act claim.\textsuperscript{307} Hosanna-Tabor responded that because the relationship between it and Perich was one between a religious organization and one of its ministers, the “ministerial exception” immunized the school from the lawsuit’s claims.\textsuperscript{308} The U.S. District Court for the Eastern District of Michigan agreed with Hosanna-Tabor.\textsuperscript{309} On appeal, the Sixth Circuit agreed with the EEOC and the United States Supreme Court granted certiorari.\textsuperscript{310}

In an opinion written by Chief Justice John Roberts, the Court recognized a “ministerial exception”\textsuperscript{311} for the first time and held that the exception operates to immunize a religious organization from its ministers’ employment discrimination claims.\textsuperscript{312} The Court’s conclusions were premised on its understanding that both the Free Exercise and Establishment Clause prohibited governmental interference in a religious organization’s choice of its minister.\textsuperscript{313} These decisions, said the Court, are “entirely ecclesiastical” matters for a religious organization to make on its own.\textsuperscript{314} The Court then went on to draw

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\item 305. \textit{Id.}
\item 306. \textit{Id.} at 701.
\item 307. \textit{Id.}
\item 308. \textit{Id.}
\item 309. \textit{Id.} (noting that the district court granted summary judgment for Hosanna-Tabor).
\item 310. \textit{Id.} at 701–02.
\item 311. \textit{Id.} at 706.
\item 312. \textit{Id.} at 706. The Court expressly limited its holding to employment discrimination suits. \textit{Id.} at 710. “Today we hold only that the ministerial exception bars [employment discrimination suits]. We express no view on whether the exception bars other types of suits . . . .” \textit{Id.}
\item 313. \textit{Id.} at 706.
\item 314. See \textit{id.} at 703 (“[W]hen John Carroll, the first Catholic bishop in the United States, solicited the Executive’s opinion on who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase . . . then-Secretary of State [James] Madison responded that the selection of
from the rationales of Kedroff\textsuperscript{315} and Serbian Eastern Orthodox Diocese\textsuperscript{316} and determined that a “ministerial exception,” which protects religious organizations from employment discrimination claims by their ministers, is embodied in the First Amendment’s Religion Clauses.\textsuperscript{317} From there, the Court proceeded to find that, contrary to the conclusions of the Sixth Circuit, the facts clearly supported a finding that Perich was a minister whose claim was subject to the “ministerial exception.”\textsuperscript{318}

Hosanna-Tabor continued the Court’s persistent reliance on hierarchical religious organizations to shape First Amendment Religion Clause doctrine.\textsuperscript{319}

F. Hierarchical Dominion

The Supreme Court has, within the context of internal property disputes,\textsuperscript{320} shaped contradictory First Amendment Religion Clause doctrine. It has simultaneously mandated that civil courts defer to ecclesiastical tribunals (in the case of hierarchical religious

\textsuperscript{315} See id. at 705 (noting that a “Church’s choice of its hierarchy[ ]” is an ecclesiastical right protected by the Free Exercise Clause (citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 119 (1952))).

\textsuperscript{316} See id. at 705 (citing Serb. E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 724 (1976)) (stating that the rules and regulations of hierarchical religious organizations disciplining and governing their choice of ministers is protected by the First Amendment against government intrusion).

\textsuperscript{317} See id.

\textsuperscript{318} See id. at 708 (“In light of . . . the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church . . . we conclude that Perich was a minister whose claim was covered by the ministerial exception.”).

\textsuperscript{319} See supra Part III.

organizations)\textsuperscript{321} and a majority of members (in the case of congregationally structured and organized religious organizations)\textsuperscript{322} on ecclesiastical matters (i.e. faith, doctrine, governance,\textsuperscript{323} and practice\textsuperscript{324}), while allowing civil courts to optionally ignore the decisions of these ecclesiastical bodies and apply "neutral principles of law."\textsuperscript{325} "Neutral principles of law" allow civil courts to paint all religious organizations with the same brush.\textsuperscript{326} My argument is that an application of "neutral principles" overlooks the ecclesiastical characteristics of a religious organization and highlights its secular characteristics. The focus on the secular aspects works as a disadvantage to congregational organizations because their internal organizational structure is more secular than hierarchical organizations. This causes their religiosity to be dwarfed by their corporate nature. At this point, they are considered more like corporations than religious organizations, and their corporate-ness overwhelms the court.

\textsuperscript{321} Hosanna-Tabor, 132 S. Ct. at 724–25 ("[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.").

\textsuperscript{322} Md. & Va. Eldership, 396 U.S. at 368 (Brennan, J., concurring) (quoting Watson, 80 U.S. (13 Wall.) at 724)).

\textsuperscript{323} Kedroff, 344 U.S. at 116. See also Serb. E. Orthodox Diocese, 426 U.S. at 713 ("[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.") (emphasis added)).

\textsuperscript{324} Serb. E. Orthodox Diocese, 426 U.S. at 710.

\textsuperscript{325} Jones, 443 U.S. at 602–03.

\textsuperscript{326} Id. The Court has applied the "neutral principles of law" doctrine to resolve lawsuits arising in a variety of religious organizations, regardless of denomination or structural organization. See, e.g., Serb. E. Orthodox Diocese, 426 U.S. at 723 n.15; Md. & Va. Churches, 396 U.S. at 370 (Brennan, J., concurring); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 449 (1969).
PART V. VULNERABILITY OF CONGREGATIONAL RELIGIOUS CORPORATIONS

A. Congregationally Organized Religious Organizations Are Seen As More Corporate Than Religious

The ubiquity of the corporation in commerce and everyday life has made it familiar to both the bench and the bar. It is rare, indeed, to find an attorney who is not familiar with the apparatus of a corporation, i.e., articles of incorporation, bylaws, minutes, and resolutions. Likewise, it is not surprising for a civil court to find a corporation on its docket. As Justice Harry Blackmun suggested in *Jones v. Wolf*, the rudiments of corporate law represent “objective, well-established concepts of . . . law familiar to lawyers and judges.” Familiarity, though, often breeds contempt. When familiarity, born of the confidence with which the courts so expertly and routinely consider corporate controversies, is applied to a religious corporation without fully recognizing or appreciating the organization’s religious essence, it amounts to an act of hubris. A hubris that not only presumes to know what is best, but, because of the corporate infrastructure of the religious organization, assumes it has all the requisite tools to resolve the matter. Consequently, ecclesiastical issues are often treated as corporate matters and First Amendment free exercise guarantees are shoved aside as insignificant.

This is the predicament of the many state-chartered, incorporated, congregational religious organizations. Created pursuant to state incorporation statutes and following the statute’s operational requirements, congregational religious organizations necessarily adopt the processes of a corporation, and in some ways even begin to act like

327. *Jones*, 443 U.S. at 603 (“The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges.”).

secular corporations by adopting bylaws for the governance of their affairs\footnote{329} and passing resolutions to authorize corporate acts, which are documented with corporate minutes. Many bind their clergy by contract.\footnote{330} The blend of corporate processes and procedures with religious practice has a tendency to turn religious tradition and doctrine into mere circumstance.\footnote{331} When this happens, intra-organizational disputes of the type that are routinely handled by internal tribunals in hierarchical polities are, in the congregational polity, handled by a civil court judge. In these situations, when a court decides to take the road most familiar and follow its corporate instincts, religious freedoms are often put in peril; the rules are followed, but injustice is done.\footnote{332} Situations involving employment disputes between a religious organization and its clergy offer typical illustrations.

The employment relationship between an organization and its clergy is paradigmatically an ecclesiastical one\footnote{333} entitled to First
Amendment protection. A long line of Supreme Court cases illustrates this point. In Gonzalez, the Supreme Court said that the appointment of clergy is a canonical act that must be accepted by "secular courts as conclusive." In Kedroff, the Court declared that interference by the state with a religious organization’s appointment of its clergy "prohibits the free exercise of religion." In Serbian Eastern Orthodox Diocese, the Court reversed the Illinois Supreme Court on First Amendment grounds when it interfered with a religious organization’s defrockment of its clergy. Most recently, in Hosanna-Tabor, the Court validated the forty-year-old lower court created "ministerial exception" that recognizes the First Amendment implications of the special relationship between a religious organization and its minister. These are the cases that have

Guildfield Missionary Baptist Church, 452 F. Supp. 2d 651, 652 (W.D. Va. 2006), a minister sued a Virginia congregational church for breach of contract after it ceased paying his salary, based on the deacon chairman’s attempt to unilaterally terminate his employment without notice or majority vote at called business meeting.

334. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am., 344 U.S. 94, 116 (1952) ("Freedom to select the clergy ... we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."). See also Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16-17 (1929) ("Because the appointment [of a chaplain] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.").

335. Gonzalez, 280 U.S. at 16.


338. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. ___, 132 S. Ct. 694 (2012); McClure, 460 F.2d at 558–59 ("The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."). See also, e.g., Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2006), cert. denied, 552 U.S. 857 (2007), abrogated by Hosanna-Tabor, 132 S. Ct. 694; Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 704 (7th Cir. 2003); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000);
shaped the development of First Amendment religious doctrine applicable to the resolution of internal disputes in religious organizations. Conspicuously absent from this jurisprudence are any cases involving a religious organization of congregational polity. As a matter of fact, the Supreme Court has decided only one case involving an internal dispute within a religious organization of congregational polity, and that case made no mention of or reference to Watson, which had been decided just one year prior.

Yet, civil courts frequently fail to recognize or acknowledge the ecclesiastical nature of the relationship between a religious organization of congregational polity and its clergy in the same way they do for those of hierarchical polity. For example, civil courts easily presume that the duties of a Roman Catholic priest are determined by Catholic doctrine, with the corollary being that any consideration by the court of these duties will lead to a prohibited entanglement in religious doctrine. On the other hand, with organizations of congregational polity, the duties of its clergy are often considered to be corporate or contractual obligations capable of interpretation by application of neutral principles through review of the organization's contracts, bylaws, constitution, minutes, and resolutions. For instance, where the duties


340. See Ellman, supra note 20, at 1387.


342. See, e.g., Rweyemamu, 520 F.3d 198; see also Natal, 878 F.2d 1575 (affirming the district court's dismissal of priest's wrongful termination claim due to the First Amendment requirement that courts not interfere with church policy).

343. Vann, 452 F. Supp. 2d 651 (sustaining a pastor's claim that the Chairman of the Deacon Board unilaterally terminated him without following the organization's bylaws sustained). See, e.g., First Baptist Church of Glen Este v. State of Ohio, 591 F. Supp. 676 (S.D. Ohio 1983); Ex Parte Bd. of Trustees of Old Elam
of a Protestant pastor are not presumed to be so much a matter of religious doctrine, but more those of a president of a voluntary association or nonprofit corporation, a court will tend to treat the matter as another secular corporate dispute.\textsuperscript{344}

This often leads to an application of neutral principles to controversies that are beyond the scope of the “neutral principles of law” doctrine. The Supreme Court cases out of which this doctrine arose repeatedly refer to “property” as the subject-matter at the core of the controversy.\textsuperscript{345} Nothing in these exclusively hierarchical polity cases allows for the application of the “neutral principles of law” doctrine to any controversy other than those involving intra-church property disputes. As recently as 	extit{Hosanna-Tabor} the Court acknowledged that controversies over property have had an indirect influence on First Amendment religious doctrine.\textsuperscript{346} Still, civil courts repeatedly apply “neutral principles” when considering non-property related disputes in

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\textsuperscript{344} See, e.g., \textit{First Baptist Church of Glen Este}, 591 F. Supp. at 681 (“[C]ourts may properly review whether a congregational church followed its own constitution and by-laws, and afforded fundamental due process in disciplinary proceedings by employing ‘neutral principles of law’ . . . ”).

\textsuperscript{345} See Jones v. Wolf, 443 U.S. 595, 595 (1979) (providing for the application of “neutral principles of law” in resolving an internal dispute over local control of a church’s property.); Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970) (per curiam) (regarding a dispute as to which, of two church factions, controlled church property); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 441 (1969) (involving a church property dispute between two local churches and the hierarchical general church).

\textsuperscript{346} \textit{Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC}, 565 U.S. __, __, 132 S. Ct. 694, 704 (2012) (“This Court touched upon the issue [of church autonomy in selecting ministers] indirectly, however, in the context of disputes over church property.”).
Inquiries of the type criticized by the United States Supreme Court in *Serbian East Orthodox Diocese* are instructive.

Recall that in *Serbian East Orthodox Diocese*, the Court found the Illinois Supreme Court’s inquiry into, and, subsequent interpretation of the church’s constitution and penal code to have been an impermissible inquiry into the church’s polity. In doing so, it warned civil courts to avoid being drawn into disputes that on the surface may appear to be about property, but are actually religious controversies that only affect property. Adjudication of property disputes that involve ecclesiastical issues, the Court said, threaten First Amendment principles.

Even so, in congregational polities, we consistently see civil courts getting involved in prohibited issues having to do with governance, doctrine, and polity. One reason for this tendency is the state mandated corporate structure and its accompanying corporate indicia of bylaws and principles of majority rule inherent to congregational polities that frequently obscure religious doctrine. Consequently, the decision of a Baptist deacon board chairman to terminate a pastor, an act that is often, within the context of African-American religious custom, doctrinally appropriate, is invalidated.

347. *See Viravonga*, 279 S.W.3d 44 (applying neutral principles applied by court to determine that congregational Buddhist temple should hold an election, and to justify court supervision of the election); *Meskel*, 869 A.2d 343 (applying neutral principles used to whether Beth Din bylaw provision was enforceable); *Waverly Hall Baptist Church*, 625 S.E.2d 23 (applying neutral principles to justify ordering a congregational church to hold church meeting to determine whether incumbent pastor would remain); *Rosen v. Lebewohl*, 28 Misc. 3d 1226(A) (N.Y. Sup. Ct. 2010) (unpublished disposition) (applying neutral principles to determine whether congregational Jewish Synagogue Center followed bylaws in conduct of election of officers); *Johnson v. Antioch United Holy Church*, Inc., 714 S.E.2d 806 (N.C. Ct. App. 2011) (applying neutral principles to determine whether church complied with state’s Nonprofit Corporation Act, regarding i.e., regularly elected a board of directors, followed bylaws); *Bowie*, 624 S.E.2d 74 (applying neutral principles applied to church deacon’s claims that he was defamed during vote to remove pastor).


349. *Id.* at 709.

350. *Id.* at 709–10 (citing *Presbyterian Church*, 393 U.S. at 449).
court as contravening majority rule principles.\textsuperscript{351} A provision in the corporate bylaws of an Orthodox Jewish congregation that allows unresolved claims of members against the congregation to be decided by a “Beth Din” of Orthodox Jewish rabbis is determined by the court to be subject to a neutral-principles of contract law analysis;\textsuperscript{352} or, a determination of whether individuals of a Hindu Temple had standing to challenge the Temple’s spiritual leader and board of trustees could be determined by application of “neutral principles of law.”\textsuperscript{353} The rationale for these otherwise impermissible inquiries and considerations is a failure to recognize the difference between a controversy over religious matters regarding “matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law,”\textsuperscript{354} that affects property, and a controversy about property that affects only property. It leaves a congregational organization vulnerable to a determination of whether or not it has followed mandated corporate rules.

CONCLUSION

Religious organizations are not above the law.\textsuperscript{355} The state has a legitimate interest in, and religious corporations are entitled to, the protection of their property rights.\textsuperscript{356} The problem is the confusion brought on by the corporate face of today’s religious institutions (churches, synagogues, mosques, and temples) who are obliged to

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\item 351. See Vann v. Guildfield Missionary Baptist Church, 452 F. Supp. 2d 651 (W.D. Va. 2006); see also supra note 20.
\item 352. Meshel, 869 A.2d at 346.
\item 354. Serb. E. Orthodox Diocese, 426 U.S. at 713.
\item 355. “[N]ot every civil court decision . . . jeopardizes values protected by the First Amendment.” Presbyterian Church, 393 U.S. at 449.
\item 356. “The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively [without engaging in religious doctrine].” Jones v. Wolf, 443 U.S. 595, 602 (1978) (quoting Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (per curiam)); see also Watson v. Jones, 80 U.S. (13 Wall.) 679, 714 (1871) (“Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints.”).
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organize as not-for-profit corporations if they want to enjoy certain privileges such as real estate and 501(c)(3) tax exemptions. However, once a non-hierarchical religious organization incorporates pursuant to a state's statute, the organizational structure (e.g., president, vice-president, secretary, and treasurer) and all the corporate indicia (e.g., charters, constitutions, and bylaws) with which it is fitted by statute, cloaks its real identity and positions it on the state's side of the "wall" that metaphorically separates the state from religion. On the outside looking in, the religious corporation is now subject to all the state's laws, statutes, rules, and regulations that apply to not-for-profit corporations.

In this space that Roger Williams referred to as the "wilderness," it is an easy thing for a civil court to treat a religious organization as a secular corporate entity. From a civil court's standpoint, if the organization before it is organized, structured, and functions like a corporation, the tendency is to treat it like a corporation. Equipped with a well developed set of tools and skills with which to deal with corporations and provisioned with a Supreme Court sanctioned doctrinal option to engage the matter by consulting the organization's secular, corporate documents, the temptation is often too much for a court to bear, and it soon finds itself, in the words of an eighteenth century aphorism, rushing in "where Angels fear to tread."

The entry of the state into the affairs of a religious corporation is contrary to the religious sensibilities that have been fostered by the message of the various religious traditions, and jeopardizes the prominent and privileged place that religion has occupied in this nation's ethos as carved out in the U.S. Constitution's First Amendment. Thus, when theology and liberty of conscience is partitioned by a state's incorporation statute requiring a specific organizational structure, an application of First Amendment Religious Clause jurisprudence can often result in inconsistency and uncertainty on the part of civil courts

357. See BASSETT ET AL. supra note 3, at § 4:46.
358. Id. § 3:44.
359. HOWE, supra note 64, at 5–6 (commenting on Roger Williams' introduction of a metaphor referring to the "gap in the hedge or wall of separation between the garden of the church and the wilderness of the world" in Williams' piece entitled "Mr. Cotton's Letter Lately Printed, Examined and Answered").
360. ALEXANDER POPE, AN ESSAY ON CRITICISM WRITTEN IN THE YEAR 1709 29 (1717).
that in turn leads to an intrusion and entanglement in prohibited religious affairs. A more constitutionally sound First Amendment Religion Clause doctrinal analysis should focus on whether or not the essence of the controversy is ecclesiastical, not on corporate form.