ECCLESIASTICAL DIVORCE IN HIERARCHICAL DENOMINATIONS AND THE RESULTING CUSTODY BATTLE OVER CHURCH PROPERTY: HOW THE SUPREME COURT HAS NEEDLESSLY RENDERED CHURCH PROPERTY TRUSTS INEFFECTUAL

Justin M. Gardner[†]

INTRODUCTION

Controversy and conflict often define political life in America. Republicans and Democrats, along with the occasional third party, constantly fight to gain political power by emphasizing their differences on the hot political issues of the day, whether they involve foreign policy, taxes, abortion, or homosexuality. Political conflicts, especially those with moral overtones, divide neighbors and families. In political discourse, conflict is considered normal and even lauded because it fosters vigorous debate, which is necessary to the health of democracy.[1] But political conflicts do not always remain confined to the political arena; they often spill over into other aspects of Americans' lives, including their religious lives.[2] And when controversy embroils a religious organization, the organization may

† Juris Doctor Candidate, Ave Maria School of Law, 2008; Bachelor of Science, Indiana Wesleyan University, 2005. I would like to thank my lovely wife, Heather; without her love and support this Note would not have been possible. This Note is dedicated to the people of Poneto United Methodist Church and Fredericksburg Presbyterian Church, who may one day be forced to choose between adherence to the fundamental doctrines of their faith and the church property that they hold in trust for the propagation of these doctrines.

1. *See* Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 373 (1993).

2. *See* RICHARD G. HUTCHESON, JR. & PEGGY SHRIVER, THE DIVIDED CHURCH: MOVING LIBERALS & CONSERVATIVES FROM DIATRIBE TO DIALOGUE 11–16, 92–93 (1999).

formally split.[3] Once a denominational split occurs, a constitutionally fraught question arises—who gets the church property?[4]

The legal issues surrounding church property disputes are pertinent today, particularly given the rise of one politically contentious issue on the American religious landscape: the role of homosexuals in ecclesiastical life. Given the moral and religious dimensions of this topic, it is not surprising that this politically potent issue has become increasingly contentious within ecclesiastical organizations.[5] This is especially true in America's mainline Protestant churches.[6] For example, the controversy surrounding the issue of homosexuality has been at the forefront of debates in the United Methodist Church, the Episcopal Church, and the Presbyterian Church USA.[7] In the Episcopal and Presbyterian USA churches, the controversy over homosexuality and its role in ecclesiastical life has escalated to the point where a schism appears increasingly likely.[8]

In the Episcopal Church, this issue has been at the forefront of church politics since 2003, when the denomination elected its first practicing homosexual bishop.[9] In addition, the Episcopal Church passed a resolution allowing individual churches within the denomination to bless same-sex unions.[10] These actions have created a firestorm within the denomination, leading many of the churches wishing to adhere to traditional sexual morality to seek separation from the denomination.[11] In fact, entire dioceses have taken steps to disaffiliate with the denomination and are seeking to align with more

3. *See generally* BRYAN V. HILLIS, CAN TWO WALK TOGETHER UNLESS THEY BE AGREED? AMERICAN RELIGIOUS SCHISMS IN THE 1970S (1991) (relating the major denominational schisms of the 1970s).

4. A GUIDE TO CHURCH PROPERTY LAW: THEOLOGICAL, CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS 1 (Lloyd J. Lunceford ed., 2006) [hereinafter GUIDE TO CHURCH PROPERTY LAW].

5. *See* HUTCHESON & SHRIVER, *supra* note 2, at 92–93.

6. *See* Steve Levin, *Mainline Denominations Losing Impact on Nation*, PITTSBURGH POST-GAZETTE, July 17, 2006, at A-1.

7. *Id.*

8. *See* Laurie Goodstein, *Stay Tuned, as 2 Churches Struggle with Gay Clergy*, N.Y. TIMES, June 24, 2006, at A10.

9. *See* Fernanda Santos, *Connecticut Episcopal Bishop Will Bless Gay Unions*, N.Y. TIMES, Oct. 23, 2006, at B1.

10. *Id.*

11. Charlotte Allen, *Liberal Christianity Is Paying for Its Sins*, L.A. TIMES, July 9, 2006, at M3.

traditional Anglican bodies overseas.[12] In the Diocese of Virginia alone, eleven churches have voted to leave the Episcopal Church, including two of the diocese's largest and most historic churches—Truro Church and Falls Church.[13] The departing churches represent more than ten percent of the diocese's 90,000 members, and they are attempting to take millions of dollars worth of church property with them as they leave.[14] The property value of the historic Truro Church and Falls Church combined is estimated at $27 million to $37 million.[15] In response to this exodus, the Episcopal Diocese of Virginia has declared the church property "abandoned," and has taken legal steps to obtain the millions of dollars worth of property from the departing congregations.[16] The battle appears to be headed to civil court, as neither side seems willing to give up its claim to the property.[17]

A similar controversy has also engulfed the Presbyterian denomination.[18] At its church convention in the summer of 2006, the Presbyterian Church USA approved the controversial proposal of the "Theological Task Force on Peace, Unity and Purity of the Church."[19] This proposal gives the regional church bodies, called presbyteries, wider latitude to ordain practicing homosexuals as clergy and elders in the church, even though the official standards of the denomination bar such ordinations.[20] Following this action, many congregations have voted to leave the denomination, and many others are considering a split.[21] As many of these local congregations consider separation, they too must confront the looming question: will they be able to keep their church property?[22]

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12. Louis Sahagun, *3 Episcopal Dioceses Seek Release: San Joaquin, Two Others Ask to Be Placed Outside Church Jurisdiction*, L.A. TIMES, June 29, 2006, at A26.

13. Natasha Altamirano, *Church Dispute Headed to Court: Diocese Assets 'Abandoned,'* WASH. TIMES, Jan. 19, 2007, at A1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* Daniel Burke, *Presbyterians Fight for Custody of Church Property*, WASH. POST, Sept. 2, 2006, at B9.

19. Goodstein, *supra* note 8.

20. *Id.*

21. Lillian Kwon, *Unhappy Presbyterians Urge, Legitimize Separation*, CHRISTIAN POST, Nov. 8, 2006, *available at* http://www.christianpost.com/article/20061108/23105.htm.

22. *See* Burke, *supra* note 18.

As the conservative and liberal factions of these churches consider the consequences of an ecclesiastical divorce, it is easy to overlook the constitutional dilemmas posed by taking the resulting property disputes before a secular court. This Note argues that the Supreme Court has misinterpreted the First Amendment and needlessly restricted the civil courts' adjudication of church property disputes within hierarchical Protestant denominations. The Supreme Court should allow civil courts to make factual determinations regarding religious and doctrinal matters and award church property to the faction that is found to be the most faithful to the church's founding doctrinal beliefs. Part I of this Note gives an overview of the methods of adjudicating church property disputes and shows how the Supreme Court has altered the way in which such cases are disposed. Part II explores the historical purpose behind the creation of property trusts in the ecclesiastical context and illustrates how the Supreme Court's current jurisprudence not only frustrates this purpose, but often works in opposition to it. Part III demonstrates that factual inquiries into religious matters do not abridge the Establishment Clause of the First Amendment, provided that they do not lead to normative determinations. In order to effectuate the purpose behind property trusts in the ecclesiastical context, the Supreme Court should allow the civil courts to make factual determinations regarding religious and doctrinal matters and award church property to the faction that is found to be the most faithful to the church's founding doctrinal beliefs.

I. CIVIL COURT ADJUDICATION OF CHURCH PROPERTY DISPUTES

It seems unusual that an ecclesiastical body would turn to the secular courts to settle a dispute that is, at its core, religious. The situation of Kirk of the Hills Presbyterian Church, a congregation in Tulsa, Oklahoma, illustrates why an ecclesiastical body in its situation would rely on the civil courts for relief.[23] Kirk of the Hills Church has 2800 members and is the largest church to date to leave the Presbyterian Church in the wake of its decision to allow room for local bodies to ordain practicing homosexuals.[24] More than 1000 members of the local congregation met and voted to leave the

23. *Id.*
24. *Id.*

Presbyterian Church USA by a wide margin—967 to 36.[25] As a result of this decision, the local congregation is now engaged in a fight with the denomination's regional body, the Eastern Oklahoma Presbytery, over the congregation's multimillion-dollar property.[26] Although the denomination claims that it has "an internal process for churches that wish to leave," Kirk of the Hills Church has little faith in this process; as a spokesman for the congregation has noted, "the presbytery acts as the judge, the jury and the benefactor."[27] This hardly seems like a fair process, considering that the presbytery has a vested interest in the outcome of such a procedure: ownership of the multimillion dollar facilities of the congregation.[28] Because of all the "money and sweat" that has been poured into the building by the members of Kirk of the Hills Church since 1961, they have vowed not to let their property go without a legal fight.[29]

The Kirk of the Hills Church's distrust of the Presbyterian denomination's adjudicatory process is not without warrant.[30] The experience of Norcrest Presbyterian Church stands out as an example of what can happen when a local congregation becomes dissatisfied with the direction of the denomination and attempts to disaffiliate from it.[31] After Norcrest attempted to leave the Presbyterian USA denomination, the Maumee Valley Presbytery made an unexpected visit to the church.[32] During this early morning visit, the Presbytery "removed the pastor's possessions, changed the locks and took over the congregation's property."[33] That next Sunday, the congregation was forced to meet at the city dog pound for worship services.[34] Although worship services continue in the original facilities for a small minority of the congregation who did not desire to leave the Presbyterian Church USA, the vast majority of the congregation was

25. John H. Adams, *Kirk of the Hills Members Vote Overwhelmingly to Leave PCUSA*, THE LAYMAN ONLINE, Aug. 31, 2006, http://www.layman.org/layman/news/2006-news/kirk-of-the-hills-members-vote.htm.

26. Burke, *supra* note 18.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See* GUIDE TO CHURCH PROPERTY LAW, *supra* note 4, at 22 (discussing Norcrest Presbyterian Church's experience with the adjudicatory process).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

left with little more than a sense of disillusionment with a process that was clearly biased in favor of the denomination.[35]

As a result of the biases inherent in a denomination's internal adjudicatory proceedings, many congregations turn to the civil courts when they are confronted by a property dispute with the denominational hierarchy. There are three generally recognized methods of adjudicating church property disputes in the civil courts, but the Supreme Court has eliminated the use of one method and placed limits on the application of the other two methods.[36] The Supreme Court did so out of concern that the First Amendment prohibited civil courts from examining any issue relating to church doctrine.[37]

The departure-from-doctrine method was the traditional common law method of adjudicating church property disputes.[38] Under this method, whenever a property dispute arose within a church, the civil court would determine which group was more faithful to the founding doctrines of the church and imply a property trust in favor of the group adhering most closely to these founding doctrines.[39]

In 1871, the Supreme Court created a new test to resolve church property disputes in the case of *Watson v. Jones*.[40] This case involved a schism in the Walnut Street Presbyterian Church.[41] As a result of a dispute regarding the identity of the true ruling elders of the church, the church split into rival factions, with each claiming the right to control the church's property.[42] To resolve this dispute, the Supreme Court created what is now known as the deference test.[43]

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35. *See id.*

36. *See* Jones v. Wolf, 443 U.S. 595, 599–606 (1979).

37. *Id.* at 602.

38. For a full discussion of the historical context surrounding the development of the departure-from-doctrine method of adjudicating church property disputes as a corollary of the English implied trust doctrine, see *infra* Part II.A. An historical inquiry would normally be appropriate in Part I because it is the background section of this Note and would make sense from a chronological standpoint. But its placement is actually more appropriate in Part II because Part II explores the historical origin of church property trusts as a legal tool to protect the doctrine of religious denominations. Its inclusion in Part II is thus critical to that section's argument that the Supreme Court's Establishment Clause jurisprudence frustrates the purpose behind the creation of legally binding church property trusts.

39. GUIDE TO CHURCH PROPERTY LAW, *supra* note 4, at 28.

40. 80 U.S. (13 Wall.) 679 (1872).

41. *Id.* at 717.

42. *Id.*

43. *See* GUIDE TO CHURCH PROPERTY LAW, *supra* note 4, at 29; *Watson*, 80 U.S. at 727.

Before the deference test becomes applicable, a church must be considered hierarchical in nature.[44] A church is considered hierarchical in nature if the "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."[45] Under this method, "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."[46] In other words, under this test, the courts will defer to the judgment of the highest adjudicatory body of the religious denomination as to the identity of the rightful owner of the church property.[47]

Although *Watson v. Jones* was not decided on constitutional grounds,[48] its holding was constitutionalized in *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*,[49] which involved a dispute over the right to use the Russian Orthodox Cathedral in New York.[50] The dispute resulted from a New York statute that purported to make the Russian Orthodox Church in North America autonomous from the Patriarch of Moscow following the Bolshevik Revolution.[51] This resulted in competing archbishops claiming the right to use the cathedral.[52] The Supreme Court held the

44. *See Watson*, 80 U.S. at 722, 726–27.

45. *Id.* at 722–23.

46. *Id.* at 726–27. It should be noted that this case is based on general common law principles and not on constitutional concerns. KENNETH E. NORTH, CHURCH PROPERTY DISPUTES: A CONSTITUTIONAL PERSPECTIVE (2000), *reprinted in* GUIDE TO CHURCH PROPERTY LAW, *supra* note 4, app. C, at 209.

47. *See Watson*, 80 U.S. at 727–35. This Note does not focus on the adjudication of church property disputes within congregational churches, so it is unnecessary to explain how the Supreme Court would adjudicate such a dispute if a church is determined to be congregational in nature. For a discussion of how the Supreme Court would have adjudicated such a dispute in this case, see *id.* at 724–25.

48. NORTH, *supra* note 46.

49. 344 U.S. 94 (1952).

50. *Id.* at 95.

51. *Id.* at 98–99 nn.2–3.

52. *Id.* at 96.

New York statute unconstitutional under the First and Fourteenth Amendments.[53]

In making this determination, the Court relied heavily on the opinion in *Watson* to conclude that the Russian Orthodox Church was a hierarchical church and that the Constitution required deference to the determinations of the Church's governing body.[54] Although *Watson* was not a constitutionally based decision, *Kedroff* noted that "the opinion radiate[d] . . . a spirit of freedom for religious organizations" and "an independence from secular control or manipulation."[55] *Kedroff* further stated that *Watson* recognized the "power" of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[56] Ultimately, *Kedroff* upheld the deference method of *Watson* on constitutional grounds, stating that "[e]ven in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion."[57]

After constitutionally grounding the deference method of deciding church disputes, the Supreme Court entered the foray again in 1969 and offered the state courts another method of adjudicating church property disputes: the neutral principles of law method.[58] In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[59] the Supreme Court reviewed a property dispute that arose when the Mary Elizabeth Blue Hull Memorial Church disassociated from its parent denomination.[60] The State of Georgia applied the traditional common law departure-from-doctrine test and awarded the property to the local congregation.[61] The Supreme Court rejected the departure-from-doctrine method utilized by the Georgia courts as unconstitutional under *Watson* and *Kedroff*, stating:

53. *Id.* at 100, 107–08.
54. *Id.* at 110–16.
55. *Id.* at 116.
56. *Id.*
57. *Id.* at 120–21.
58. GUIDE TO CHURCH PROPERTY LAW, *supra* note 4, at 29.
59. 393 U.S. 440 (1969).
60. *Id.* at 441–42.
61. *Id.* at 443–44.

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes . . . .[62]

The Court further 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."[63]

A later Supreme Court case, *Serbian Eastern Orthodox Diocese for the United States v. Milivojevich*,[64] reaffirmed the unconstitutionality of state court consideration of religious matters.[65] In this case, the general church body removed Bishop Milivojevich from his post, defrocked him, appointed Bishop Firmilian to replace him, and reorganized the diocese.[66] Milivojevich challenged these actions in court, and the Illinois Supreme Court set aside Milivojevich's "removal and defrockment" as "'arbitrary' because the proceedings resulting in those actions were not conducted according to the Illinois Supreme Court's interpretation of the Church's constitution and penal code."[67] The Illinois Supreme Court also set aside the reorganization plan "because it went beyond the scope of the Mother Church's authority to effectuate such changes without Diocesan approval."[68] In making this decision, the Illinois Supreme Court relied, in part, on *Gonzalez v. Roman Catholic Archbishop of Manila*,[69] in which the Supreme Court stated in dicta that there might be a "fraud, collusion, or arbitrariness" exception to the deference method given in *Watson*.[70]

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62. *Id.* at 449.

63. *Id.*

64. 426 U.S. 696 (1976).

65. *See id.*

66. *Id.* at 697–98.

67. *Id.* at 708.

68. *Id.*

69. *Id.* at 711–12 (citing Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929)) (noting that the Illinois Supreme Court's decision was "predicate[d]" on *Gonzalez*).

70. *Gonzalez*, 280 U.S. at 16.

The Supreme Court, in *Milivojevic*, rejected the arbitrariness exception that they had previously mentioned in *Gonzalez*, stating that this exception required "inquiry into the procedures that canon or ecclesiastical law supposedly require[d] the church judicatory to follow, or else into the substantive criteria by which they [were] supposedly to decide the ecclesiastical question."[71] According to the Court, this "would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them."[72] Thus, the Court held that under no circumstances could the civil courts inquire into "religious law and polity."[73] If this inquiry becomes necessary to adjudicate the dispute, the civil courts must defer to the "decisions of the highest ecclesiastical tribunal within a church hierarchical polity . . . ."[74]

In 1979, the Supreme Court again entered the ecclesiastical arena in *Jones v. Wolf*,[75] this time to resolve an issue left ambiguous by prior rulings.[76] In the *Hull* case, the Supreme Court recommended the neutral principles of law method as a way to resolve church property disputes.[77] In contrast, *Milivojevich* indicated that when ecclesiastical adjudicatory bodies had made determinations on religious matters, the First Amendment required the civil courts to defer to their judgments.[78] Like the *Hull* case, *Jones v. Wolf* involved a property dispute resulting from a local congregation's attempt to withdraw from its parent denomination.[79] But *Wolf* also resembled *Milivojevich* because it involved a decision by a general church body, the Augusta-Macon Presbytery, which issued its own ruling declaring the minority faction the true representative of Vineville Presbyterian Church, thereby giving that faction the local church property.[80]

The opposing faction sued, and the trial court applied the neutral principles of the law method to determine that the title vested in the

71. *Milivojevich*, 426 U.S. at 713.

72. *Id.*

73. *Id.* at 709.

74. *Id.*

75. 443 U.S. 595 (1979).

76. *See* NORTH, *supra* note 46, at 225–26 (discussing the issue in *Jones v. Wolf* of whether a court may forego the deference test and apply neutral principles of state law).

77. *See supra* text accompanying notes 59–63.

78. *See supra* text accompanying notes 64–74.

79. *Jones*, 443 U.S. at 598.

80. *Id.*

local congregation, which was represented by the majority faction.[81] In reviewing this controversy, the Supreme Court recognized that the First Amendment "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization."[82] But the Court also noted that this did not mean that the states "must follow a particular method of resolving church property disputes."[83] The Court held that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute," provided that the method does not require the civil courts "to resolve a religious controversy," in which case the courts would have to "defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[84]

As the matter currently stands, the civil courts have two permissible methods of adjudicating church property disputes. The state courts can use neutral principles of the law—i.e., state property, trust, and incorporation law—to determine who owns the church property;[85] or they can adopt the deference approach whereby the state court must defer to the decisions of the church's highest adjudicatory body if it is a hierarchical denomination.[86] The state courts, however, cannot apply a departure-from-doctrine method because the Supreme Court has clearly stated that any inquiry involving an examination of religious doctrine and practice is unconstitutional, pursuant to the Establishment Clause of the First Amendment—even if the inquiry is factual in nature.[87]

81. *Id.* at 598–99.
82. *Id.* at 602.
83. *Id.*
84. *Id.* at 604.
85. GUIDE TO CHURCH PROPERTY LAW, *supra* note 4, at 32.
86. *Id.*
87. *See id.*

II. CURRENT PRECEDENT THWARTS THE HISTORICAL PURPOSE OF CHURCH PROPERTY TRUSTS

A. *Introduction*

A review of the historical origin of church property trusts reveals that their purpose was to protect a church's doctrinal standards.[88] These trusts ensured that property procured for the propagation of a church's beliefs would continue to be used in service to these beliefs long after the founding generation of the church had passed away.[89] This purpose becomes readily apparent through an examination of the origins of the implied trust doctrine in English common law and the use of express property trusts in the Methodist Church from its founding in the American colonies.[90] The historical context makes it clear that by barring the use of the departure-from-doctrine method of resolving church property disputes, the Supreme Court has frustrated the very purpose of church property trusts: the preservation of doctrinal standards.

B. *The Origin of the Implied Trust Doctrine*

The implied trust doctrine appeared in English common law after the Protestant dissenters were given religious freedom by the Toleration Act of 1688.[91] Prior to this Act, the English common law did not need a legal doctrine to dispose of church property in ecclesiastical disputes because the Established Church was the only religious body with legal status, and religious dissent was not tolerated.[92] Although the Toleration Act did not bring full religious liberty to England, it did allow certain Protestant dissenters some freedom to worship in conformance with their own consciences.[93] As a result, the number of religious sects in England with divergent doctrinal beliefs grew, and as they did so, doctrinal disputes arose

88. *See* discussion *infra* Part II.B–C.

89. *Id.*

90. *Id.*

91. Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1145 (1961-62) [hereinafter *Judicial Intervention*].

92. *See id.*

93. Charles F. Mullett, *The Legal Position of English Protestant Dissenters, 1689–1767*, 23 VA. L. REV. 389, 389 (1937).

within the dissenting groups regarding finer points of doctrine.[94] The implied trust doctrine developed out of this context.[95]

The first reported case to discuss an intra-church property dispute was *Craigdallie v. Aikman*.[96] In that case, four clergymen and their followers had seceded from the Church of Scotland because of a doctrinal difference with the Established Church, and they formed their own church judicatory.[97] Mr. Wilson, the minister at Perth, was one of these ministers, and his congregation submitted itself to this newly formed church judicatory.[98] After the secession, Mr. Wilson's followers purchased some land and built a chapel.[99] The members of this newly formed congregation voluntarily contributed their money, material, and labor in order to build this chapel for their worship.[100]

In 1795, a doctrinal dispute arose among the members of the sect regarding the church's teaching on the "power of the magistrate to suppress heresy."[101] As a result of this doctrinal dispute, the Perth congregation split into two competing factions.[102] Perth's minister at that time and a minority of his congregants rejected what they viewed as the doctrinal innovations of the general church's judicatory body.[103] The minority of congregants who were loyal to the minister, however, contained a majority of the monetary contributors in the church.[104] Regardless of this, the majority of the congregation adopted the new doctrinal position and continued to adhere to the general church's adjudicatory body.[105]

As a result of this split, a dispute arose within the Perth congregation regarding which faction had legal title to the property: the majority of congregants or the majority of money contributors.[106] The Court of Sessions implied a trust in the property in favor of those "who contributed their money for purchasing the ground, and

94. Note, *supra* note 91, at 1145.
95. *See id.* at 1145–47.
96. 3 Eng. Rep. 601 (H.L. 1813).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 602.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

building, repairing, and upholding the house or houses thereon, under the name of the Associate Congregation of Perth."[107] On appeal, Lord Eldon, Chancellor of the House of Lords, rejected that proposition.[108] Lord Eldon stated that if the church's property instrument formed a trust that did not address the possibility of a schism and a schism occurred, he could "not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property" by those "adhering to the opinions and principles" originally uniting the congregation.[109]

In Lord Eldon's opinion, "no case . . . would enable him to say, that the adherents to the original [doctrines] should . . . for that adherence forfeit their rights" merely because those "who changed their opinions" constituted a majority of the congregation or a majority of its monetary contributors.[110] Thus, Lord Eldon implied a trust in favor of the faction adhering to the doctrinal beliefs originally uniting the religious society.[111] Although the property of the Perth congregation was later awarded to the faction that had remained loyal to the general judicatory body because the lower courts were unable to ascertain any difference in the competing factions' doctrinal beliefs, the direction of the English common law was set.[112]

Lord Eldon reiterated the implied trust doctrine and explained the reasoning behind it in another case involving a church property dispute that reached the House of Lords in 1817: *Attorney General ex rel. Mander v. Pearson*.[113] The case involved a dispute over a meetinghouse that was built by a group of Protestant dissenters in 1701 under a trust deed, which stated that the purpose was "for the worship and service of God."[114] A dispute arose within the congregation between the trustees regarding the choice of a minister and the doctrine of the Trinity.[115] This resulted in two factions of trustees competing for the right to use the church facilities, each with

107. *Id.*

108. *Id.* at 605–07.

109. *Id.* at 606.

110. *Id.*

111. *See id.*

112. *See Judicial Intervention*, *supra* note 91, at 1147 (citing Craigdallie v. Aikman, 4 Eng. Rep. 435 (H.L. 1820)).

113. 36 Eng. Rep. 135 (H.L. 1817).

114. *Id.* at 136.

115. *See id.* at 135–44.

its own minister: one faction espousing Unitarianism and the other Trinitarianism.[116]

In the course of resolving this case, Lord Eldon articulated the reasoning behind the implied trust doctrine:

> I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, "We have changed our opinions—and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship, prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions." In such a case, therefore, I apprehend—considering it as settled by the authority of that I have already referred to [*Craigdallie v. Aikman*]—that, where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to, as the guide for the decision of the Court—and that, to refer to any other criterion—as to the sense of the existing majority,—would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character, of this Court.[117]

It is clear from this excerpt that the rationale of the decision was that "doctrinal continuity is the essential characteristic of a church, so that doctrinal innovation works a trust diversion."[118] From this premise, it logically follows that if a property dispute arises within a church, the only equitable way to dispose of the property in question is to award it to the group furthering the purpose of the religious organization—the group adhering to the founding doctrines. On the basis of this reasoning, Lord Eldon concluded that if an institution is "established for Trinitarian purposes," it can not later be converted to "Anti-trinitarian" uses because such a conversion would "allow a trust for the benefit of *A.* to be diverted to the benefit of *B.*"[119]

This rule became known as the implied trust doctrine because it implied that the members of the church had "bound themselves . . . to adhere to the original doctrines" of the religious association.[120] The

116. *See id.*
117. *Id.* at 150.
118. *Judicial Intervention*, *supra* note 91, at 1147.
119. *Pearson*, 36 Eng. Rep. at 150.
120. *Judicial Intervention*, *supra* note 91, at 1147.

implied trust doctrine, with its corollary departure-from-doctrine test, became the accepted practice of England, with one slight modification: the English courts usually distinguished between "fundamental" doctrinal innovations and "immaterial deviations."[121]

Where the implied trust doctrine was adopted and applied in the American context, it was usually justified on the same basis that Lord Eldon justified it in England—to prevent property given and acquired for the propagation of particular religious doctrines from being redirected to support contrary religious doctrines.[122] For example, in response to the argument that such a rule hindered religious freedom, the Supreme Court of Pennsylvania responded that "[t]he guarantee of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches."[123] Instead, the Pennsylvania Supreme Court defined "religious freedom" as the individual right to leave the old religious society and create a new church "with such creed and government as they please, raising from their own means another fund and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves."[124] To summarize, the implied trust doctrine was created in England and widely adopted in the United States to protect the doctrinal standards of a particular religious group.

Given the implied trust doctrine's purpose of preserving a church's doctrinal standards, a necessary corollary is the departure-from-doctrine's method of adjudicating church property disputes.[125] When the Supreme Court declared the departure-from-doctrine method unconstitutional, it made it impossible for civil courts to effectuate the very purpose of implying trusts on church property in the first place.[126] Some state courts recognized this problem and consequently rejected the implied trust doctrine in favor of the neutral

121. *Id.* at 1148.

122. *See id.* at 1148, 1168 ("Courts have seemed to ground the implied-trust doctrine more often in vague notions, first voiced in the *Pearson* decision, that a church as an entity is defined by its doctrinal coherence. This concept may reflect some feeling that in a dispute over church property the equities favor the traditionalists as against the schismatics regardless of relative numbers.").

123. Schnorr's Appeal, 67 Pa. 138, 147 (1870).

124. *Id.*

125. Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 557 (1990).

126. *Id.* at 557–58.

principles of law method.[127] Instead of implying a trust in favor of the religious hierarchy that could no longer be abrogated by a fundamental departure from doctrine, these courts utilized neutral principles of property law in order to determine whether an express trust favoring the hierarchy existed.[128]

But other state courts failed to grasp the fundamental problem the Supreme Court created with respect to the implied trust doctrine. These courts have utilized the implied trust doctrine as an element of the deference method of adjudicating church property disputes.[129] In these states, the church "hierarchy remains the beneficiary of the implied trust" and "the faction loyal to the hierarchy retains control of the local entity and its property," even if the church hierarchy has abandoned the doctrinal standards that the common law intended to protect by implying the trust in the first place.[130] Thus, the Supreme Court has undermined the very purpose of the implied trust doctrine and ensured that the church hierarchy is favored over the local church in every instance where the implied trust doctrine is applied. In this way the Supreme Court has, in the name of the First Amendment, created an "establishment of [the denominational hierarchy] at the expense of the free exercise rights of [the local congregation]."[131]

C. *Express Church Property Trusts*

The legal issues surrounding express trusts on church property are largely limited to hierarchical Protestant denominations. Regarding the Roman Catholic Church, which is a hierarchical church, "[m]ost states provide in their laws for a 'corporation sole,'" which allows the bishop to possess "all the benefits of being a corporation in regard to his holding title to real estate."[132] Thus, the Catholic bishop of a particular diocese holds the title to all of the local

127. *See, e.g.*, Presbyterian Church in U.S. v. E. Heights Presbyterian Church, 167 S.E.2d 658, 659 (Ga. 1969).

128. *See id.* at 659–60.

129. *See, e.g.*, Calvary Presbyterian Church v. Presbytery of Lake Huron, 384 N.W.2d 92, 95 (Mich. Ct. App. 1986); Protestant Episcopal Church in Diocese of N.J. v. Graves, 391 A.2d 563, 576–77 (N.J. Super. Ct. Ch. Div. 1978).

130. Gerstenblith, *supra* note 125, at 557.

131. *Id.* at 558.

132. JACK M. TUELL, THE ORGANIZATION OF THE UNITED METHODIST CHURCH 149 (rev. ed. 1997).

church property in that diocese.[133] If a local parish decides to withdraw from the Roman Catholic Church, its property would clearly stay with the diocese.[134] In congregationally structured Protestant denominations, the title to the local church property is held by the local church.[135] The congregation, it would follow, could freely withdraw from its parent denomination with its property, provided that there was not a schism within the congregation that would open up the question of whether the withdrawing faction actually represented the local congregation.

In contrast to the Roman Catholic Church and congregational Protestant churches, many hierarchical Protestant churches make use of express trusts in their ordering of local church property.[136] In these churches, the local congregation holds the title to its property, but it holds that property in trust for the denomination.[137] The Presbyterian Church USA, the Episcopal Church, and the United Methodist Church are all examples of hierarchical mainline Protestant churches that make use of express property trusts in their denominational constitutions.[138]

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133. *Id.*

134. *See id.*

135. *See id.*

136. *See, e.g., id.* (illustrating the United Methodist Church's use of an express property trust).

137. *See id.*

138. *See* EPISCOPAL CHURCH, CONSTITUTION & CANONS tit. I., c.7.4–5 (2003) ("All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitutions and Canons. The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust."); II PRESBYTERIAN CHURCH (U.S.A.), BOOK OF ORDER: THE CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A.) G-8.0201 (2005-2007) ("All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.)."); UNITED METHODIST CHURCH, THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH ¶ 2501 (2004) ("[T]itles to all real and personal, tangible and intangible property held at jurisdictional, annual, or district conference levels, or by a local church or charge, or by an agency or institution of the Church, shall be held in trust for The United Methodist Church and subject to the provisions of its *Discipline*.").

This Note focuses on the use of express trust clauses in the United Methodist Church in order to shed light on the purpose behind their use. The history surrounding the United Methodist Church's use of express property trusts is most useful in illustrating the purpose of these trusts because the United Methodist Church has made use of such trusts since the formation of its predecessor denomination in the 1700s.[139] In contrast, the Presbyterian Church USA and the Episcopal Church did not add express property trust clauses to their denominational constitutions until the latter part of the twentieth century in response to the Supreme Court decisions that allowed the state courts to adjudicate church property disputes on the basis of the neutral principles of law method.[140] Presumably, these denominations amended their constitutions in order to take advantage of the newly created neutral principles of law method.[141] These amendments created some evidence of a trust over the member churches' property, thereby giving the church hierarchy more leverage to prevent an exodus of member churches dissatisfied with the theological direction of their particular denomination.[142] For this reason, the legal existence of an express property trust over local church property in the Presbyterian Church USA and the Episcopal Church is suspect—at least in regard to member congregations in existence prior to the amendments—and is therefore not as useful in illustrating the purpose of these trusts.[143]

The historical context surrounding the Methodist Church's use of express property trusts illustrates that these trusts were utilized to protect the doctrinal standards of the Methodist Church and not the church hierarchy itself, except insomuch as the hierarchy is defending the church's doctrinal standards.[144] The original deeds of the John Street Methodist Church in New York City and Saint George's Methodist Church in Philadelphia, both dated in 1770, illustrate this

139. THOMAS C. ODEN, THE TRUST CLAUSE GOVERNING USE OF PROPERTY IN THE UNITED METHODIST CHURCH 19 (2002).

140. *See* GUIDE TO CHURCH PROPERTY LAW, *supra* note 4, at 65–83, 119–36.

141. *See id.* at 75–77, 129–30.

142. *See id.*

143. *See, e.g.*, Protestant Episcopal Church in Diocese of Los Angeles v. Barker, 171 Cal. Rptr. 541, 554 (Cal. Ct. App. 1981); Presbytery of Hudson River of the Presbyterian Church (U.S.A.) v. Trustees of First Presbyterian Church & Congregation of Ridgeberry, 821 N.Y.S.2d 834, 839 (N.Y. Sup. Ct. 2006).

144. ODEN, *supra* note 139, at 21–22.

reality.[145] These two deeds provide "that the said person or persons, so from time to time to be chosen as aforesaid, preach no other doctrine than is contained in the said John Wesley's Notes upon the New Testament and his four volumes of Sermons."[146] The language from these two property deeds indicates an intent to ensure that the property of these two churches be used solely for the propagation of Methodist doctrine as it is contained in "John Wesley's Notes upon the New Testament" and his "Sermons."

John Wesley, the founder of Methodism, was very much concerned that the Methodist Church should remain faithful to its founding doctrines.[147] The letter he addressed "To the Preachers in America" after the conclusion of the American Revolution manifests this intent:

> 1. Let all of you be determined to abide by the Methodist doctrine and discipline, published in the four volumes of *Sermons*, and the *Notes upon the New Testament*, together with the *Large Minutes* of the Conference.
>
> 2. Beware of preachers coming from Great Britain or Ireland without a full recommendation from me . . . .
>
> 3. Neither should you receive any preachers, however recommended, who will not be subject to the American Conference, and cheerfully conform to the Minutes both of the English and American Conferences. . . .
>
> Undoubtedly the greatest danger to the work of God in America is likely to arise either from preachers coming from Europe, or from such as will arise from among yourselves speaking perverse things, or bringing in among you new doctrines, particularly Calvinism. You should guard against this with all possible care, for it is far easier to keep them out than to thrust them out.[148]

John Wesley further sought to preserve the doctrinal teachings of the Methodist Church in England by drafting a legal document

145. THOMAS C. ODEN, DOCTRINAL STANDARDS IN THE WESLEYAN TRADITION 29 (1988).

146. *Id.*

147. *Id.* at 33 (quoting the text of the letter sent from Wesley (through Jesse Lee) "To the Preachers in America").

148. *Id.* (containing parts of the letter, including those cited).

entitled "The Deed of Declaration" and enrolling it in His Majesty's High Court of Chancery.[149] In this document, Wesley sought to secure the use of Methodist property in England for the use of approved Methodist preachers, and he sought to provide for the continuation of the "yearly Conference of the people called Methodists," which had the task of approving and supervising preachers for the use of Methodist churches.[150] This document provided that:

> The Conference shall not, nor may, nominate or appoint any person to the use and enjoyment of, or to preach and expound God's Holy Word in, any of the chapels and premises so given or conveyed, or which may be given or conveyed upon the trusts aforesaid, who is not either a member of the Conference, or admitted into connection with the same, or upon trial as aforesaid; nor appoint any person for more than three years successively, to the use and enjoyment of any chapel and premises already given, or to be given or conveyed, upon the trusts aforesaid, except ordained Ministers of the Church of England.[151]

Thus, in this legal document, Wesley provided strict limitations on the use of Methodist Church property.

Lest anyone think that this Deed of Declaration sought to ensure the use of Methodist property for the Methodist organization—the Conference—rather than for the propagation of the Methodist faith and practice, Wesley explained the reason he drafted this legal document:

> 10. "But what need was there for any deed at all?" There was the utmost need of it: Without some authentic deed fixing the meaning of the term, the moment I died the Conference had been nothing. Therefore any of the proprietors of the land on which our preaching-houses were built might have seized them for their own use; and there would have been none to hinder them; for the Conference would have been nobody, a mere empty name.

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149. JOHN WESLEY, DEED OF DECLARATION, *in* AMERICAN METHODIST CHURCH, BOOK OF DISCIPLINE, § 1, art. 7, pt. A (Michael D. Hinton ed., 2001), *available at* http://www.ammethch.org/book_of_discipline/bookdisc.html.

150. *Id.*

151. *Id.*

> 11. You see then in all the pains I have taken about this absolutely necessary Deed, I have been laboring, not for myself, (I have no interest therein,) but for the whole body of Methodists; in order to fix them upon such a foundation as is likely to stand as long as the sun and moon endure. *That is, if they continue to walk by faith, and to show forth their faith by their works; otherwise, I pray God to root out the memorial of them from the earth.*[152]

John Wesley was attempting to use this legal document to preserve the use of Methodist property for the propagation of the church's doctrines and practices. The preservation of the Methodist Conference was the means to this end and not the end in itself.[153]

Methodists in the United States took similar actions in order to ensure the preservation of the doctrinal standards.[154] As has already been illustrated, the Methodist churches established in colonial America utilized language from Wesley's "model deed," which prohibited preaching that conflicted with the doctrinal standards of the Methodist Church.[155] Methodist "chapels and meetinghouses" in America were "generally settled according to the form of the deed used in England since 1750."[156]

In addition, the American General Conference of 1796 took action to preserve the doctrinal standards of the Methodist Church.[157] After reassuring all of the American Methodists in attendance that no doctrinal changes had been made, "a revised plan for 'a deed of settlement'" was introduced to provide a "standardized, legal, post-Revolutionary American version of the Model Deed."[158] This Deed of Settlement provided that the local trustees of Methodist congregations could "mortgage, buy, and sell" church property, but it bound them to the "rules and discipline" of the Methodist Church.[159] In other words, the trustees of the local church were authorized to make use of the church property as long as such use was in conformance with the

152. JOHN WESLEY, THE MEANING OF THE CONFERENCE, *in* AMERICAN METHODIST CHURCH, BOOK OF DISCIPLINE, § 1, art. 7, pt. B (Michael D. Hinton ed., 2001), *available at* http://www.ammethch.org/book_of_discipline/bookdisc.html.

153. *See id.*

154. *See* ODEN, *supra* note 139, at 19.

155. *Id.*

156. *Id.*

157. ODEN, *supra* note 145, at 47.

158. *Id.*

159. *Id.* at 47–48.

doctrinal standards of the denomination.[160] To this very day, the *Discipline of the United Methodist Church* states that the title to all "property held at jurisdictional, annual, or district conference levels, or by a local church or charge, or by an agency or institution of the Church, *shall be held in trust for The United Methodist Church and subject to the provisions of its* Discipline."[161] Thus, pursuant to Methodist Church law, Methodist Church property can only be used in accordance with the Methodist Church's *Discipline*.

The *Discipline* of the United Methodist Church sets out the doctrinal standards of the church.[162] These doctrinal standards are protected from alteration by a restrictive rule in the *Discipline*, which states: "The General Conference shall not revoke, alter, or change our Articles of Religion or establish any new standards or rules of doctrine contrary to our present existing and established standards of doctrine."[163] This restrictive rule is further protected from amendment by the Exception of 1832, which provides that the restrictive rule can only be changed by "the concurrent recommendation of three fourths of all the members of the several annual conferences who shall be present and vote on such a recommendation, then a majority of two thirds of the conference succeeding."[164] It is nearly impossible to change the doctrinal standards contained in the *Discipline*.[165] Thus, the United Methodist Church has ensured that its doctrinal standards are legally protected via the trust clauses subjecting each local church to the *Discipline*.[166]

It has been established that the purpose behind the use of the express trust clause in the United Methodist Church, and thus one of the major purposes behind the use of express trusts in the ecclesiastical context generally, is the protection of the religious group's doctrinal standards. Accordingly, the departure-from-doctrine standard should be available for the use of state courts in their adjudication of church property disputes that involve express property trusts. By barring the use of this method of adjudicating church property disputes, the Supreme Court has ensured that when

160. *See id.*
161. UNITED METHODIST CHURCH, *supra* note 138, at ¶ 2501 (emphasis added).
162. *Id.* ¶ 103.
163. *Id.* ¶ 17.
164. ODEN, *supra* note 139, at 26.
165. *Id.*
166. *Id.* at 9–11.

an express trust is found to exist in a church property dispute between a local congregation and its parent denomination, the church property will be awarded to the church hierarchy, even if that hierarchy is no longer willing to abide by the doctrinal standards of that particular denomination. In such a situation, a local congregation that desires to continue ministry in the faith of its founding will be forced to choose between forfeiting its property or accepting the doctrinal innovations of the current church hierarchy. Given this situation, it is arguable that a civil court's enforcement of an express property trust in favor of a church hierarchy violates the Establishment Clause because it allows the denominational hierarchy to force doctrinal innovations on its member congregations while the congregation is left powerless to leave.

III. THE FIRST AMENDMENT AND FACTUAL INQUIRIES INTO A CHURCH'S DOCTRINE

A. *Introduction*

The Supreme Court should allow the state courts to inquire into religious matters in the resolution of church property disputes. As previously demonstrated, the departure-from-doctrine method is an equitable method of resolving such disputes—at least in situations where a trust has been implied by state law or where an express trust exists—because it would further the purpose of such trusts.[167] In addition, civil courts routinely examine religious matters in other contexts with approval from the Supreme Court.[168] Provided that the civil courts only examine religious doctrines in order to make factual determinations, the Establishment Clause of the First Amendment is not endangered.[169]

167. *See supra* Part II.

168. *See* discussion *infra* Part III.B.

169. For an article giving a full account of why there is no broad First Amendment prohibition on judicial inquiries into religious matters, see Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497 (2005).

B. *The Courts Are Permitted to Examine Religious Questions in Other Contexts*

The Supreme Court's prohibition of judicial consideration of religious doctrines in the resolution of church property disputes seems incongruous when one considers that the civil courts often consider religious doctrine and tenants in other contexts.[170] Courts are routinely required to examine religious doctrines in order to determine whether a certain practice is "religious" for the purposes of the First Amendment and various other laws that deal with religion.[171] One scholar has stated that "[f]orbidding such judgments out of concern about judicial encroachment on religion would amount to killing free exercise protection with kindness. By the same token, if courts could not discern which practices are 'religious,' then they could not credibly assess governmental actions under the Establishment Clause."[172] Such a prohibition would render it impossible for a court to "distinguish between a nativity scene and a red-nosed reindeer" when determining whether a display on public property is religious or secular.[173]

Cases arising under the Religious Freedom Restoration Act (RFRA) present one area in which civil courts must take religious doctrines into consideration.[174] This Act recognizes that certain laws, which are neutral toward religion, may in fact burden the free exercise of religion.[175] For this reason, the act requires application of the "compelling interest test" set forth in *Wisconsin v. Yoder*[176] when neutral laws burden the exercise of one's religious practices.[177] In order to determine whether a practice burdened by the government falls under RFRA, it must be determined to be religious, because as noted in *Yoder*, "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the

170. *Id.* at 525–26.

171. *Id.*

172. Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1960 (2001).

173. *Id.*

174. 42 U.S.C. § 2000bb (2000).

175. *See id.*

176. 406 U.S. 205 (1972).

177. 42 U.S.C. § 2000bb.

protection of the Religion Clauses, the claims must be rooted in religious belief."[178]

In *Yoder*, the Supreme Court recognized that the "determination of what is a 'religious' belief or practice" was a "delicate question," but this determination was necessary because "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[179] For this reason, one cannot subjectively declare a favored practice to be religious in order to obtain the benefits of the Free Exercise Clause and RFRA.[180] But, in order to determine whether a particular practice is religiously motivated, an examination of religious doctrines and beliefs is necessary.[181]

In the *Yoder* case, the Supreme Court determined that the Amish method of educating children was a religious practice: "That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction . . . 'be not conformed to this world. . . .' This command is fundamental to the Amish faith."[182] Here, the Supreme Court examined the Old Order Amish's religious doctrines and determined that their lifestyle stemmed from a fundamental religious belief thereby entitling them to First Amendment protection.[183] Yet, the Supreme Court continues to prohibit civil court examination of religious doctrines to determine whether a fundamental change of doctrine has occurred when attempting to effectuate the purpose of express and implied church property trusts.[184] There is no logical explanation for this inconsistency in First Amendment jurisprudence.

United States v. Meyers presents an example of a more recent case where the Tenth Circuit Court of Appeals examined religious doctrines in order to determine whether a practice was religious in nature.[185] In this case, Mitchell Meyers was charged and convicted of marijuana possession.[186] He appealed his conviction and sentence

178. *Yoder*, 406 U.S. at 215.
179. *Id.* at 215–16.
180. *See id.;* 42 U.S.C. § 2000bb.
181. *Yoder*, 406 U.S. at 215–16.
182. *Id.* at 216.
183. *See id.*
184. *See* discussion *supra* Part I.
185. 95 F.3d 1475 (10th Cir. 1996).
186. *Id.* at 1479.

because the district court denied his motion to raise a RFRA defense, in which he claimed that he was "the founder and Reverend of the Church of Marijuana and that it is his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth."[187] The Court of Appeals affirmed the conviction on the grounds that his beliefs concerning the use of marijuana were not religious beliefs.[188] The Court of Appeals reached this conclusion after examining various factors, which included whether the Church of Marijuana "address[ed] fundamental questions about life, purpose, and death," whether it taught "metaphysical" conceptions, whether it had religious rituals, and whether it had a "moral or ethical belief structure."[189] In other words, the Court of Appeals had to examine the religious doctrines of this religious organization in order to determine whether it was a religious organization.

Had the Court of Appeals applied the Supreme Court's First Amendment jurisprudence from the church property cases to the situation in *Meyers*, it could have examined the neutral drug laws to convict him, but it would have been prohibited from examining the religious doctrines of the Church of Marijuana to determine if it was a *bona fide* religious organization for the purposes of his RFRA defense. Instead, it would have had to defer to the judgment of the church's highest adjudicatory body. Obviously, this would have led to the absurd result of the Court of Appeals deferring to Reverend Mitchell Meyers's decree that his use of marijuana was based on his *bona fide* Church's fundamental religious doctrines in his own criminal trial. Instead of basing its decision on Reverend Meyers's self-serving assertions, the Court of Appeals examined the Church's religious doctrines. But if the First Amendment permits judicial examination of religious doctrines in this context, how can it logically prohibit it as an establishment of religion in the context of church property disputes? Is it not just as absurd to defer to a church hierarchy's self-serving judgments about religious matters when they are determinative of the disposition of church property in a dispute?

C. *The Establishment Clause Merely Prohibits Normative*

187. *Id.*
188. *Id.* at 1484.
189. *Id.* at 1483.

Determinations

Not only do the civil courts engage in examinations of religious doctrine outside the context of church property disputes, but the Establishment Clause does not prohibit this inquiry so long as the civil courts limit themselves to factual determinations.[190] As Jared Goldstein astutely pointed out, "[t]he government plainly cannot tell the Catholic Church who should be Pope; but, it would be hard to find that a court unconstitutionally meddles with the church by saying who the Pope is."[191] The difference between these two statements is that, in the first statement, a court is telling a religious organization, the Catholic Church, what it *should do* in order to further its religious mission.[192] This would be a normative determination.[193] In the second statement, the court is merely recognizing what the Catholic Church *has already done* in furtherance of its religious purpose—a purely factual determination.[194]

Based on this distinction, the Establishment Clause of the U.S. Constitution would clearly prohibit a civil court from telling a particular Baptist denomination that it must completely immerse its adherents in water in order for the sacrament of baptism to be religiously valid. This would be a normative determination on a religious issue best reserved for the authorities of that particular religious organization. In contrast, the Establishment Clause would not prohibit a civil court from making the factual determination that a particular Baptist denomination in fact does practice the sacrament of baptism by completely immersing its adherents in water. Establishment Clause cases commonly make such distinctions in the context of what is permissible within the public schools.[195]

In *School District v. Schemp*, the Supreme Court addressed the propriety of mandatory Bible readings in the Pennsylvania public schools under the Establishment Clause of the Constitution.[196] In this case, the Supreme Court stated that, although these mandatory Bible readings took place without commentary by school officials, the

190. Goldstein, *supra* note 169, at 541.
191. *Id.* at 541.
192. *See id.* at 541–42.
193. *See id.*
194. *See id.*
195. *Id.* at 542.
196. 374 U.S. 203, 205 (1963).

purpose of the exercise was to instill in the students the religious and moral values contained within the religious text of the Christian Bible.[197] In other words, the public schools were endorsing the normative values and beliefs of a particular religion—Christianity—over and against the normative values of other religions.[198] As a result, the Supreme Court held that these mandatory Bible readings violated the Establishment Clause.[199] Nevertheless, the Supreme Court rejected the argument that it was establishing a religion of secularism, stating: "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories."[200] The Supreme Court seems to indicate in *Schemp* that the public schools can, consistently with the Establishment Clause, teach facts about particular religions—i.e., what its adherents believe and how these beliefs have affected society throughout history.[201] But if the Establishment Clause permits the public schools to teach facts about religion so long as the religious beliefs are not portrayed as normatively true, then it follows that the Establishment Clause allows the civil courts to identify a church's fundamental religious doctrines so long as they refrain from making normative declarations about such doctrines.

The departure-from-doctrine method of adjudicating church property disputes merely requires a court to identify a denomination's fundamental doctrines in order to determine whether a change has occurred that would allow a congregation to depart with its property. The Establishment Clause does not prevent this inquiry; it only prohibits courts from normative endorsements of religious doctrine. A court does not make a normative endorsement of a faction's doctrinal beliefs by awarding it the church's property because it still adheres to the church's founding doctrines. The court is merely recognizing the fact that the church property is legally held in trust, whether express or implied, for the furtherance of those doctrinal beliefs. If such recognition by a secular court is unconstitutional, it is because court enforcement of church property

197. *Id.* at 224.
198. *See id.*
199. *Id.* at 224–25.
200. *Id.* at 225 (emphasis added).
201. *See id.*

trusts violates the Establishment Clause, not court application of the departure-from-doctrine method.

CONCLUSION

The Supreme Court should permit the state civil courts to use the departure-from-doctrine method in their adjudication of church property disputes. The history behind church property trusts illuminates the major purpose of these trusts: to preserve the doctrinal standards of particular religious organizations. By prohibiting the use of the departure-from-doctrine method, the Supreme Court effectively prevents church property trusts from effectuating their purpose. The Court has ensured that the civil courts will award local church property subject to such a trust to the hierarchy of a particular denomination, even if that hierarchy openly flouts the doctrinal standards that that local congregation intended to preserve when it submitted its property to the trust. There is no logical reason to prevent the civil courts from examining religious doctrines and practices—courts routinely engage in such examinations in other contexts. More importantly, the Establishment Clause does not prohibit factual examinations of doctrine, provided the civil courts refrain from making normative determinations about religious doctrine and practice. By eliminating the departure-from-doctrine method of adjudicating church property disputes, the Supreme Court has rendered court enforcement of church property trusts—express and implied—ineffectual, and possibly unconstitutional.