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SURGICAL ARBITRATION: EXCISING FIRST AMENDMENT CATARACTS FROM RELIGIOUS HIERARCHICAL PROPERTY DISPUTES

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I. INTRODUCTION

Religion enjoys a special status under the laws of the United States of America.[1] Scholars debate the justification for religion's special status, contending it is due to the circumstances of history; the contrast between rationality and supra-rationality; the inherent value of religion in promoting a peaceful society; or merely the fact the First Amendment decrees it so.[2] A particularly convincing explanation for

1. *See* Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303 (2001).

2. *Id.* at 323; *see also id.* at 351 ("It does not matter whether a practice is called a religion or a philosophy, or whether it is perceived to be rational or irrational. If the practice serves the functions religion serves (helping to balance power, speaking for the marginalized, articulating non-market values, and supporting personal spirituality and dignity), then the practice should be entitled to free exercise exemptions and be subject to Establishment Clause limits.").

the special status of religion under the law is based on the functions of religion in society: balancing power, advancing minority rights, promoting "non-market driven values," and serving as a source of identity.[3]

Whatever the justification for the status of religion may be, it is undeniable that religion enjoys special legal treatment today in the form of federal and state tax exemption, the "ministerial exception" to employment discrimination laws, and a court's limited ability to act in matters concerning religious doctrine.[4] The special status of religion complicates otherwise routine matters dealt with by courts, particularly when both parties to a suit are religious factions and the dispute is rooted in religious doctrine.[5]

One area of litigation where such complications are apparent is in the realm of hierarchical religious real property disputes.[6] An action to quiet title, typically a straight-forward claim for a court to handle, becomes increasingly complex as the church divides into an unincorporated religious association and a non-profit corporation.[7] Each side to the dispute then claims to represent the "true" association and, or non-profit corporation quickly multiplying the number of potential entities involved.[8] The religious nature of these entities impedes a court's ability to identify the "true" entities because of First Amendment complications.[9]

Since the Supreme Court allowed states the option of using the neutral-principles-of-law method to resolve church property disputes, commentators have bemoaned this method as unpredictable and unbalanced.[10] Numerous solutions have been proposed to alleviate the perceived inequities that result from the application of the neutral-

3. *See id.* at 332 ("Religious liberty may be necessary in order to enable religion and religious institutions to serve important independent societal functions. I can identify at least four related functions that religion serves: (1) religion helps balance power and limit the power of both the government and organized faith; (2) religion sometimes enables disempowered groups to organize and increase their power; (3) religion produces values that are neither market-driven nor controlled by the government; and (4) religion provides a source of spirituality and personal identity that enables individuals to live with purpose and dignity.").

4. *See* Nicholas A. Mirkay, *Losing Our Religion: Reevaluating the Section 501(c)(3) Exemption of Religious Organizations That Discriminate*, 17 WM. & MARY BILL RTS. J. 715, 715–18 (2009); *see also* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 287 (2008).

5. *See infra* Part II.C.3.i.

6. *See infra* Part II.C.3.i.

7. *See infra* Part II.C.3.i.

8. *See infra* Part II.C.3.i.

9. *See infra* Part II.C.3.i.

10. *See* Ashley Alderman, *Where's the Wall?: Church Property Disputes Within the Civil Courts and the Need for Consistent Application of the Law*, 39 GA. L. REV. 1027, 1052 (2005) (citing Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 130 (1998)); *see also* Christopher W. Wynne, *WWJD: A True Neutral Principles*

principles-of-law method to hierarchical religious property disputes.[11] These solutions involve passing federal statutes and placing greater emphasis on church constitutions.[12] Other scholars think the neutral-principles-of-law method lacks true neutrality because of its consideration of the constitutions of national denominations, which are religious content.[13] These scholars maintain that true neutrality requires a court not to consider the constitutions of national religious denominations at all.[14]

However, a strict neutral-principles-of-law approach of analyzing the facts through only a secular lens essentially ignores the ecclesiastical character of religious property disputes altogether. While this option initially appeals to constitutional sensibilities, can a court that is unable to look to the true cause of a dispute resolve it with an acceptable level of justice?

This Comment proposes adding contractual stipulations that result from the surgical arbitration of two questions to the neutral-principles-of-law method analysis. Outsourcing the question: "Did the national denomination substantially and unforeseeably change its doctrine?" to arbitration, allows the underlying cause of the hierarchical religious property dispute to be weighed by a court without compromising that court's religious neutrality. This Comment will explore this issue primarily in the context of the Presbyterian Church's (U.S.A.) ("PC(USA)") affiliation with local churches in Texas that recently attempted to disassociate from the national denomination.[15]

The first Section of this Comment will briefly examine the historical context surrounding the founding of the Nation and of the Presbyterian Church. The second Section will examine the development of the law regarding hierarchical church property disputes. Finally, the third Section will examine proposed alternatives to the current method of adjudicating hierarchical church property disputes and conclude by advancing the surgical arbitration proposal.

Approach? Arkansas Courts Should Take Another Look, 65 ARK. L. REV. 481, 505 (2012).

11. *See* Part III *infra*.

12. *See* Part III *infra*.

13. Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 547–50 (1990).

14. *Id.*

15. The taxonomy of Presbyterian Church can be somewhat confusing. "PCUSA" refers to the denomination from 1788–1958, while "PC(USA)" refers to the current incarnation of the denomination from 1983 to the present. In the intervening gap the denomination existed as the "UPCUSA." *See* JAMES H. SMYLIE, A BRIEF HISTORY OF THE PRESBYTERIANS 2 (Geneva Press ed. 1996).

A. *The Old World mixture of church and state was a witch's brew of turmoil.*

Look to Western history and one will see a line of church schisms, one begetting the next, followed by a trail of warfare, inquisition, and intolerance.[16] The desire to escape this ecclesiastically motivated carnage was one impetus that induced British citizens to leave the British Isles for the Thirteen Colonies between the 16th and 18th centuries.[17]

England's disassociation from the Roman Catholic Church opened the proverbial gate to centuries of religious and political strife in the British Isles and colonial territories.[18] The fluctuation of monarchs professing opposing religious views mixed with the entanglement of church and state rapidly boiled a bloody cauldron of civil discord.[19] The persecution of supposed heretics or traitors involved the cruel executions of thousands.[20] The resulting backlash wrought havoc in the British Isles with a series of wars responsible for tens of thousands of casualties and culminated with the end of the absolute monarchy in England.[21]

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16. *See generally* John E. Drabble, *Mary's Protestant Martyrs and Elizabeth's Catholic Traitors in the Age of Catholic Emancipation*, 51 CHURCH HIST. NO. 2 (1982), http://www.jstor.org/stable/3165834; *see also* Alice Hunt, *The Monarchical Republic of Mary I*, 52 HIST. J. NO. 3, 557 (2009); *see also* L. M. Hill, *The Marian "Experience of Defeat": The Case of Sir John Bourne*, 25 SIXTEENTH CENTURY J. 3, 531–49 (1994), http://www.jstor.org/stable/2542632; *see also* Sarah Waureghen, *Covenanter Propaganda and Conceptualizations of the Public during the Bishops Wars, 1638–1640*, 52 HIST. J. 1, 63–86, 65 (2009).

17. *See* David W. Noble, HISTORIANS AGAINST HISTORY: THE FRONTIER THESIS AND THE NATIONAL COVENANT IN AMERICAN HISTORICAL WRITING SINCE 1830 5 (U. Minn. Press 1967), http://www.jstor.org/stable/10.5749/j.ctttt28q.

18. *See generally* John E. Drabble, *Mary's Protestant Martyrs and Elizabeth's Catholic Traitors in the Age of Catholic Emancipation*, 51 AM. SOC'Y CHURCH HIST. 2 (1982), http://www.jstor.org/stable/3165834; *see generally* Alice Hunt, *The Monarchical Republic of Mary I*, 52 HIST. J. 3 (2009), http://www.jstor.org/stable/40264190.

19. *See generally supra* note 18.

20. *See generally* 9 JOHN FOXE, THE ACTS AND MONUMENTS OF THE CHRISTIAN CHURCH (Ex-classics Project 2009) (1563), http://www.exclassics.com/foxe/foxe9pdf.pdf; *see generally* 10 JOHN FOXE, THE ACTS AND MONUMENTS OF THE CHRISTIAN CHURCH (Ex-classics Project 2009) (1563), http://www.exclassics.com/foxe/fox10pdf.pdf; *see generally* 11 JOHN FOXE, THE ACTS AND MONUMENTS OF THE CHRISTIAN CHURCH (Ex-classics Project 2009) (1563), http://www.exclassics.com/foxe/fox11pdf.pdf; *see generally* 12 JOHN FOXE, THE ACTS AND MONUMENTS OF THE CHRISTIAN CHURCH (Ex-classics Project 2010) (1563), http://www.exclassics.com/foxe/fox12pdf.pdf; *see generally* 13 JOHN FOXE, THE ACTS AND MONUMENTS OF THE CHRISTIAN CHURCH (Ex-classics Project 2010) (1563), http://www.exclassics.com/foxe/fox13pdf.pdf (illustrating that immolation, drawing and quartering, murder, and torture of religious or political opponents was common in this time period).

21. *See* ENGLISH BILL OF RIGHTS OF 1689, http://avalon.law.yale.edu/17th_century/england.asp (last visited Sept. 4, 2015); *see generally* Charles Carlton, *Going to the Wars: The Experience of the British Civil Wars 1638-1651*, 24 SIXTEENTH CENTURY J. 3, 740 (1994).

B. *Origins and Beliefs of the Presbyterian Church*

The Presbyterian Church initially emerged as the Church of Scotland in 1560.[22] It differed structurally from other Reformed Protestant movements with respect to its hierarchical structure of bodies, which were listed in descending order: the General Assembly, the Synod, the Presbytery, and the Session.[23] The exact specifications of who constitutes each body, and each body's exact powers, are somewhat complex.[24] Basically, the Presbyterian Church generally uses a representative system to vote in equal ratios of clergy and laity to serve as commissioners in the higher bodies of the denomination.[25]

This system reflects the Presbyterian Church's early values of parity between the clergy and laity, as well as its historical commitment to representative government stretching back to the English Civil Wars.[26] A presbytery has two important powers particularly relevant to church property disputes: the power to create and dissolve churches, as well as the power to ordain candidates for ministry.[27] Title to local church property is usually held at the Session level by a non-profit corporation as trustee for the use and benefit of the local church.[28]

The Presbyterian Church in the United States of America ("PCUSA") traces its history back to the Synod of Philadelphia that was founded in 1716.[29] In the wilderness of the frontier, charismatic revivals caused early theological tensions within the church that would recur with westward expansion.[30] Although King George III and his

22. *See* OFF. OF THE GEN. ASSEMBLY, PRESBYTERIAN CHURCH (U.S.A.), THE CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A) PART I: BOOK OF CONFESSIONS 10 (2014), http://www.pcusa.org/site_media/media/uploads/oga/pdf/boc2014.pdf [hereinafter BOOK OF CONFESSIONS].

23. *See id.*; *see also* SMYLIE, *supra* note 15, at 23–38.

24. All of a local church's clergy and elders (laity elected by congregation) constitute the Session. OFF. OF THE GEN. ASSEMBLY, PRESBYTERIAN CHURCH (U.S.A.), THE CONSTITUTION OF THE PRESBYTERIAN CHURCH IN THE (U.S.A) PART II: BOOK OF ORDER 2015–2017 48 (2015), http://store.pcusa.org/OGA15010 [hereinafter BOOK OF ORDER]. All of the Sessions within a geographic district belong to a Presbytery. All clergy in that district and an equal number of elders sit on that council. *Id.* at 50; A Synod is a group of Presbyteries within a region. Each Presbytery elects one cleric and one elder to serve as commissioners in the Synod. *Id.* at 54. The General Assembly includes all Presbyteries within the nation. The number of commissioners (again an equal ratio of clergy and elders) a Presbytery may send to the General Assembly is dependent on the size of the Presbytery. *Id.* at 57.

25. *See generally* BOOK OF ORDER, *supra* note 24.

26. *See* BOOK OF CONFESSIONS, *supra* note 22, at 120, 146.

27. BOOK OF ORDER, *supra* note 24, at 52, 36.

28. Patty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 BYU L. REV. 439, 441–42 (1995) (" . . . 87% [of national religious organizations] use the religious not-for-profit corporation form . . ."); *see also* BOOK OF ORDER, *supra* note 24, at 61.

29. It is helpful to note that the Synod of New York and Philadelphia did not maintain any ties to the Church of Scotland. SMYLIE, *supra* note 15, at 43.

30. *See id.* at 48–49, 69–73.

underlings characterized the American Revolution as a "Presbyterian rebellion," not all Presbyterians were united behind the rebellion against the Crown.[31] After the Colonies achieved independence, the Synod of New York and Philadelphia promoted itself to the General Assembly of the PCUSA.[32]

PCUSA's history is filled with divisions and reconciliations. While some disputes were mostly religious in nature,[33] the fault lines of the majority of disputes formed along civil rights issues. PCUSA has generally been ahead of the curve on civil rights issues.[34] PCUSA denounced slavery very early in the nation's history.[35] Some members of the PCUSA tried to defend the sovereignty of Cherokee territory immediately preceding governmental action that later resulted in the Trail of Tears.[36] PCUSA opposed segregation before the status quo was ready.[37] PCUSA was not as early a proponent of women's rights as their Congregationalist cousins, but PCUSA did not lag far behind.[38] As of 2013, around half of the leadership of PC(USA)[39] is

31. Richard Gardiner, *The Presbyterian Rebellion?*, J. AM. REVOLUTION (Sept. 5, 2013), http://allthingsliberty.com/2013/09/presbyterian-rebellion/.

32. SMYLIE, *supra* note 15, at 62.

33. *See* John Fea, *In Search of Unity: Presbyterians in the Wake of the First Great Awakening*, 86 J. PRESBYTERIAN HIST. 2, 53 (2008), http://www.jstor.org/stable/23338196.

34. *See infra* notes 25–30.

35. PCUSA called for the abolition of slavery in 1787. PRESBYTERIAN CHURCH IN THE U.S.A, RECORDS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES 539 (Presbyterian Board of Publication And Sabbath-School Work, 1904) ("The Creator of the world having made of one flesh all the children of men, it becomes them as members of the same family, to consult and promote each other's happiness. It is more especially the duty of those who maintain the rights of humanity, and who acknowledge and teach the obligations of Christianity, to use such means as are in their power to extend the blessings of equal freedom to every part of the human race. From a full conviction of these truths, and sensible that the rights of human nature are too well understood to admit of debate, Overtured, that the Synod of New York and Philadelphia recommend, in the warmest terms, to every member of their body, and to all the churches and families under their care, to do every thing in their power consistent with the rights of civil society, to promote the abolition of slavery, and the instruction of negroes, whether bond or free.").

36. Chief among them was US Attorney General William Wirt who argued before the Supreme Court "The Cherokees are a state. They have been uniformly treated as a state since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political, character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community." Cherokee Nation v. Georgia, 30 U.S. 1, 14 (1831); *see generally* Joseph C. Robert, *William Wirt, Virginian*, 80 VA. MAG. HIST. AND BIOGRAPHY 4, 387–41 (1972), http://www.jstor.org/stable/4247747.

37. *See generally Presbyterians and the Civil Rights Movement*, PRESBYTERIAN HIST. SOC'Y, http://www.history.pcusa.org/history-online/exhibits/commission-religion-and-race-page-1 (last visited Mar. 24, 2015).

38. *See generally* R. Douglas Brackenridge & Lois A. Boyd, *United Presbyterian Policy on Women and the Church—an Historical Overview*, 59 J. OF PRESBYTERIAN HIST. 3, 383, 385–86 (1981), http://www.jstor.org/stable/23328186.

made up of women.[40] PC(USA) is also pro-choice regarding legal constraints on abortion.[41] One of the most significant issues contributing to the current exodus of local churches from PC(USA) is its acceptance of same-sex marriage and ordination of non-celibate homosexual ministers.[42]

These progressive positions caused PCUSA—and PC(USA)—to suffer numerous divisions throughout its history. The nation's issues leading up to the Civil War fractured PCUSA four ways.[43] These wounds would not be healed until 1983, and even then not entirely, because of compounding complications from PC(USA)'s other progressive stances.[44] What healing did occur, however, is now being undone by the current exodus.[45] Historical context is crucial to achieving a full understanding of the disputes giving rise to the current hierarchical church property litigation occurring in Texas.

II. Background

This Section will survey the relevant laws regarding hierarchical church property disputes. The first Subsection will examine the origins of the First Amendment. The second Subsection will discuss the evolution of Supreme Court jurisprudence on the topic of hierarchical church property disputes. The third Subsection will address Texas law regarding the adjudication of hierarchical church property disputes.

A. *The Founders Motivation for Drafting the First Amendment*

On June 8, 1789, House Representative, James Madison, first proposed amending the Constitution.[46] As the House of Representatives debated the exact wording of its draft of the religion clauses, many of the viewpoints of the founders manifested in the legislative history.[47]

39. Again, "PC(USA)" refers to the organization from 1983–present, while "PCUSA" refers to the organization from 1788–1958. *See supra* note 15.

40. Research Services, Presbyterian Church (U.S.A.), Comparative Statistics 2013 25 (2014), http://www.pcusa.org/site_media/media/uploads/research/pdfs/table_13-14_comparative_statistics_2013.pdf.

41. *Report of the Special Committee On Problem Pregnancies And Abortion*, Off. Gen. Assembly Presbyterian Church 11 (1992), http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf ("We do not wish to see laws enacted that would attach criminal penalties to those who seek abortions or to appropriately qualified and licensed persons who perform abortions in medically approved facilities.").

42. *See generally* Leslie Scanlon, *Who's Joining the Exodus*? Departure of PC(USA) Congregations to Other Denominations Accelerates, Presbyterian Church (USA) (Sept. 20, 2013), http://www.pcusa.org/news/2013/9/20/whos-joining-exodus/.

43. Smiley, *supra* note 15, at 87–93.

44. *See id.* at 141.

45. *See generally* Scanlon, *supra* note 42.

46. Anita Y. Woudenberg, *Propagating A Lemon: How the Supreme Court Establishes Religion in the Name of Neutrality*, 7 First Amend. L. Rev. 307, 310 (2009).

47. *Id.* at 312.

Madison's primary intent was to ensure that the amendment prohibited the establishment of an official national religion.[48] Others feared the proposed language could be misinterpreted to eliminate all religion.[49] The Senate's debate was primarily concerned with preventing federal law from advancing one religious denomination above another.[50]

Essentially, the Founders did not want to duplicate the historical experience in England, where some religious groups exercised superior rights due to the laws of the land preferring one group over another.[51] The Founders also wanted to ensure that no religious denomination was granted privileges others lacked.[52] The law has never enshrined any of the hierarchical churches as an official national denomination. The operation of the *Watson* hierarchical deference regime, however, could be seen on some level as granting the clergy of a hierarchical denomination a superior right in church property disputes relative to their counterparts in non-hierarchical churches.[53]

B. *United States Supreme Court Church Property Jurisprudence*

Over the course of American history, the main methods of resolving church property disputes can be placed into three general categories: the departure-from-doctrine rule, the *Watson* hierarchical deference rule, and the neutral-principles-of-law method. The following Subsections examine the means of operation and judicial history of each of these methodologies.

1. Departure-from-Doctrine Rule

English law resolved church property disputes by first investigating the religious beliefs on both sides of a split and then awarding the property to the side whose beliefs most conformed to the official doctrine of the church.[54] In contrast, the United States Constitution forbids the government from interfering with matters of religious establishment; therefore, the courts needed to create a new rule to deal with church property disputes.[55] The *Watson* Court stated:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious

48. *Id.* at 312 & n.29.
49. *Id.* at 312.
50. *Id.*
51. *Id.* at 313.
52. *Id.* at 314–15.
53. *See* Michael William Galligan, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007, 2020 (1983) (". . . [the deference approach] violates the establishment clause for two reasons. First, it has the unintended consequence of causing courts to make doctrinal decisions. Second, the deference rule treats organizations differently on the basis of their religious orientation.").
54. Watson v. Jones, 80 U.S. 679, 727 (1872).
55. *Id.* at 728.

> 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.[56]

In *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the Supreme Court expressly held that the departure-from-doctrine rule was unconstitutional.[57]

2. *Watson* Hierarchical Deference Rule

Watson v. Jones created the *Watson* hierarchical deference rule that would be the law of the land from 1871 to 1979.[58] *Watson* involved the threshold question of whether or not a church was hierarchical or congregational.[59] A hierarchical church uses a large system of connected churches that are subordinate to a larger governing entity.[60] There are also intermediate hierarchical churches such as the Presbyterian and Methodist churches.[61] A congregational church may still loosely align with other churches, but it is essentially a single sovereign church, like Baptist, Church of Christ, or independent-charismatic churches.[62] If a church was determined to be a hierarchical church, then courts deferred to an appropriate ecclesiastical tribunal to decide the matter.[63]

3. Neutral-Principles-of-Law Method

In *Blue Hull*, Justice Harlan first hinted at the neutral principle of law method's application to hierarchical church property disputes.[64] In 1979, the Supreme Court held in *Jones v. Wolf* that each state had a variety of methods available to it in dealing with hierarchical church property disputes.[65] Specifically, states were free to choose to continue using the *Watson* hierarchical deference rule, to use the neutral-

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56. *Id.*

57. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969).

58. *See Watson,* 80 U.S. at 728–30.

59. *Id.* at 726–27.

60. *Id.*; The Roman Catholic Church is the quintessential example of a hierarchical church. Jeffrey B. Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 PEPP. L. REV. 399, 405–06 (2008).

61. *Watson*, 80 U.S. at 728–30.

62. *Id.*

63. *See Watson*, 80 U.S. at 732–33.

64. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 452 (1969) (Harlan J., concurring) ("[T]he church should not be permitted to keep the property simply because church authorities have determined that the doctrinal innovation is justified by the faith's basic principles.").

65. Jones v. Wolf, 443 U.S. 595, 602 (1979).

principals-of-law method to determine secular issues, or to pass statutes to deal with such issues.[66]

The Court expressly held that the ownership of disputed property could be determined by applying the neutral-principals-of-law method and considering evidence such as deeds to the property, the local church charter, the bylaws of the entity holding the deed to the property, and relevant provisions in the national denomination's constitution.[67] In fact, a state is free to use any method of law that "does not impair free-exercise rights or entangle the civil courts in matters of religious controversy."[68]

C. *Texas Law Relevant to Hierarchical Church Property Disputes*

The following Subsections will cover relevant Texas law applicable to hierarchical church property disputes. The first Subsection will address trust law. The second Subsection will discuss Texas laws governing non-profit corporations. The third Subsection will examine the coevolution of Texas jurisprudence in the light of Supreme Court jurisprudence and historical context.

1. Trusts and Hierarchical Church Property Disputes

Most church property is held by a non-profit corporation in charitable trust for the benefit of its local congregation.[69] A great deal of the legal and academic controversy regarding the application of the neutral-principles-of-law method to hierarchical church property disputes revolves around issues of trust law.[70] In addition, the surgical arbitration proposal advanced in this Comment is also partially based on principles of trust law. Given how important trust law is to the following discussion, it is beneficial to review trust concepts as elucidated by the Restatement (Third) of Trusts.

A trust is a legal relationship between parties with regard to property.[71] The creator of the trust is referred to as the *settlor*.[72] The *trust property* is the property involved in the trust.[73] The *trustee* typically holds legal title to the property, though sometimes he or she may hold equitable title as well.[74] The trustee holds title for the benefit of the "beneficiary," who holds equitable title to the trust property.[75]

66. *Id.* at 609.
67. *Id.* at 602–03.
68. *Id.* at 607–08.
69. *See* Gerstenblith, *supra* note 28, at 441–44.
70. *See generally infra* Part III.B–C; *see also infra* notes 191–94; *see also infra* note 205.
71. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).
72. *Id.* § 3.
73. *Id.*
74. *Id.* § 2 cmt. d.
75. *Id.; id.* § 3.

A trust may be characterized as private or charitable based on the nature of a trust's objective.[76] A charitable trust must be created with the objective of furthering the public good, without serving any private trust interests.[77] Several classes of objectives have long been held to be charitable, including the advancement of religion—the class most relevant to this Comment's topic.[78] The rules regarding charitable trusts differ from private trusts in several aspects, e.g., charitable trusts can be created even if lacking definite beneficiaries and may extend beyond the duration normally allowed by the rule against perpetuities because the property is said to "vest in charity."[79]

To create a trust, the settlor must properly manifest the intent to do so, e.g., a trust involving interests in real property must be in writing and signed by the settlor as required by the statute of frauds.[80] According to the Restatement (Third) of Trusts, so long as the terms of the trust contain no provision to the contrary, a settlor who fails to expressly specify that a trust is revocable or amendable is presumed to have no power to revoke or amend the trust if the settlor has retained no interest in the trust property.[81] However, if the settlor has retained an interest in the trust property, he or she is presumed to have the power to revoke or amend the trust.[82] Texas trust law provides for the opposite—a trust is presumed revocable unless its language makes it expressly irrevocable.[83] The fact that the American Legal Institute states that trusts are irrevocable by default in all three editions of the Restatement of Trust law demonstrate the jurisdictional ubiquity of this rule. Perhaps this idiosyncrasy of Texas trust law is responsible for the degree of contention regarding trusts in Texas hierarchical church property litigation.[84]

A trustee typically has the power to revoke or amend a trust so long as doing so remains within the bounds of the trustee's fiduciary duty to the beneficiary and the terms of the trust do not specify otherwise.[85] In general, a beneficiary does not have the power to revoke or amend a trust unless given that power by the trust terms;[86] however, if all beneficiaries unanimously agree to a revocation or amendment to

76. *Id.* § 27.
77. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003).
78. *Id.* § 28(c).
79. *Id.* § 28 cmt. c–d.
80. *Id.* § 13 cmt. a; *id.* § 22.
81. *Id.* § 63 cmt. c.
82. *Id.*
83. "A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it." TEX. PROP. CODE ANN. § 112.051(a) (West 2015).
84. "The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power." RESTATEMENT (SECOND) OF TRUSTS § 330(1) (1959); *see also* RESTATEMENT (FIRST) OF TRUSTS § 330(1) (1935).
85. RESTATEMENT (THIRD) OF TRUSTS § 64 cmt. b.
86. *See id.* at § 64.

the trust, that alteration can be effected (except in certain situations).[87]

If a circumstance unforeseen by the settlor when creating the trust terms arises, the equitable-deviation doctrine allows the court to modify, or direct the trustee to modify, the terms of the trust to better comply with the intent of the settlor in creating the trust.[88] The equitable-deviation doctrine is the mechanism to be utilized by the surgical arbitration proposal to empower the court to modify the terms of any existing trust.

2. Texas Non-profit Corporation Law

Many national denominations require that their local churches form non-profit entities for the purpose of handling the civil affairs of the local church.[89] These non-profit corporations typically hold title to the church in a charitable trust, as trustees for the benefit of the local church.[90] Depending on the wording of the terms of the trust, there may exist some room for argument as to whether the beneficiary is the local church, the national denomination, or both.

A local church's non-profit corporation likely has references to the national denomination in its certificate of formation and bylaws. When a certificate of formation is inconsistent with the bylaws the certificate of formation controls.[91] A disassociating local church with references to the national denomination in its certificate of formation would first need to amend its certificate of formation to excise such references. Amending the certificate of formation can be accomplished in a variety of manners, depending on the organization of the non-profit corporation.[92] After amending the certificate of formation, the corporation can then amend its bylaws by following its own rules for doing so. The board of directors can amend the bylaws themselves, so long as the certificate of formation does not reserve that power to its members, the management of the corporation is not vested in the members, or unless the members have expressly forbidden the board of directors to amend the bylaws in question.[93]

The next issue a disassociating board might face is that the national denomination may try to replace the board. Under Texas law, if the articles of formation or bylaws of a non-profit corporation provide for a method of removing a director, then that method must be followed.[94] Any vacancies on a board will be filled by a majority vote of

87. *Id.* § 65 cmt. b.
88. *Id.* § 66 cmt. a.
89. BOOK OF ORDER, *supra* note 24, at 61.
90. *See generally supra* note 28.
91. TEX. BUS. ORGS. CODE ANN. § 22.103 (West Westlaw through 2015 Reg. Sess. of 84th Leg. 2006).
92. *See* §§ 22.105–.107 (Westlaw); *see also* § 3.063 (Westlaw).
93. § 22.102. (Westlaw).
94. § 22.211 (Westlaw).

the remaining directors.[95] So long as the certificate of formation and bylaws do not allow the national denomination a means of removing the directors, the sitting directors should be able to retain their places on the board despite allegations to the contrary.

Depending on the structure and the disposition of the corporation's members or board of directors towards disassociation, it is likely a local church with a majority in favor of disassociating from the national denomination will be able to legally manipulate the factors evaluated under the neutral-principles-of-law method.

3. Texas Hierarchical Church Property Dispute Jurisprudence

Texas's treatment of church property disputes has evolved parallel to Supreme Court jurisprudence. The Texas cases discussed below examine how Texas law was applied in the past, and how it has changed in more recent times.

a. Brown v. Clark *and the Paradoxical Foundation of Both the Identification Method and Neutral-Principles-of-Law Method for Resolving Hierarchical Church Property Disputes*

Brown v. Clark is one of the earliest Texas Supreme Court church property dispute cases.[96] It was decided in 1909, only thirty-eight years into the 108-year reign of the *Watson* hierarchical deference rule.[97] It is the case cited to for the creation of the "identification method" that would be employed by Texas courts for 104 years.[98] Somewhat counter-intuitively, it is also the case cited to by the Texas Supreme Court in 2013 to show that Texas courts have always utilized the neutral-principles-of-law method in hierarchical church property disputes.[99]

Though the court only addresses one issue, [100] several factors influenced the underlying dispute in the original split between PCUSA and Cumberland Presbyterian Church ("CPC"). At the turn of the 19th century, the Presbytery of Cumberland was located on the frontier.[101] Charismatic revivals had a tendency to sweep through these rural ar-

95. § 22.212 (Westlaw).

96. *See generally* Brown v. Clark, 116 S.W. 360 (Tex. 1909).

97. *See id.*

98. Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc., 552 S.W.2d 865, 871 (Tex. Civ. App.—Texarkana 1977, no writ); *see also* Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc., 710 S.W.2d 700, 705–06 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *see generally Brown*, 116 S.W. 360.

99. Masterson v. Diocese of Nw. Texas, 422 S.W.3d 594, 605 (Tex. 2013); Episcopal Diocese of Fort Worth v. Episcopal Church, 422 S.W.3d 646, 647 (Tex. 2012).

100. *See Brown*, 116 S.W. at 363–64.

101. *See* SMYLIE, *supra* note 15, at 71–73.

eas and influence the theology of those who dwelt in such remote locales.[102]

The underlying dispute driving the split was PCUSA's unwillingness to relax its high formal education standards for the ordination of ministers in consideration of the difficulty frontier dwelling candidates for ministry faced obtaining the required formal education.[103] When the Presbytery of Cumberland ordained candidates for ministry, despite their lack of formal education, the Synod of Kentucky dissolved the Presbytery of Cumberland.[104] Left to its own devices, the former Presbytery of Cumberland eventually developed into a separate denomination, the CPC.[105]

In 1903, the PCUSA modified its confession of faith to become more accepting of charismatic ideas.[106] The General Assembly of the CPC felt that these modifications sufficiently resolved the CPC's differences with the PCUSA, and two-thirds of the CPC denomination voted to reunite with the PCUSA. The dissenting one-third of the CPC carried on its independent existence.[107]

Justice John Marshall Harlan, known as the "Great Dissenter"[108] in part for being the sole dissenter in *Plessy v. Ferguson* and the *Civil Rights Cases*, was also a Ruling Elder of a PCUSA church when reunion with the CPC was up for a vote.[109] At this time, PCUSA was racially integrated at all levels except the congregational level, while the CPC was still entirely segregated.[110] The reunion proposal allowed the CPC to remain segregated upon reuniting with the PCUSA, thus requiring some Presbyteries and Synods to become re-segregated.[111] Justice Harlan[112] argued against the reunification because it would impose segregation on part of the PCUSA.[113]

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102. *See About Us*, CUMBERLAND PRESBYTERIAN CHURCH, http://www.cumberland.org/center/CPC_Home_Page/About_Us.html (last visited Mar. 27, 2015).

103. SMYLIE, *supra* note 15, at 72–73.

104. *See* PHILA.: PRESBYTERIAN BD. OF PUBL'N, MINUTES OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA FROM ITS ORGANIZATION A.D. 1789 TO A.D. 1820 INCLUSIVE 389 (Philadelphia, Presbyterian Board of Publication 1847), https://archive.org/details/minutesofgeneral01phil.

105. *See generally* CUMBERLAND PRESBYTERIAN CHURCH, *supra* note 102.

106. *See generally* BOOK OF CONFESSIONS, *supra* note 22, at 187–91.

107. SMYLIE, *supra* note 15, at 106.

108. *See* James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317, 417 (2001).

109. *Id.* at 334.

110. *Id.* at 389.

111. *See id.* at 390.

112. Not to be confused with his grandson, John Marshall Harlan II, who also was a Supreme Court Justice and whose concurrence first hinted at the neutral principles of law method. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 452 (1969) (Harlan J., concurring).

113. Gordon, *supra* note 108, at 390.

Against this national background, a CPC congregation in Jefferson, Texas, was divided over the reunification with the PCUSA. [114] Two factions claimed possession of the local church property, the Session of the CPC of Jefferson, Texas, and the Session of the PCUSA at Jefferson, Texas.[115] The Cumberland faction of the local church argued that the General Assembly of the CPC lacked the authority to merge with the PCUSA on the grounds that the confession of faith of the CPC was antagonistic to the PCUSA's confession of faith.[116] The Cumberland faction was essentially requesting the implementation of the old English departure-from-doctrine rule, which the court properly declined to follow.[117]

The court did, however, engage in a thorough examination of how the CPC national denomination was organized.[118] The court delved deeply into the composition of a Session, a Presbytery, a Synod, and the General Assembly. Additionally, the court examined the jurisdiction that each judicatory body had over various matters regarding church administration.[119] The court ultimately invoked *Watson* when it deferred to the General Assembly of the CPC's determination that it had the authority to reunite with the PCUSA because the General Assembly had original jurisdiction in matters concerning all CPC affiliated local churches in the nation.[120] The court recognized that the only question it had jurisdiction over was what effect the reunification of the CPC and the PCUSA had on the Jefferson, Texas, church property.[121] The deed listed the holders as the trustees of the "Cumberland Presbyterian Church at Jefferson, Tex," and contained no trust or limitation on the title. The court found that neither an express or implied trust attached to the property.[122]

The court explained: "It follows, we think, as a natural and proper conclusion, that the church to which the deed was made still owns the property, and that whatever body is identified as being the church to which the deed was made must still hold the title."[123] This quote served as the basis of Texas's identification methodology for the next 104 years. The reunion did not disband the local church, so the incidental name change of the church did not affect the identity of the

114. *See* Brown v. Clark, 116 S.W. 360, 361–62 (Tex. 1909).
115. *Id.* at 361.
116. *Id.* at 363.
117. *Id.*
118. *Brown*, 116 S.W. at 361–63.
119. *Id.*
120. *Id.* at 363 ("The original jurisdiction of the General Assembly is limited by the language in question to those things which belong to the churches in general and it could not exercise authority over any matter which concerned only one church except upon appeal.").
121. *Id.* at 364.
122. *Id.* at 361.
123. *Id.* at 364–65.

church regarding the deed to the property.[124] Therefore, the court held that the PCUSA at Jefferson, Texas, was the faction rightly entitled to possession and use of the local church property.[125]

Even though *Brown v. Clark* would regularly be cited to show that Texas common law always embraced the *Watson* hierarchical deference rule, the court in *Brown* examined the deed, searched for the existence of any express or implied trust provisions, and thoroughly examined the bureaucratic functions of the system of church government as set out in the national denomination's church constitution instead.[126] These actions are very similar to how the neutral- principles-of-law method is applied in the post-*Wolf* era.[127] While the court did defer to the judicatory of the church's determination that the PCUSA church at Jefferson, Texas, was the rightful faction entitled to possession and use of the premises in question, it did not defer until after determining that the CPC's constitution made the General Assembly the "supreme legislative, judicial, and executive" body of the church, and that it had the "authority to adjudicate" matters concerning the national church as a whole.[128] So perhaps it is not so odd after all that the *Masterson* court held that *Brown* demonstrated that Texas law had always applied the neutral-principles-of-law method to hierarchical church property disputes.[129]

b. Texas Presbyterian Church Cases in the Identification Method Era

Two cases involving Presbyterian Church property disputes went before Texas appellate courts in 1977 and 1986.[130] These cases show how the identification method functioned. Most Presbyterian churches are held in a charitable trust.[131] The trustees are elected from the lay members of the congregation and the beneficiary is usually listed with only the name of the local church.[132] When there is a church property dispute, at least two different factions claim solely to constitute the local church and be the beneficiaries of the trust entitled to the use and possession of the church property.[133] Using the *Watson* hierarchical deference rule, a court defers the question of the identity of the "true" local church to the appropriate higher ecclesias-

124. *Brown*, 116 S.W. at 365.
125. *Id.*
126. *See generally id.* at 360–65; *see generally* Watson v. Jones, 80 U.S. 679 (1871).
127. *See* Masterson v. Diocese of Nw. Texas, 422 S.W.3d 594, 605 (Tex. 2013).
128. *Brown*, 116 S.W. at 365.
129. *See Masterson*, 422 S.W.3d 594, 605–06.
130. Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc., 552 S.W.2d 865 (Tex. Civ. App.—Texarkana 1977, no writ); *see generally* Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc., 710 S.W.2d 700, 702 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
131. *See supra* note 28.
132. *See generally supra* note 130; *see also supra* note 27, at 61.
133. *See supra* note 132.

tical body of the national denomination. In both of these instances, that body is the presbytery because it has the sole power to create and dissolve congregations according to the denomination's constitution.[134]

Each of these cases involved a Presbyterian Church in the United States ("PCUS") congregation dissociating to join the Presbyterian Church in America ("PCA"). When the Civil War split the PCUSA into four factions, the main southern faction styled itself as the Presbyterian Church in the Confederate States of America during the hostilities.[135] The other southern faction merged with the Presbyterian Church in the Confederate States of America during the war. After the Confederacy's defeat, this southern half of the Presbyterian Church became the PCUS.[136]

In 1954, when the PCUSA, PCUS, and the United Presbyterian Church in North America ("UPCNA")[137] voted on a merger proposal, the PCUS voted the proposal down at the presbytery level.[138] The fact that the PCUS voted against reunion the same year *Brown v. Board of Education* ended segregation is no coincidence.[139] The more conservative southern churches of the PCUS were uncomfortable with desegregation, while the more progressive northern churches of the PCUSA mostly welcomed desegregation with open arms. Though PCUS rejected the reunification measure in 1954, the UPCNA and PCUSA approved it and merged into the United Presbyterian Church in the United States of America ("UPCUSA") in 1958.[140]

Despite its more conservative tendencies, the PCUS generally progressed parallel to the PCUSA on social issues, even though it lagged several years behind. For example, PCUSA began ordaining female ministers in 1956; PCUS followed suit in 1964.[141] A significant faction of the PCUS still desired reunification with the UPCUSA,[142] while other more conservative factions within the PCUS were increasingly distressed by the liberalization of the PCUS.[143] These more conservative factions in the PCUS disapproved of the ordination of

134. *See* BOOK OF ORDER, *supra* note 24, at 52.

135. SMYLIE, *supra* note 15, at 89.

136. *Id.* at 89–91.

137. The UPCNA was another Presbyterian faction that also traces its roots back to colonial times. UPCNA's predecessors were established in the colonies with ties to the Church of Scotland, while the Synod of Philadelphia (which became the PCUSA) never had ties to the Church of Scotland. *Id.* at 82–83, 103.

138. *Id.* at 124.

139. *See* Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955) (holding "separate but equal" unconstitutional).

140. SMYLIE, *supra* note 15, at 124.

141. *Id.* at 128.

142. *See id.* at 124.

143. *See id.* at 136.

women and were alarmed by the scriptural standards espoused in the UPCUSA's Confession of 1967.[144]

In 1973, the PCUS discussed reunion with the UPCUSA once again.[145] Though the proposal did not result in reunification (despite its addition of an "escape clause" to allow dissenting congregations to opt-out of the reunion), the more conservative elements broke away from the PCUS and formed the PCA, which held its inaugural General Assembly meeting on the 112th anniversary of the creation of the Presbyterian Church in the Confederate States of America.[146]

Both the Paris, Texas and Casa Linda, Texas congregations were able to secure a majority vote of their members in favor of disassociating from the PCUS and joining the PCA.[147] Each congregation also had a minority remnant that remained loyal to the PCUS.[148] The Paris, Texas congregation voted to disassociate in 1973 in an attempt to be a part of the original PCA movement.[149] The Casa Linda, Texas congregation voted to disassociate in 1981, most likely in fear of the impending reunification of the PCUS and UPCUSA that would occur in 1983.[150] More significant than motive, the timing of these two suits also places the Paris, Texas suit two years before *Wolf* and the Casa Linda, Texas suit a few years after *Wolf*.

The trial court found for the disassociating majority in the Paris, Texas suit.[151] On appeal, the appellate court first determined that the Paris, Texas, church was a member of the PCUS.[152] The court then determined that PCUS was a hierarchical denomination because an "ascending order of ecclesiastical judicatories" governed it.[153] The court then examined the PCUS church constitution and determined that the Presbytery was the judicatory body with the power to create and dissolve congregations.[154] The court utilized the identification method by deferring the matter of identification to the Presbytery be-

144. *Id.*

145. *See id.* at 136–37.

146. *See* R. Milton Winter, *Division & Reunion in the Presbyterian Church, U.S.: A Mississippi Retrospective*, 78 J. PRESBYTERIAN HIST. 1, 77–78 (2000), http://www.jstor.org/stable/23335299.

147. *See* Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc., 552 S.W.2d 865, 869 (Tex. Civ. App.—Texarkana 1977, no writ); Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc., 710 S.W.2d 700, 702 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

148. *Presbytery of the Covenant*, 552 S.W.2d at 870; *Casa Linda*, 710 S.W.2d at 703.

149. *See Presbytery of the Covenant*, 552 S.W.2d at 869.

150. *Casa Linda*, 710 S.W.2d at 702.

151. *Presbytery of the Covenant*, 552 S.W.2d at 867.

152. *Id.* at 868.

153. *Id.*

154. *Id.* ("The Presbytery alone has power to organize new churches, receive and dismiss churches, and dissolve churches, as well as to ordain, receive, dismiss, install, remove and judge ministers.").

cause it was the appropriate ecclesiastical authority.[155] The Presbytery identified the loyal remnant as the true congregation; therefore, the disassociating majority was free to leave the PCUS but could not take the church property.[156]

In the Casa Linda suit, the trial court found for the minority loyal to the PCUS and the majority appealed, claiming that *Wolf* required the court to use the neutral-principles-of-law method instead of the *Watson* hierarchical deference rule.[157] The appellate court held this assertion to be incorrect, holding that while *Wolf* allowed a state to use the neutral-principles-of-law method in a hierarchical church property dispute, it did not require it.[158] Therefore, because Texas jurisprudence always adhered to the *Watson* hierarchical deference rule, the court would continue to do so until the Texas Supreme Court held otherwise.[159] The trial court's ruling was affirmed and the PCUS minority retained the use and possession of the church property.

c. Texas resurrects the neutral-principles-of-law method for hierarchical church property disputes.

In 2013, the Texas Supreme Court weighed in on the matter of the neutral-principles-of-law method option with regard to hierarchical denominations presented to the states by the Supreme Court in *Jones v. Wolf*.[160] Oral arguments for two cases, both involving splits in the Episcopal Church, were heard by the Texas Supreme Court on the

155. *See id.* at 871 (stating that the "faction . . . entitled to the property . . . is determined by which of the two factions adheres to or is sanctioned by the appropriate governing body of the organization.").

156. *Id.* ("It is a simple question of identity.").

157. Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc., 710 S.W.2d 700, 703 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

158. *Id.* at 704.

159. *Id.* at 707.

160. *See generally* Masterson v. Diocese of Nw. Texas, 422 S.W.3d 594 (Tex. 2013); Texas has consistently applied neutral principles of law in church property disputes within denominations with congregational polities. *See generally* First Baptist Church of Paris v. Fort, 54 S.W. 892, 896 (Tex. 1900) (holding in a congregational church ultimate authority vests in the members); *see also* Libhart v. Copeland, 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) (holding if neutral principles of law do not resolve a controversy in a congregational church the court must defer to the majority vote of the congregation); *see also* Dean v. Alford, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.) (holding courts do have jurisdiction to review matters involving civil, contract, or property rights even though they stem from a church controversy in congregational churches); *see also* Hawkins v. Friendship Missionary Baptist Church, 69 S.W.3d 756, 759 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding neutral principles of law cannot be applied to a congregational church where no governing documents exist as well as denying the authority of the congregation's majority vote); *see also* Smith v. N. Texas Dist. Council of Assemblies of God & House of Grace, No. 2-05-425-CV, 2006 WL 3438077, at *2 (Tex. App.—Fort Worth Nov. 30, 2006, no pet.) (mem. op.).

same day.[161] The Episcopal splits were motivated by the Episcopal Church's consecration of a homosexual bishop and ordination of homosexual ministers.[162] In *Masterson*, a local parish of the Episcopal Church sought to leave both its diocese as well as its national denomination.[163] In *Episcopal Diocese of Fort Worth*, an entire diocese sought to disassociate from the Episcopal Church.[164]

The court cited *Wolf* as requiring the use of the neutral-principles-of-law method to determine where the authority to make property decisions resides within a religious institution, and then to enforce the decision of the religious authority.[165] The court then cited *Miliovojevich* to differentiate how the neutral-principles-of-law methodology functions based on the subject matter it is applied to.[166] Courts must show absolute deference to the national denomination on matters such as membership and the ordination of clergy; however, matters such as property ownership and trust law should be "based on the same neutral principles of secular law that apply to other entities."[167]

In *Masterson*, the court conducted an intense reexamination of *Brown* in light of later U.S. Supreme Court decisions.[168] The court determined that *Brown* had in fact properly applied the neutral-principles-of-law methodology, and further, that the Texas Constitution obligated the courts "to apply neutral principles of law to issues such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved."[169] Finally, the court stated that in order to prevent additional confusion in an already confusing area of law, Texas courts must only apply the neutral-principles-of-law method to church property disputes.[170]

Having enshrined Texas's place with the majority of jurisdictions,[171] the Texas Supreme Court then remanded both cases to the trial courts with some guidance as to how those courts should proceed.[172]

161. Episcopal Diocese of Fort Worth v. Episcopal Church, 422 S.W.3d 646, 649 (Tex. 2013).

162. Matthew Waller, *Anglican Church in Lawsuit Limbo*, STANDARD TIMES (Jan. 20, 2010, 9:26 PM), http://www.gosanangelo.com/lifestyle/anglican-church-in-lawsuit-limbo; Jim Jones, *Ruling Expected Soon in Episcopal Diocese Dispute*, FORT WORTH STAR-TELEGRAM (Feb. 25, 2015, 7:18 PM), http://www.star-telegram.com/news/local/article11176544.html.

163. *Masterson*, 422 S.W.3d at 596.

164. *See Episcopal Diocese of Fort Worth*, 422 S.W.3d at 648.

165. *Id.* at 650.

166. Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich, 426 U.S. 696 (1976).

167. *Episcopal Diocese of Fort Worth*, 422 S.W.3d at 650.

168. *Masterson*, 422 S.W.3d 594, 604–07.

169. *Id.* at 606.

170. *Id.* at 607.

171. *Id.* at 606 n.6.

172. *Episcopal Diocese of Fort Worth*, 422 S.W.3d at 652–53.

i. Remand of *Episcopal Diocese of Fort Worth*

On March 2, 2015, the 141st Tarrant County District Court ordered that the Defendant's Second Motion for Partial Summary Judgment be granted.[173] The arguments advanced in the Defendant's Second Motion for Partial Summary Judgment is an available viewpoint to see how the neutral-principles-of-law method in hierarchical church property disputes is being applied in Texas so far, because it resolved all the identity of the titleholder in forty nine out of fifty parish properties.[174]

Prior to the dispute, the Diocese of Fort Worth ("Diocese") constituted two legal entities—an unincorporated non-profit association and a non-profit corporation.[175] The non-profit corporation was formed to hold title and control real property used by the Diocese.[176] The defendant in *Salazar* asserted that all of the real property was purchased, built, and maintained by donations from within the Diocese or its predecessor.[177] The non-profit corporation, chaired by Bishop Iker, motivated by its perception of the national denomination's substantial deviation from doctrine by ordaining homosexual ministers, amended its certificate of formation and bylaws to remove any reference to the national denomination.[178] The Diocese also amended its constitution to remove any references to the national denomination.[179] For the amendments to be properly conducted according to the Diocese's constitution, votes were held at two separate conventions in 2007 and 2008, respectively.[180] An overwhelming majority of both conventions approved the amendments.[181]

In response, the national denomination excommunicated the bishop of the breakaway diocese.[182] The national denomination never contended that the non-profit corporation did not hold title to the proper-

173. The motion is partial because the judge decided that facts pertaining to one parish in particular would need to be resolved at trial. Defendants' Third Motion for Partial Summary Judgment Relating to All Saints Episcopal Church at 1, The Episcopal Church v. Salazar, No. 141-252083-11 (141st Dist. Ct., Tarrant County, Tex. Mar. 2, 2015).

174. *See* Defendants' Second Motion for Partial Summary Judgment at 46-48, Episcopal Church v. Salazar, No. 141-252083-11 (141st Dist. Ct., Tarrant Cnty., Tex. Mar. 2, 2015).

175. *Id.* at 3.

176. *Id.* at 7.

177. *Id.* at 6–7 (explaining Diocese of Fort Worth was divided from Diocese of Dallas in November 1982).

178. S. C. Gwynne, *Bishop Takes Castle*, TEX. MONTHLY, (February 2010), http://www.texasmonthly.com/story/bishop-takes-castle.

179. *See supra* note 174.

180. Defendants' Second Motion, No. 141-252083-11 at 7–8.

181. *Id.* ("83% of clergy, 77% of lay delegates").

182. In re Salazar, 315 S.W.3d 279, 281 (Tex. App.—Fort Worth 2010, no pet.).

ties,[183] but instead claimed that the minority loyal to the national denomination constituted the true corporation and Diocese, thus complicating the identity crisis with two dioceses, two corporations, and potentially 100 parishes.[184] In an attempt to accomplish this, the presiding bishop of the national denomination called a special convention of the Diocese attended only by the minority who had voted against the amendments to the constitution.[185]

At this meeting, the minority loyal to the national denomination voted to undo the amendments to the constitution, declared all of the seats on the board to be vacant, and elected Gulick as the provisional bishop of the loyal Diocese. Gulick then replaced all positions of the non-profit corporation with his own appointees and retained attorneys to file suit against the breakaway Diocese.[186]

The defendant asserted that, under Texas law, the manner of electing a board of directors is determined by either the certificate of formation or bylaws of the corporation, with the certificate of formation controlling in the event of discrepancy.[187] The non-profit corporation's bylaws specified that one director must be elected to the board per year; a candidate for director is eligible only if a member of the Diocese; a director may resign by submitting written notice to the board; a director may only be removed by a majority vote of the board; and temporary vacancies can only be filled by a majority vote of the board.[188]

Therefore, when representatives of the national denomination declared the board vacant and filled all board positions simultaneously, none of the previous directors were actually removed and none of the national denomination's purported directors were elected according to the bylaws.[189] The actions of the national denomination not only failed to affect the corporation, but are not provided for in the national denomination's own constitution.[190]

The defendant challenged the validity of the Dennis Canon under Texas trust law and asserted it lacked the signed writing required by the statute of frauds.[191] Even if the trust was otherwise valid, the

183. Plaintiffs' Response to Defendants' Second Motion for Partial Summary Judgment at 1, The Episcopal Church v. Salazar, (141st Dist. Ct., Tarrant County, Tex. Mar. 2, 2015) (No. 141-252083-11).

184. Due to identity crisis multiplication, assuming that each parish had at least one member loyal to the national denomination.

185. Defendants' Second Motion, No. 141-252083-11 at 24–25.

186. *Salazar*, 315 S.W.3d at 281–82 (holding plaintiff's attorneys failed to demonstrate the proper authority required under Texas Civil Procedure Rule 12 to bring the suit).

187. Defendants' Second Motion, No. 141-252083-11 at 23–24.

188. *Id.* at 19–20.

189. *Id.* at 24.

190. *Id.* at 25

191. GEN. CONVENTION OF THE EPISCOPAL CHURCH, CONSTITUTION & CANONS 41 (2009), http://www.episcopalarchives.org/CandC_2009.pdf ("All real and personal

wording of the Dennis Canon does not expressly state that it is irrevocable.[192] Under Texas law, a trust is revocable unless specifically stated to be irrevocable; therefore, the breakaway Diocese was able to revoke any hypothetical trust at any time.[193] In the event the trust was not revoked, the defendant advanced an alternative argument that the corporation had held and controlled all of the real property for more than twenty-five years, and thus, would adversely possess title to the properties in question.[194]

The plaintiff's response hinged on the premise that when the Diocese disaffiliated with The Episcopal Church ("TEC"), it ceased to exist, and only those designated by TEC afterward were the true "Diocese and Congregations."[195] Plaintiff argued that control of the corporation was irrelevant because the corporation holds the property in trust for the benefit of the Diocese and Congregations.[196] Even so, plaintiff argued the corporation's 2006 bylaws provision conditioned board eligibility on being a member of the Diocese.[197] Even under the neutral-principles-of-law method, courts still must defer to a national denomination's determination of polity or leadership.[198] The plaintiff contended that the court must defer to the national denomination's determination that the board of directors were not members of the Diocese, and therefore, they were ineligible to sit upon the board of directors under the corporation's bylaws.[199] This argument was an attempt to manipulate the language of the Texas Supreme Court into preserving the deference regime rather than expressly establishing that the neutral-principles-of-law method applies to hierarchical church property disputes.

The most obvious flaw in this reasoning is that in 2006 the breakaway Diocese and its bishop were still members in good standing when they amended the certificate of formation and bylaws of the cor-

property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons."); Defendants' Second Motion, No. 141-252083-11, at 44; *see also* TEX. PROP CODE ANN. § 112.004 (West 2015).

192. Defendants' Second Motion, No. 141-252083-11, at 44.

193. *Id.* ("[The Diocese] revoked any trust for TEC in 1989 . . . ").

194. *Id.* at 36; *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.024–16.028 (West 2015).

195. Plaintiffs' Response to Defendants' Second Motion for Partial Summary Judgment at 24, The Episcopal Church v. Salazar, (141st Dist. Ct., Tarrant County, Tex. Mar. 2, 2015) (No. 141-252083-11).

196. *Id.*

197. *Id.* at 56.

198. *Id.* at 39.

199. *Id.* at 59–62.

poration.[200] As the plaintiffs admitted, the corporation held title in trust for the Diocese and parishes at that time.[201] After the split, the Diocese allowed several parishes to leave that did not approve the action.[202] Even if not every member of each parish agreed with the disassociation, as long as the majority of a parish agreed then the corporation was still faithful in its fiduciary duty to the parishes. The only entity removed from the paradigm was the TEC, which was never established as a beneficiary of the corporation's valid trust.

The national denomination advanced several interesting theories based on old cases, including the contractual trust theory, and insisted local chapters of national organizations cannot disassociate from the national organization and keep their property.[203] However, the facts of these cases do not line up squarely with the current situation, and most profoundly, these arguments essentially ignore the Texas Supreme Court's guidance on how to proceed in these matters.

So far, the application of the neutral-principles-of-law method to hierarchical church property disputes in Texas seems to have borne out that the Dennis Canon is an insufficient instrument to unilaterally claim an interest in real property. The application of Texas corporation law to the operation of a non-profit corporation via its certificate of formation and bylaws holds more weight in a hierarchical church property dispute than a national denomination's constitution. As of the writing of this Comment, a trial on the merits for the issue of the remaining parish remains to be resolved. There is little doubt the national denomination will appeal this grant of partial summary judgment to the appellate court. For the time being, however, it appears that the breakaway Diocese has won the day.

ii. Implications for the PC(USA) in Texas

Though many previously PC(USA)-affiliated local churches have broken with the national denomination in Texas,[204] the specific facts of a local church's disaffiliation from the PC(USA) have now been tested under Texas's neutral-principles-of-law regime. It seemed that

200. *See supra* note 174.

201. *See supra* note 195.

202. Defendants' Second Motion for Partial Summary Judgment at 8, Episcopal Church v. Salazar, No. 141-252083-11 (141st Dist. Ct., Tarrant County, Tex. Mar. 2, 2015) ("Three parishes took advantage of the offer, and in February 2009 the Corporation transferred property to them.").

203. Plaintiffs' Response to Defendants' Second Motion for Partial Summary Judgment at 70–73, The Episcopal Church v. Salazar, (141st Dist. Ct., Tarrant County, Tex. Mar. 2, 2015) (No. 141-252083-11); *see also* Shellberg v. Shellberg, 459 S.W.2d 465, 470–71 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); *see also* Dist. Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones, 160 S.W.2d 915, 921 (Tex. 1942).

204. Presbyterian Lay Committee, *Churches that are seeking to leave or have left the PCUSA*, LAYMAN (Aug. 15, 2014), http://www.layman.org/wp-content/uploads/2014/08/churches-seeking-discernment.pdf.

the first case to do so would have been *Windwood*,[205] which was remanded to the trial court for resolution in accordance with the neutral-principles-of-law method; however, PC(USA) and Windwood Presbyterian Church reached a settlement prior to trial.[206] Some have alleged PC(USA) settled in order to avoid a precedential ruling against the validity of a portion of PC(USA)'s Book of Order.[207]

On the surface, the facts seem analogous to those in *Episcopal Diocese of Fort Worth*. In both cases, the split occurred at the hierarchical level where title was held; the titleholder was a non-profit corporation formed under Texas law,[208] and the corporate documents were amended to remove any reference to the national denomination.[209] PC(USA) has a provision in its constitution worded similarly to the Dennis Canon known as the Trust Clause.[210] The only real difference between the Dennis Canon and the Trust Clause is the specification that the national denomination holds a trust, despite the type of entity "title [to the local church property] is lodged in."[211] Since the initial writing of this Comment, a Texas trial court held that the Trust Clause does not constitute a valid trust under Texas law.[212] The language of

205. Windwood Presbyterian Church, Inc. v. Presbyterian Church (U.S.A.), 438 S.W.3d 597 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

206. Paula R. Kincaid, *With no exchange of money, Texas church gets clear title to its property*, LAYMAN (April 15, 2015), http://www.layman.org/with-no-exchange-of-money-texas-church-gets-clear-title-to-its-property/; *see also* Windwood Presbyterian Church, Inc. v. Presbyterian Church (U.S.A.), No. 200853684 (Harris Cnty. Dist. Court filed Oct. 6, 2010), http://www.hcdistrictclerk.com/eDocs/Public/Search.aspx?Tab=tabCivil.

207. Kincaid, *supra* note 206 (illustrating the comments in the discussion forum).

208. *Windwood*, 438 S.W.3d at 599.

209. *Id.* at 600.

210. *Id.* at 599–600; *see also* BOOK OF CONFESSIONS, *supra* note 22, at 62 ("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).").

211. *Compare supra* note 191, *with supra* note 210.

212. First Amended Final Summary Judgment and Permanent Injunction, First Presbyterian Church of Houston v. Presbytery of New Covenant, Inc., No. 2014-30354 (234th Dist. Ct., Harris Cnty., Tex. Feb. 16, 2015) ("IT IS FURTHER ORDERED that the trust and other property interest claims asserted by Presbytery of New Covenant, Inc., including pursuant to G-4 0203 (formerly G-8 0201) of the PCUSA Book of Order, G-4 0204 (formerly G-8 0301) of the PCUSA Book of Order, G-4 0205 (formerly G-8 0401) of the PCUSA Book of Order and Chapter 6 of the 1982/83 edition and previous editions of the PCUS Book of Church Order, are unenforceable and without legal force and effect as to said Personal and Real Property, and that neither the Presbytery of New Covenant, Inc nor any person, entity, administrative unit, agency, commission, committee, or governing body acting on behalf of the Presbytery of New Covenant, Inc or in its stead, or claiming by, through or under it, has any right, title or interest in or to the Personal and Real Property, whether in trust or otherwise, express or implied, nor any right, express or implied, to determine or control, directly or indirectly, the use, ownership or disposition of the Personal and Real

the Trust Clause, without the local church's written assent as required by the statute of frauds, is not sufficient to form an irrevocable trust under Texas law.[213]

One remote possibility, considering the Texas Supreme Court's ruling that the neutral-principles-of-law method has in fact been the law of Texas governing hierarchical church property disputes since *Brown*, is that the hierarchical church property dispute cases decided under the identification method could theoretically be reheard by the Texas Supreme Court. If the Texas Supreme Court finds that Texas courts applying the wrong law for over a century is an "exceptional" circumstance (even though the appropriate time-table for a motion for rehearing is long exhausted), the Texas Rules of Appellate Procedure provide that the Texas Supreme Court could potentially act on such a motion if it so desired.[214] However, it is extremely unlikely the Texas Supreme Court would elect to act upon any such motion due to the judicial havoc that would ensue.

III. Proposed Alternatives and Changes to the Neutral-Principles-of-Law Method

Numerous scholars have critiqued the neutral-principles-of-law method and have proposed alterations or alternatives to ameliorate the doctrine's perceived shortcomings.[215] Some of these proposals include enacting a federal statute, adopting a church-constitution-centered approach, adopting the strict-neutral-principals approach, and fully embracing alternative dispute resolution.

A. *Federal statute normalizing application of neutral principles lacks public policy benefit to justify undermining the federalist system.*

The neutral-principles-of-law method is often criticized because its application produces different results for the same national denomination in different jurisdictions. One commentator argues that national denominations deserve a federal statute standardizing the application of the neutral-principals-of-law method in church property disputes across the nation.[216] The commentator's rationale is essentially that the burden a national denomination incurs by having to comply with the laws of each state where it has an affiliated local church is so oner-

Property, including particularly the immovable Property described in the attached Exhibit A.").

213. *Id.*

214. "But in exceptional cases, if justice so requires, the Court may . . . act on a motion any time after it is filed." Tex. R. App. P. 64.3.

215. *See generally infra* Part.III.

216. Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 Va. L. Rev. 443, 444 (2010).

ous that all state laws relevant to a church property dispute should be preempted by a federal statute to mitigate that burden.[217]

The Constitution established a federalist system with horizontal and vertical separation of powers.[218] A benefit of federalism is that it allows the will of the citizens of one state to be better implemented through the representatives in their state legislature than in Congress, because a state's citizenry has more proximate access to its state legislature than to the federal legislature.[219] Determining who holds an interest in real property is possibly the most traditional state power.[220] The proposed federal statute's preemption of state real property law (as well as all state laws relevant to church property disputes) impacts not only the free exercise rights of local church congregations, but also undermines the federalist structure provided by the Constitution.[221]

The reasons national denominations require protection via federal statute are:[222] (1) most of the local churches belonging to national denominations were organized while *Watson* was the law of the land;[223] (2) the national denominations failed to establish separate express trust agreements with each local church because they reasonably relied on the *Watson* ruling;[224] (3) the Supreme Court's ruling in *Wolf* "pulled the rug out from under the national churches";[225] and (4) the establishment of separate express trust agreements with each local

217. *Id.*

218. *See generally* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1441–51 (1987).

219. Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 321 (2003) ("The smaller the polity in geography and in population, the easier it is for the people (1) to monitor what their government is doing, (2) to criticize or praise, and therefore (3) to affect public policy. The people's need to monitor arises because the system is representative, rather than a direct democracy. Federalism makes it easier for the people to monitor issues that are properly under local control, while it places those issues that must be governed at a federal level in the hands of more distant representatives.").

220. Thompson v. Maxwell, 95 U.S. 391, 399 (1877) (stating an action to quiet title promotes the peace of society and the security of property); Lochner v. New York, 198 U.S. 45, 53 (1905) (defining police powers as "existing in the sovereignty of each state" and relating to, among other things, the general welfare of public; property is held on conditions imposed by the state in the exercise of police powers).

221. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."); Wilcox v. Jackson ex dem. McConnel, 38 U.S. 498, 516 ("A state has a perfect right to legislate as she may please in regard to the remedies to be prosecuted in her Courts; and to regulate the disposition of the property of her citizens, by descent, devise, or alienation.").

222. Schmalzbach, *supra* note 216, at 447.

223. *Id.* at 471.

224. *Id.*

225. *Id.* at 446.

church is too burdensome on the national denominations.[226] The commentator insists that if the national denominations had known express trust agreements might "someday" be required, then the national denominations "would have made the appropriate legal arrangements" upon organizing their local churches.[227]

This detrimental reliance justification is flawed in several respects. First, it presupposes most hierarchical local churches were organized prior to *Wolf*. Second, it alleges that *Watson* caused local churches not to seek express trust agreements. Third, it asserts that the national denominations had no notice that the neutral-principles-of-law method could be applied to hierarchical church property disputes. Fourth, the claim that complying with state law is too difficult is an insufficient excuse given the multiple regional levels of administrative strata that comprise a hierarchical denomination by its very definition.

First, while the assumption that most hierarchical congregations were organized prior to 1979 may prove true for the Protestant Episcopal Church,[228] it will not stand up for several hierarchical denominations,[229] including the Presbyterian Church. In illustrating the adverse effects of the neutral-principles-of-law methodology, the commentator uses two national denominations as examples, the "Protestant Episcopal Church and the United Presbyterian Church [sic]."[230] The commentator devotes an entire subsection to the "United Presbyterian Church of the USA" and refers to the UPCUSA throughout, even while citing to the PC(USA)'s church constitution.[231] Admittedly, the history and taxonomy of the Presbyterian Church is confusing.[232] Unfortunately, this oversight is fatal to the justification of the commentator's argument.

The UPCUSA ceased to exist when it reunited with the PCUS in 1983 to form the PC(USA)—four years after *Wolf* was decided. When this occurred, many local congregations had the option of leaving

226. *Id.* at 448.

227. *Id.* at 471.

228. *Episcopal Congregations Overview: Findings from the 2010 Faith Communities Today Survey*, EPISCOPAL CHURCH (Mar. 2011), http://www.episcopalchurch.org/files/episcopal_overview_fact_2010.pdf ("A majority (53%) of Episcopal parishes and missions were founded before 1901").

229. Evangelical Lutheran Church in America was founded in 1988, therefore none of its 9,846 congregations were organized in the *Watson* era. Evangelical Lutheran Church in America, *History*, ELCA, http://www.elca.org/en/About/History (last visited Mar. 25, 2015); The United Methodist Church has organized 2,709 congregations since 1979. E-mail from Lauren S. Arieux, Statistician and Research Fellow, GCFA Data Services, to David Fulton (Mar. 25, 2015, 11:30 AM) (on file with author).

230. Schmalzbach, *supra* note 216, at 444.

231. "The UPCUSA's [sic] constitution now provides that '[a]ll property held by or for a particular church . . . is held in trust nevertheless for the use and benefit of [UPCUSA] [sic].' *Id.* at 454; 'CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A.), PART II: BOOK OF ORDER, G-8.0200 (2009), http://www.pcusa.org/oga/publications/boo07-09.pdf.'" *Id.* at 454 n.42.

232. *See supra* note 15.

through the Article 13 escape clause, but every local church would have been required to execute significant paperwork to formalize the transition. The nationwide reorganization of a "new" national denomination is a convenient opportunity to execute express trust agreements with each local congregation. The timing of this nationwide reorganization gave the PC(USA) ample notice of the possibility of local church property being subject to the neutral-principles-of-law methodology in the future, yet no express trust agreements were executed. As far as the commentator's contention that most local churches of national denominations were organized during the *Watson* era, *all* of the PC(USA) congregations were organized during the *Wolf* era and therefore cannot be said to have reasonably relied on *Watson* for protection.

Second, *Watson* did not prohibit denominations from executing express trust agreements on local church property.[233] Given that many express trust agreements were executed between elected bodies of trustees for the benefit of the a local church congregation during this time, it would not have been so alien an option as to never cross the mind of a reasonable administrator of a national denomination.

Third, the commentator's characterization implies that the denominations had no notice of the possibility that the neutral-principles-of-law method might one day be applied to the adjudication of a hierarchical church property dispute. The *Watson* Court contemplated three possible dispositions of church property disputes, of which two would essentially result in the application of the neutral-principles-of-law method by examining the deed, looking for express trusts, and possibly by majority vote of the congregation.[234] The fact that the Court underscored the stringency of its obligation to enforce express trust agreements that restrict doctrinal practice on church property should have put the national denominations on notice that their legal position would be strengthened by having an express trust.[235]

Beyond the language of *Watson* itself, as early as 1929, national denominations were on notice that, under certain circumstances, the court might apply the neutral-principles-of-law method even to "purely ecclesiastical" matters.[236] Justice Harlan's concurrence in *Blue Hull* gave the national denominations a decade of notice that the juris-

233. *See generally* Watson v Jones, 80 U.S. 679 (1872).

234. *Id.* at 722.

235. *Id.* at 722–23 (". . . when the property . . . is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief . . . the obvious duty of the court [is] to see that the property so dedicated is not diverted from the trust which is thus attached to its use.").

236. Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929) (stating a fraud, collusion, or arbitrariness exception to court deference in purely ecclesiastical matters).

prudential winds were beginning to blow towards the big bad *Wolf*.[237] Regarding local churches in Texas, the national denominations had thirty-four years of incontrovertible notice after *Wolf* before being subjected to the application of the neutral-principles-of-law method in that jurisdiction.

Finally, the claim that it would be too difficult for a national denomination to comply with a state's law is weak considering the multiple, regionally distributed levels of administrative bodies that comprise the very structure of a hierarchal denomination. A hierarchical body corresponding to a Synod should be able to acquire legal advice regarding the property laws of the states it shares a federal circuit with. At the very least, the chief level of a national denomination could acquire representation to discover the state laws most adverse to its policies and formulate a national standard that would comply with even the most demanding jurisdiction.[238]

While the commentator addresses the implied trusts contained in the church constitutions of some national denominations, the valid express charitable trusts, under which title to local church property is held are not addressed. If the statute overrode the preexisting valid express trust, then there might be a regulatory takings issue in addition to the issue of preemption. If the federal statute merely modified the existing state laws to add the national denomination as a beneficiary in addition to the local church, the non-profit corporation trustee would be exposed to liability in the event the interests of the two beneficiaries diverge, thereby forcing the trustee to breach its fiduciary duty to either one or the other.

The commentator proposes a federal statute be passed that "preempts state statutory and common law [regarding] church property disputes" to replace state laws with a rule that would grant the national church with "beneficial ownership" of local church property—that the national church does not hold title to—if the national church amends its constitution to include a trust provision.[239] It is asserted that this would be a "recognizable form" of the neutral-principles-of-law method.[240] Far from it, this rule would actually function as

237. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 452 (1969) (Harlan J., concurring) ("I do not, however, read the Court's opinion to go further to hold that the Fourteenth Amendment forbids civilian courts from enforcing a deed or will which expressly and clearly lays down conditions limiting a religious organization's use of the property which is granted . . . In such a case, the church should not be permitted to keep the property simply because church authorities have determined that the doctrinal innovation is justified by the faith's basic principles.").

238. A leaked legal strategy memo outlining those very things demonstrates the feasibility of the concept. *See generally* Memorandum from the Presbyterian Church (USA) on Church Property Disputes (Dec. 2005), http://www.layman.org/Files/legal-strategy-memo.pdf.

239. Schmalzbach, *supra* note 216, at 470.

240. *Id.*

a reincarnation of the *Watson* hierarchical deference rule. Upholding trust provisions unilaterally created by a national denomination amending its constitution, without the written consent of the current titleholder, is essentially deferring decisions on the issue of property ownership to the denomination.[241]

The commentator's main contention with the neutral-principles-of-law method is that it interferes with the national church's free exercise rights by "pressuring" it to either change its property management system or its governmental structure.[242] The commentator allows that "there is a colorable argument that [the proposed statute] violates the free exercise rights of parishes by making it too easy for national denominations to take ownership of parish property."[243] The proposed language of this statute reads "[a] supercongregational church can establish the existence of such a trust through statements in the deed to the property, provisions in the local church charter or articles of incorporation, *or* provisions in the supercongregational church's constitution or canons . . ." (emphasis added).[244] The "or" is fairly significant because an express trust for the local church on any of the documents listed could be overridden or modified by the national denomination's unilateral amendment of the church constitution.

The commentator's proposed federal statute may prevent national denominations from "being coerced into adopting forms of governance that are not traditionally and doctrinally their own."[245] Considering that church property disputes typically originate in reaction to what the local churches perceive as the national denomination's drastic change in doctrine, the burden is merely shifted to the local church, who will likely feel coerced into accepting doctrine not traditionally its own.

Either outcome in a church property dispute will impact the free-exercise rights of the loser to some degree. On the one hand, the free-exercise rights exercised by ecclesiastical administrators spiritually guiding a local church as part of a national denomination will be negatively impacted to some degree if the local church is allowed to leave with its property. On the other hand, rousting the congregation of the local church from its house of worship will negatively impact its free-exercise rights if the national denomination is allowed to prevail on a trust claim that would be invalid in any other circumstance. The infringement of the local congregation's free-exercise rights would be compounded by a potential Fifth Amendment infringement because of the seizure of its interest in real property without compensation, by state-action, for the unjust enrichment of a private party. Even if the

241. *Id.* at 446.
242. *Id.* at 471.
243. *Id.*
244. *Id.* at 470.
245. *Id.* at 471.

regulatory takings issue was resolved, the local congregation still must bear the certain economic and emotional harm that will accompany such a loss. The local congregation must also endure the dilution of its representation by the state legislature due to the preemption of state statutes validly enacted by its state legislators. The scale of burdens weighs heavily against the local church. Merely tossing the convenience of standardized resolution of church property disputes on the national denomination's side of the scale certainly would not balance it, and it is doubtful it would even jostle it.

B. *Church-constitution-centered approach is inherently biased against local churches.*

Another proposed solution involves shifting the order and emphasis with which a court examines documents under the neutral-principles-of-law method.[246] The first step in this solution is to eliminate the option of *Watson* hierarchical deference entirely.[247] Then, the neutral-principles-of-law method's implementation would be modified so that a court first considers only the national denomination's constitution.[248] A court could only follow the neutral-principles-of-law method if the language of a national denomination's constitution allowed the court to do so.[249]

Much like the *Watson* Court, the commentator posits three possible outcomes.[250] The church constitution: (1) expressly requires deference in church property disputes; (2) dictates what documents may be considered by courts in church property disputes; or (3) fails to sufficiently state what documents may be considered by courts in church property disputes.[251] In the first instance, a court must defer to the national denomination, despite the previous elimination of the *Watson* hierarchical deference rule. In the second instance, a court is bound to only consider the documents specified by the national church. In the third instance, a court has permission to apply the neutral-principles-of-law methodology.[252]

The first two instances are intended to be governed by state contract law.[253] The first question, then, is did the local church manifest the intent to enter into a contract waiving its property rights at the

246. Alderman, *supra* note 10, at 1029–30.
247. *Id.* at 1055.
248. *Id.* at 1056.
249. *Id.* at 1057 ("Depending on the contents of the constitution . . . a court might be able to consider other documents, such as deeds and statutes, in further steps of its analysis.").
250. *Id.* at 1060–61.
251. *Id.* at 1057–60.
252. *Id.* at 1060.
253. *Id.*; *see generally id.* at 1057 ("This appears to be a reversion back to the deference approach, which has already been eliminated under this system, but it is actually just an enforcement of a contract between the church and the denomination.").

time it joined the national denomination? If the local church was unwilling to execute an express trust in its property, by naming the national denomination as a beneficiary, then it is unlikely it manifested the intent to do so merely by joining the national denomination.

In Texas, a trust in real property is only enforceable if its terms are in writing and signed.[254] As mentioned previously, most church properties are already held by a non-profit corporation in a charitable trust.[255] The modification of the preexisting trust to identify the national denomination as an additional beneficiary would require more than the local church merely assenting to join the national denomination. The same previously discussed conflicts of fiduciary interest would arise if this resulted in adding the national denomination as a beneficiary.[256] If the modification removed the local church as a beneficiary, it would possibly implicate the takings clause, along with the rest of the "parade of horribles" marched out in the previous subsection.[257]

The second instance gives the national denomination far too much power. For example, if the national denomination specified the only document to be considered was Exhibit A, and Exhibit A merely said "trustees and beneficiaries of the local church hereby revoke the charitable trust in local church property and convey that property to national denomination in fee simple absolute"—would that be acceptable? It seems egregious that a party to a lawsuit would have the power to dictate how a court does its job.

As the commentator admits, if enacted, the proposal's core problem is that the proposed solution will likely encourage national denominations to amend their constitutions to include an express trust agreement and therefore usher in a "de facto deference regime."[258] The commentator also admits that, under a deference regime, "decisions will never be reached in favor of the local church or the dissenting faction because the general judicatory will never find against itself."[259] Even though the commentator claims the grievances of both sides will not go unheard, a local church's arguments are futile if the national denomination has the power to write the rules. When facing a trust provision that would be invalid in any other circumstance, the church-constitution-centered approach values consistent findings in favor of the national denomination over a local church's right to a remedy under state law.[260]

254. TEX. PROP. CODE ANN. § 112.004 (West 2015).
255. *See supra* note 28.
256. *See supra* Part III.A.
257. *Id.*
258. Alderman, *supra* note 10, at 1061.
259. *Id.* at 1054.
260. *See id.* at 1054, 1060–61.

The commentator claims this approach will benefit both the national denominations and local churches by reducing litigation.[261] While the reduction in litigation will certainly benefit the national denominations, a local church will not likely see the benefit of being deprived of both its property and access to a remedy in civil court.

Finally, the policy motivation underlying the commentator's proposal is not a sufficient reason to justify the judicial advantage the proposal confers upon the national denominations.[262] Church splits are often due to political differences that are entangled with disagreement over perceived changes in religious doctrine. The commentator laments "[N]ational denominations . . . which already face problems due to splintering factions . . . already weakened by modern social pressures and issues will become even weaker when faced with divisive state legal battles."[263] While the current plight of the national denominations is tragic, hierarchical church property disputes are just one symptom of a more complicated situation in society at large. Unfortunately, the church-constitution-centered approach to the neutral-principles-of-law method is not the answer.

The advantage the church-constitution-centered approach vests in a targeted class of religious groups likely violates the establishment clause. While this solution does not overtly preempt state law, its application as described would likely produce its functional equivalent. Therefore, this proposal implicates many of the same concerns with undermining federalism that attended the federal statute proposal. The concern for the wellbeing of the faltering national denominations is not unfounded, but without a more fully articulated public policy concern, the proposed church-constitution-centered approach cannot be justified due to its constitutional costs.

C. *Strict neutral-principles-of-law method ignores the ecclesiastical nature of the dispute.*

The strict-neutral-principles-of-law method is a variation used by some courts that first looks only at the language of the deed and then either to trust law or corporate law as necessary to vest the title.[264] Under this approach, the court ignores the national denomination's constitution altogether.[265] One perceived benefit of this method is that it does not require the court to use special rules for the resolution of church property disputes, but instead treats such a dispute like any

261. *Id.* at 1062.

262. *Id.* at 1051 ("A national denomination already weakened by modern social pressures and issues will become even weaker when faced with divisive state legal battles.").

263. *Id.*

264. Gerstenblith, *supra* note 13, at 544–45.

265. *Id.* at 545–46.

other quiet title action.[266] The commentator argues that courts looking to national denominational constitutions often find the existence of a trust where there is not a sufficient manifestation of intent to form one.[267] The commentator finds parallels between courts favoring national labor unions in property disputes with breakaway local unions.[268] The commentator concludes that, while there are valid public policy concerns for strengthening national labor unions, the First Amendment forecloses that public policy from extension into the church-property-dispute arena.[269]

While the commentator's arguments are well-reasoned and compelling, the functional justification for the special status of religion could conceivably call for the indirect strengthening of national denominations, if these organizations were the only religious institutions willing (or able) to fulfill the role. Further, strict neutral principles exacerbate the mandated blindness of the courts to the true cause of the dispute, therefore amplifying the core flaw in the neutral-principles-of-law method.

D. *Alternative dispute resolution addresses the flaw but ignores the benefits of neutral-principles-of-law method.*

After more jurisdictions began to adopt the neutral-principles-of-law method, its implications for national denominations became more apparent. National denominations began to look to alternative dispute resolution for relief.[270] One commentator proposes that alternative dispute resolution may be the best method of adjudicating church property disputes because it would allow experts to render more informed settlements, it would relieve judges from having to deal with thorny First Amendment issues, and it would promote judicial economy in general by relieving such troublesome claims.[271]

Alternative dispute resolution squarely addresses the neutral-principles-of-law method's core flaw of ignoring the true cause of the dispute. However, it might trade-out experts in the application of property law for experts in religious disputes, while at the same time

266. *Id.* at 543.

267. *See id.* at 571–72.

268. *Id.* at 570.

269. *Id.* at 571 ("Judicially-created legal rules that permit enforcement of otherwise unenforceable restrictions on the local entity's retention of its property would have the effect of strengthening the religious hierarchy and discouraging the formation of new schismatic religions. Although a comparable result is certainly permissible and may be desirable to effectuate other policies, such as national labor policy, this result among religious organizations clearly violates the religion clauses of the first amendment.").

270. Michael William Galligan, Note, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007, 2036 (1983).

271. *Id.* at 2036–37.

mostly forfeiting the parties' right to an appeal in the event of error as courts possess little power to review arbitration awards.

PC(USA) has resolved some of its recent property disputes with negotiations, typically by extracting an exit fee from a disassociating local church to compensate PC(USA) for its future loss of that local church's annual dues.[272] The fee varies according to the particular presbytery and local church involved, but the most common figure is around 10% of the local church's property value.[273] Many congregations have simply relinquished their church property to their presbytery and walked away rather than pay the fee.

Without all the particular facts, it is difficult to tell if PC(USA) financially assisted the founding or maintenance of any of these local churches. If PC(USA) did not financially assist the local churches, the situation could easily be construed that the presbyteries are simply assessing an exit toll on real property they had no legitimate interest in, and the local churches capitulate and pay the fee in order to avoid a more costly and time consuming lawsuit. PC(USA)'s settlements do not fully utilize the advantages of alternative dispute resolution ("ADR"). The ADR process's heightened access to religious experts should result in more informed settlements between national denominations and local churches. The hope is that the more information available in the settlement process, the more just the outcome will be, and the more amicable the disassociation will be. While PC(USA)'s current settlement strategy is relieving the strain on judicial economy to some extent by keeping many church property disputes off the dockets, that strategy is failing to deliver the full benefits of ADR to the community.

E. *Surgical Arbitration*

It seems that the true problem with the *Watson* hierarchical deference rule is not that a court must defer on issues of doctrine, but rather to who it must defer. Under *Watson*, a court is required to effectively defer the adjudication of property ownership dispute to one party of the lawsuit (or its functional equivalent), who is unlikely to ever rule against itself because of its economic and religious self-interests. Most contentions with the neutral-principles-of-law method share the common undercurrent that the method overcorrects for the preference enjoyed by national denominations under the *Watson* hier-

272. Highland Park Presbyterian Church in Dallas had filed suit to test the Trust Clause, but instead of following through agreed to pay Grace Presbytery $7.8 million in return for the PC(USA) releasing it from the Trust Clause and the denomination. Rob Allen, *Grace Presbytery, Highland Park Presbyterian Church settle lawsuit*, PRESBYTERIAN CHURCH (USA) (September 10, 2014), http://www.pcusa.org/news/2014/9/10/grace-presbytery-highland-park-presbyterian-church/.

273. Presbyterian Lay Committee, *supra* note 204.

archical deference rule by ignoring the ecclesiastical character and value of the national denomination all together.

A compromise could be forged to alleviate these foundational issues by adding a factor to be considered in addition to the neutral-principles-of-law method. This Comment proposes to use the surgical arbitration of two questions to create a hybrid of the departure-from-doctrine rule and the neutral-principles-of-law method—as oxymoronic as that appears.

This Section will demonstrate the following six considerations: (1) that the surgical arbitration of a single factor can insulate a court from the unconstitutionality of using a variation of the departure-from-doctrine rule, (2) the procedural organization to accomplish the surgical arbitration, (3) how the result of the surgical arbitration would be used by a court, (4) that the surgical arbitration method is not inherently biased to either a local church or a national denomination, (5) the benefits of arbitrating this single factor rather than the entire property dispute, and (6) how to encourage local churches and national denominations to opt into the surgical arbitration method.

1. Arbitration in General

Arbitration uses principles of contract law to effectuate an alternative to resolving a dispute through litigation.[274] Though arbitration is an ancient system with a "rich historical tradition" of resolving disputes between sovereigns, its use between private actors in the United States is a relatively modern development.[275] Congress passed the Federal Arbitration Act ("FAA") in 1925, allowing parties involved in international or interstate commerce to enter into irrevocable and enforceable arbitration agreements, escapable only "on grounds for the revocation of any contract."[276]

The death of the "non-arbitrability" doctrine catalyzed arbitration's expansion into areas beyond those contemplated by the FAA, including disputes between individuals and corporations.[277] In the wake of that expansion, questions lingered about the constitutionality of arbitration in general.[278] These questions revolved around the waivability of Article III, potential interference with executive authority under Article II,[279] federalism implications,[280] and the possible violations of

274. BLACK'S LAW DICTIONARY 44 (4th Pocket ed. 2011) ("[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.").

275. PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION 3–4 (Cambridge Univ. Press 2013).

276. *Id.* at 3 (citing 9 U.S.C. § 1 *et seq*); *see also* 9 U.S.C.A. § 2 (West).

277. RUTLEDGE, *supra* note 275, at 4.

278. *See id.*

279. "Did the [binational panel of arbiters]'s remand order–effectively requiring the Commerce Department to make certain findings–violate Article II's provision

the civil rights of individuals.[281] The Supreme Court held in *Commodity Futures Trading Comm'n v. Schor* that Article III's provision for the adjudication of matters, such as diversity or federal question in federal court, are personal rights that can be waived.[282]

Rutledge argues that Article III rights are not waivable considering the *Schor* Court's lack of analysis of this "bold assertion" against the textual, structural, and historical context of Article III,[283] its "confla[tion] of arbitration with settlement,"[284] and its failure to address the mandated enforcement of arbitration awards consequential diminishment of judicial power.[285] For these reasons, Rutledge states that the waivability theory for the constitutional validity of arbitration is too "facile."[286]

The appellate review theory, first proposed by Fallon, advances the proposition that non-Article III adjudicators (mostly referring to administrative agencies) can satisfy Article III requirements by submitting to Article III court review and following Article III court precedent in making decisions.[287] Though this theory aims primarily at administrative agencies, it has implications for arbitration, as both are non-Article III adjudicators.[288] Fallon balances the values supporting non-Article III adjudicators—expertise, governmental functions, flexibility, fairness, and sovereign immunity—against the values necessitat-

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vesting the U.S. president with the power to 'take care' that the laws of the United States are 'faithfully executed?'" *Id.* at 57.

280. RUTLEDGE, *supra* note 275, at 99–100, 101–24.

281. *Id.* at 168–69, 200–01.

282. "Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848–49 (1986).

283. RUTLEDGE, *supra* note 275, at 19–21 ("Nothing in the Constituion speaks in terms of a 'right' to a decision in a federal forum . . . the use of terms such as 'shall extend' and 'all Cases' . . . support a mandatory view . . . .") ("The opening Articles of the Constitution primarily address structur[e] . . . of government; most discussions of rights appears in the Amendments.") (" . . . drafters' failure to include a right to a civil jury trial in Article III was among Anti-Federalists' greatest complaints about the Article during the ratification debate . . . .").

284. *Id.* at 21–22 (stating in settlement parties know terms before agreeing to be bound, while in arbitration parties agree to be bound before they know the terms, settlements are subject to judicial review before enforcement, arbitration awards however are subject to limited review and are treated as if a judicial judgment).

285. *Id.* at 22 ("By mandating the enforcement of the award, and controlling scope of Article III review, particularly the extent of review of federal questions, Congress is effectively stripping federal courts of the power to interpret . . . federal law [and giving it to] . . . arbitrators.").

286. *Id.* at 23.

287. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III,* 101 HARV. L. REV. 915, 946 (1988).

288. RUTLEDGE, *supra* note 275, at 25 (citing Richard H. Fallon, JR., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918–26 (1988)).

ing Article III courts—separation of powers, fairness, and judicial integrity.[289]

Fallon's analysis of these values led him to conclude that the "necessity and scope of [appellate review] turn on the type of determination" being made by the non-Article III adjudicator.[290] Pure questions of constitutional law require de novo review by an Article III court in order to ensure fairness to individual litigants when their constitutional rights are at stake.[291] Arbiters' findings of constitutional fact are not subject to review in Article III courts.[292] Although Rutledge criticizes Fallon's acceptance of waiver theory, it is important to mention that Fallon considers that voluntary waiver "substantially alleviates any concern of unfairness."[293]

2. Implications of Arbitration for Principles of Federalism

The primary drawbacks to the proposed solutions discussed earlier in Subsections A and B, are those proposals' detriments to federalist principals. Arbitration's implications for federalism are not nearly as dire. There are numerous factors to consider when discussing arbitration's impact on federalism, including agreement enforcement, procedural law, and award enforcement.[294] State contract laws promote federalist principles by allowing each jurisdiction's grounds for the revocation of a contract to potentially nullify the arbitration agreement.[295] States enjoy a distinct role in the procedural aspects of arbitration due to the unique options a state's statutory or common law might bring to the table.[296] States are also not as bound by Section 10 of the FAA as a federal court would be in matters regarding award enforcement.[297] Choice of law clauses, choice of arbitral forum clauses, and a party's choice of forum when challenging or enforcing an arbitration agreement—on balance promote federalism.[298]

3. The enforcement of an arbitration agreement is not a state action.

A major issue regarding this Comment's proposal is whether arbitration is a state action. The action of an entity may be considered a state action if it exercises a power traditionally used by the state, or if

289. *Id.* at 26.
290. *Id.* at 27.
291. *Id.*
292. *Id.*
293. *Id.* at 29–32 (citing Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 918–26 (1988)); Fallon, *supra* note 287, at 991–92.
294. Rutledge, *supra* note 275, at 99.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.* at 101–04.

the state takes significant steps to encourage certain conduct.[299] One argument that arbitration constitutes state action relies on the Supreme Court's holding in *Shelley v. Kraemer*, where the Court held that judicial enforcement of restrictive covenants was a state action.[300] Restrictive covenants and arbitration agreements are both private agreements; therefore, if judicial enforcement of a restrictive covenant is a state action, then it would follow that the enforcement of an arbitration agreement is also a state action.[301] Rutledge counters that the restrictive covenants at issue in *Shelley* differ from arbitration agreements because the restrictive covenants affected third parties.[302]

Unfortunately, Rutledge's rebuttal to the extension of the *Shelley* argument—that judicial enforcement of arbitration is a state action—does not insulate this Comment's proposal. It is common for a church to have long-term "visitors" who regularly attend but never formally join a church's membership. This class of people would technically be a third party affected by an arbitration agreement. Additionally, this situation is more akin to the facts in *Shelley* because the court found that the state action ultimately violated the Civil Rights Act of 1964, which covers religious discrimination as well as racial discrimination. Fortunately, a later Supreme Court decision reduced the reach of *Shelley* by requiring that a state action involves more than just judicial enforcement.[303] Further, "[e]very federal court considering the question has concluded that there is no state action present in contractual arbitration."[304]

Even though legal scholars continue to dispute the state action status of arbitration, the courts have decided that arbitration is not a state action. This has merely shifted the front of the battle over the constitutionality of arbitration to the theater of due process.[305] Although procedural due process is not constitutionally required for arbitration, due process protocols have proliferated throughout arbitral bodies, likely because a "procedural irregularity" is "one ground upon which parties can seek *vacatur* or resist enforcement of an arbitral award."[306]

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299. *Id.* at 131.

300. *Id.* at 136; *see also* Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

301. RUTLEDGE, *supra* note 275, at 136–37.

302. *See id.* at 138–39.

303. "Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

304. Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U.L. REV. 1, 4 & n.11 (2005).

305. RUTLEDGE, *supra* note 275, at 169.

306. Rutledge posits four possible reasons including this one, but allowing Occam's razor to cut this line of inquiry short seems appropriate here. *Id.* at 148–49. For the complete discussion *see id.* at 148–56.

4. Arbitration agreements involving a religious question have been enforced.

The final bridge to cross is to determine whether a court can enforce an arbitration award that involves a religious question. The Supreme Court has not specifically ruled on this issue, but several courts have had no problem enforcing agreements that involve a religious question.[307] A Texas court allowed the enforcement of an arbitration agreement that stated:

> [A]ny claim or dispute arising out of, or related to, this agreement or to any aspect of the employment relationship, including statutory claims, shall be settled by Biblically based mediation [,] and if that is not successful, the matter "shall then be submitted to a panel of three arbitrators for binding arbitration.[308]

For the time being, it appears that the judicial enforcement of an arbitration agreement involving a religious question is acceptable.[309]

In summary, while arbitration continues to endure a multitude of well-founded criticism from the academy, courts have found that Article III rights are waivable, arbitration promotes federalism, judicial enforcement of an arbitration agreement is not a state action, procedural due process is not required, and arbitration can reach religious questions.

5. The Single Factor to be Arbitrated: Unforeseeable-Substantial-Deviation-from-Doctrine

This Comment proposes that, in addition to the neutral-principles-of-law method, another factor be added to the analysis—the unforeseeable-substantial-deviation-from-doctrine factor. This factor must be outsourced to arbitration in order to circumvent the constitutional prohibition on the use of the departure-from-doctrine rule. In order for the arbitrators' conclusion to be binding, both the local church and the national denomination would have to voluntarily opt-in to the provision in writing. Ideally, the agreement should be executed in a separate contract where both parties have equal bargaining power to negotiate its terms. What must be in the agreement is the choice of the particular arbitral body (proposed below), the establishment of a

307. *See* Encore Productions, Inc. v. Promise Keepers, 53 F. Supp. 2d 1101 (D. Colo. 1999); *see also* Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343 (D.C. 2005); *see also* Easterly v. Heritage Christian Sch., Inc., No. 1:08-CV-1714-WTL-TAB, 2009 WL 2750099 (S.D. Ind. Aug. 26, 2009).

308. Woodlands Christian Acad. v. Weibust, 09-10-00010-CV, 2010 WL 3910366, at *3 (Tex. App.—Beaumont Oct. 7, 2010, no pet.) (mem. op., not designated for publication).

309. Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 527 (2012) ("American courts, so far as possible, treat challenges to religious arbitration exactly as they would challenges to secular arbitration—and exercise the same 'presumption . . . in favor of arbitration,' even in family law disputes.").

charitable trust by the local church for the benefit of the local church,[310] and the specific agreement by both parties that they will make certain stipulations in any church property dispute between the parties.

a. Composition and procedure for the proposed arbitral body.

The proposed arbitral body will have to be created by the private impetus of some concerned citizen or entity. The panel of arbitrators will be composed of an odd number of neutral theological or philosophical experts who have demonstrated their competence in the area of dispute by their educational degrees, topic specialization, and ability to faithfully articulate the viewpoints of various competing positions on religious doctrines. Each party will be assigned an advocate employed by the arbitral body to represent it in the proceedings. Each party will have a comparable ability to select or protest panel members in a manner somewhat analogous to voir dire in jury selection.

Once this panel has been selected, each arbiter on the panel will be presented with the appropriate documentation representing the doctrinal views of the national denomination at the local church's time of affiliation and disaffiliation. After comparing these documents and hearing the arguments of each side, which explain or refute the impact of any alterations in doctrine, each arbiter will vote either yes or no in response to two questions: (1) whether the doctrine of the national denomination had substantially deviated from the time of the local church's affiliation, and (2) whether the perceived changes in doctrine were foreseeable. If a majority of the arbiters vote "yes" to the first and second questions, then both parties must stipulate to the court that the intent and purposes of the national denomination have substantially and unforeseeably changed since the time of the local church's affiliation. If a majority of the arbiters vote "no" to either the first or second question, the parties must both stipulate to the court that the intent and purposes of the local church have substantially and unforeseeably changed since the time of its affiliation with the national denomination.

b. How the outcome will be used by a court.

By importing the stipulation from the arbitral proceeding, a court will no longer be prevented by the First Amendment from analyzing the necessary elements of the equitable-deviation doctrine of trust law. The equitable-deviation doctrine allows courts to modify a charitable trust themselves, or to allow a trustee to modify a charitable trust when the occurrence of unforeseeable events require the terms of a trust to be altered so that the purpose of the trust may be ful-

310. If one does not already exist.

filled.[311] Access to this remedy empowers the courts to alter charitable trusts in response to instances where a local church unexpectedly finds itself subjected to a national denomination espousing substantially different doctrine than when the local church affiliated with the national denomination.

c. Surgical arbitration is not inherently biased.

Many of the previously discussed rules and proposals tend to be inherently preferential to either the national denomination or local church. The *Watson* hierarchical deference rule expressly gave national denominations a significant advantage.[312] The application of the neutral-principles-of-law method appears, so far, to give an advantage to a local church—though not to the extent that *Watson* privileged a national denomination. The federal statute decreeing the validity of unilaterally executed trust provisions, like the Dennis Canon and the Trust Clause, inherently favors the national denomination. The church-constitution-centered approach would also validate such dubious trust provisions. In addition, that approach essentially hands over all control of discovery to the national denomination, therefore inherently favoring the national denomination. The strict-neutral-principles-of-law method is less prejudicial, but appears to aid the local church somewhat more than the national denomination by ignoring the denominational constitution altogether.

The substantial-unforeseen-deviation-from doctrine factor, decided in arbitration, that allows the equitable-deviation doctrine to be invoked in a doctrinally motivated church property dispute is not inherently prejudiced towards either the local church or the national denomination. In the case of PC(USA)'s recent exodus, the national denomination could argue that its standard of scriptural interpretation has not changed since the Plan of Reunion that established the current incarnation of the PC(USA).[313] It is that standard of interpretation that allowed the PC(USA) to reach the biblically-based conclusion of fully accepting LGBT persons into the fold by permitting them the same opportunity to be ordained into the ministry that any heterosexual person would have.

311. RESTATEMENT (THIRD) OF TRUSTS § 66 (2003).

312. *See generally supra* Part.III.

313. The standard of interpretation was expressly stated in the UPCUSA's Confession of 1967, preexisting the Plan of Reunion by more than a decade. BOOK OF CONFESSIONS, *supra* note 22, at 291 ("The Bible is to be interpreted in the light of its witness to God's work of reconciliation in Christ. The Scriptures, given under the guidance of the Holy Spirit, are nevertheless the words of men, conditioned by the language, thought forms, and literary fashions of the places and times at which they were written. They reflect views of life, history, and the cosmos which were then current. The church, therefore, has an obligation to approach the Scriptures with literary and historical understanding. As God has spoken his word in diverse cultural situations, the church is confident that he will continue to speak through the Scriptures in a changing world and in every form of human culture.").

Therefore, a reasonable arbiter could conclude that the doctrine of PC(USA) has not substantially deviated since the affiliation of any of its local churches, as 1983 is the earliest possible year of affiliation. Even if an arbiter did find the implementation of that standard of scriptural interpretation allowing the ordination of LGBT ministers to substantially deviate from the doctrine of the national denomination at the time of the local church's affiliation, it is unlikely a reasonable arbiter could find that such a development was unforeseeable given the PC(USA)'s, and its previous incarnations', long-standing and consistent commitment to progressive civil rights positions. In fact, disputes over Presbyterian ordination standards in America can be traced all the way back to 1721.[314] However, it still remains possible that a reasonable arbiter could find that such a change was unforeseeable.

Hypothetically, if the General Assembly of the PCA allowed for the ordination of women tomorrow, this factor would aid local churches seeking to disassociate from the PCA, as protest to the ordination of women was one of the primary motivations to form the PCA. The point is that whether this provision aids a local church or a national denomination is not inherent in the rule itself, but is entirely dependent on the facts as considered in a case-by-case basis.

d. Surgical arbitration in addition to the neutral-principles-of-law analysis is a stronger solution than arbitration alone.

To hark back to *Watson*, one of the Court's reasons for supporting deference (though admittedly not its chief reason) is that civil courts lack the theological expertise to handle issues of religious doctrine.[315] One of the values of surgical arbitration is that it allows the true underlying cause of the dispute to be addressed by experts in that field. The logical inversion of the *Watson* Court's statement is that theologians lack the expertise to quiet title to real property through the examination of deeds, the implementation of trust law, and the application of corporation law. Civil courts are experts in these matters; therefore, the rest of a property dispute is best left to a court's implementation of the neutral-principles-of-law method.

To return briefly to Fallon's points as applied to arbitration by Rutledge, three values supporting arbitration are its flexibility, fairness, and expertise.[316] The proposed surgical arbitration utilizes the flexibil-

314. Michael Bauman, *Jonathan Dickinson and the Subscription Controversy*, 41 J. EVANGELICAL THEOLOGICAL SOC'Y 3, 455, 457–60 (1998), http://www.etsjets.org/files/JETS-PDFs/41/41-3/41-3-pp455-467-JETS.pdf.

315. Watson v. Jones, 80 U.S. 679, 729 (1872) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.").

316. RUTLEDGE, *supra* note 275, at 26.

ity of arbitration to permissibly circumscribe First Amendment barriers in a special situation where those rights obfuscate the true nature of the dispute and serve as an impediment to the judicial mission to promote a peace in society by justly resolving disputes. The surgical arbitration approach is fair because it is voluntary, and the rule itself is not inherently biased to one side of a dispute. Surgical arbitration utilizes the expertise of theologians and philosophers without sacrificing the expertise of the courts in the adjudication of property disputes.

According to Fallon's theory, pure findings of fact by a non-Article III adjudicator never require appellate review. Though findings of constitutional fact should be available for appellate review for the sake of fairness to individuals regarding their civil liberties, Fallon states that voluntariness alleviates fairness concerns.[317]

e. Motivating volunteerism without coercion.

One could hope that both sides' desire to be vindicated as correct on the underlying doctrinal disagreement that caused the church property dispute would be enough to motivate them into opting-in to the surgical arbitration proceeding. This is unlikely though, as after the dispute has arisen, whichever side that may be disfavored by the facts could potentially refuse to participate. Ideally, the local church and national denomination would enter into an agreement to use surgical arbitration prior to a dispute arising. One way of motivating them to do so would be to repeal the state's current 100% property tax exemption for churches and replace it with a statute that grants between an 85% property tax exemption with the remaining 15% contingent on the acceptance of the surgical arbitration agreement. The intended purpose is to more effectively motivate local churches and national denominations to seek to enter into the surgical arbitration agreement because they are acting out of mutual financial interest, instead of from an awkward initial contemplation of a future split. Hopefully the financial interest involved would be sufficient to motivate the churches without being so great as to be found coercive. The downside to this approach is that any state encouragement raises anew the specter of the arbitration being considered a state action, which would destroy the entire scheme.

The proposed surgical arbitration is constitutional because arbitration is not state action, courts can enforce arbitration agreements involving religious questions, and the arbitral award specified by the agreement of the parties requires them both to make resulting stipulations through secular wording in a manner analogous to the secular lens through which a court can examine church constitutions.

317. *Id.* at 27.

IV. Conclusion

The special legal status of religious institutions in the United States results in special problems for those institutions. If religion's special status is justified by its "function . . . helping to balance power, speaking for the marginalized, articulating non-market values, and supporting personal spirituality and dignity,"[318] then to the extent religion operates adversely to those functions, it should forfeit its special status. The majority of that discussion is beyond the scope of this Comment. The special problems hierarchical religious institutions face are particularly evident when a split congregation is embroiled in a lawsuit to quiet title to church real property.

Though the neutral-principles-of-law method is a marked improvement over the *Watson* hierarchical deference rule, it falls short of the full implementation of justice. Just as the litigants in a church property dispute are forced to argue around the dispute's true cause, so too have commentators critical of the neutral-principles-of-law method latched onto the complaint of jurisdictional disparity of judicial enforcement. These commentators' proposals veer back towards *Watson* hierarchical deference because what they truly want to address is the vindication of the national denominations' doctrinal positions. The most divisive doctrinal positions for national denominations in the United States have historically been, and continue to be, centered on the advancement of civil rights. Slavery, segregation, and the subordination of women to second class citizens, have all been defended by some churches on doctrinal grounds.[319] National denominations that speak out on civil rights issues before certain segments of society are ready to hear it pay the price in being lambasted as un-Biblical, and rent asunder by the fractious division of their congregations.

The PCUSA is a prime example of this. As an early proponent of abolition, desegregation, and women's rights, the PCUSA saw its national denomination shatter four ways over its stance on abolition. Those fractures never fully healed because of PCUSA's latter stances on desegregation and women's rights. Today the PC(USA) is suffering again for its stance that those in the LGBT community are not second-class citizens. Dissenting congregations abandoning the PC(USA) couch their opposition in religious doctrine and thereby prevent the underlying cause of the dispute from being considered in court.

The neutral-principles-of-law method critics' underlying perception of insufficient justice in the rule is well-founded, but the solution is not a veiled return to *Watson* hierarchical deference. The solution is in addressing the true dispute squarely in the civil forum. Neutral-principles-of-law are not the enemy of national denominations. Ironically, the shadows cast by the First Amendment are the true obstacle.

318. Rutherford, *supra* note 1, at 351.
319. *See supra* Part I.B.

To circumvent this First Amendment obstacle to the just resolution of hierarchical religious disputes, this Comment proposes the arbitration of a finding of facts. Whether a national denomination has unforeseeably and substantially deviated in doctrine from the time the local church affiliated will be determined by arbitration. The arbitral award of the proceeding will be a specifically enforceable agreement for both parties to either stipulate that the national denomination's or the local church's purpose and intent as an organization has substantially and unforeseeably changed from the time of the local church's affiliation with the national denomination. The importation of these stipulations from arbitration will allow the court to utilize equitable deviation to modify an existing charitable trust on the arbitrated grounds of unforeseeable and substantial deviation-from-doctrine. The rest of the matter will be decided by the neutral-principles-of-law method. By allowing the true nature of the dispute to affect the outcome of the quiet title action in some way, justice is more fully served, and the perceived deeper concerns of critics will be satisfied.[320]

320. Critics of the neutral-principles-of-law method's application to hierarchical church property disputes.