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THE NEW CODE OF CANON LAW AND CHURCH-STATE RELATIONS

Freedom of religion is one of the pillars of American constitutional law.[1] Yet few concepts have elicited so much judicial and political controversy and dispute. One reason why this has happened is the inherent tension in the concept of religious freedom itself. This concept is expressed in two distinct ways in the first amendment: non-establishment of religion and free exercise of religion. These two clauses have stood for two centuries in irreconcilable tension.[2] If the law strictly enforces non-establishment, it may place a burden on free exercise. If it enforces free exercise, it may be accused of making an establishment. The Supreme Court has sought to balance the two competing values. Its success may be measured in examining an important potential new area of church-state confrontation.

I. THE PROBLEM

On November 27, 1983, the Roman Catholic Church promulgated its new, revised Code of Canon Law.[3] Canon 812 of the new Code contains a precept not found in the original 1917 Code: "It is necessary that those who teach theological disciplines in any institute of higher studies have a mandate from the competent ecclesiastical authority."[4] The concept of an ecclesiastical mandate for a university appointment in theology stems from the European concordats between the Vatican and national governments, and the

1. U.S. CONST. amend. I, § 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

2. The problem has generated a great amount of literature. Some of the most important recent studies include: P. KURLAND, RELIGION AND THE LAW (1961); L. PFEFFER, CHURCH, STATE, AND FREEDOM (rev. ed. 1967); L. PFEFFER, GOD, CAESAR AND THE CONSTITUTION (1975); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development. Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1380 (1967); *Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

3. CORPUS IURIS CANONICI (1983) (hereinafter CIC II). The first CIC was completed in 1917, codifying many of the sources of church law which had accumulated over the centuries. Among these were papal statements, conciliar decrees and collections, such as the DECRETUM of Gratian (c.1150 A.D.). The CIC II consists of seven books of 1752 canons.

4. Translation in THE CANON LAW SOCIETY OF AMERICA, CODE OF CANON LAW 305 (1983).

practice of European universities.[5] Such a notion is foreign to American traditions of academic freedom[6] and potentially violative of United States law in the areas of contractual rights, property rights, and civil rights.

In order to throw light on the issues which may arise if this canon is implemented, and possible resolution of subsequent issues in the civil courts, this comment will examine the meaning of the new Canon 812. Specifically considered will be the nature of the American Catholic university, the problems and relevant legal principles which may be found in American civil law, and the possible limitations to freedom of religion which such a confrontation could signal.

A. Canon 812: The Mandate to Teach Theological Disciplines

The meaning of Canon 812 may be analyzed first by looking at its context within the new Code. It is set within Book III which deals with the teaching role of the Church. More immediately, it is situated within Title III, "On Catholic Education," and Chapter 2 of that Title, "On Catholic Universities and Other Institutes of Higher Studies."[7] The meaning of "university" in this section is what is commonly understood to be an institution of higher education in which a multiplicity of disciplines are taught.[8]

"Theological disciplines" include biblical studies and historical, systematic, and moral theology. The concept often includes canon law and church history. Scholars debate whether it includes the scientific study of religion (*Religionswissenschaft*) or comparative religions.

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5. Provost, *The Revised Code, A Promising Vintage*, 148 AM. 85, 86 (1983). For example, in the German concordat with the Vatican, the state agrees to pay theology professors, while the Church retains control over their appointment through the concept of canonical mission (*missio canonica*), an ecclesiastical approval or mandate which is a prerequisite for a faculty appointment in theology at a German state university. *See* Orsy, *The Mandate to Teach Theological Disciplines: Glosses on Canon 812 of the New Code*, 44 THEOLOGICAL STUD. 476, 477 n.2 (1983).

6. McBrien, *Newness in Fidelity*, 12 NOTRE DAME MAG. 39, 41 (1983).

7. CIC II, *supra* note 4 at 283, 299, 303. *See* Orsy, *supra* note 5, at 477.

8. Orsy, *supra* note 5, at 477. This type of university is opposed to a pontifical faculty or ecclesiastical university which focuses on the teaching of theology, philosophy and canon law. *Id.* "Universities" and "institutions of higher studies" are to be deemed equivalent for the purposes of implementing canon law. *Id.*

The meaning of "competent ecclesiastical authority"[9] is ambiguous. The Code could have stated, but chose not to, that the authority required was that of the diocesan bishop or the Holy See.[10] The most logical person to approach would be the diocesan bishop.[11] Yet the trend in modern Catholic church history has been to exempt universities from the control of local bishops.[12] This locus of authority could also create problems, since bishops could disagree from one diocese to another on whether to grant a teaching mandate to a particular theologian. If the competent authority were understood as an office of the Roman Curia, this would contradict the Vatican II movement toward decentralization in the Church. In either case, it is unlikely that a bishop or a curial official would be professionally competent to pass judgment on a theologian.[13] The meaning of "mandate" (*mandatum*) is also unclear, since the concept has no historical antecedents. It has been defined as an administrative act constituting a commission to teach.[14]

Finally the canon states that theology professors "must have" (*habent oportet*) this mandate. It is a duty imposed by law. The theologian is not to exercise the right to teach without first fulfilling the obligation of obtaining the mandate.[15] This canon is strictly legal, in contrast to other texts in the Corpus Iuris Canonici of 1983 (CIC II) which are doctrinal, hortatory, or paradigmatic. It specifies a legal duty.[16] Since the canon restricts the free exercise of the right to teach, it is to be interpreted strictly and narrowly.[17]

The obligation to obtain the mandate is imposed on the teacher, not the university.[18] Under canon law, institutions may or may not be legal persons. If the institution in the past requested

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9. *Id.* at 483. Orsy does not include *Religionswissenschaft* in his understanding of theology. Richardson, *The "Competence" of a Catholic University*, 1 FORDHAM 15, 21 (1967), however, does include it.

10. Orsy, *supra* note 5, at 483-84.

11. *Id.*

12. *Id.* at 484-85.

13. *Id.* at 480.

14. *Id.* Its weight is less than that of a canonical mission, but greater than that of a mere permission. *Id.*

15. *Id.*

16. *Id.* at 481. It has been suggested, however, that this requirement is not as rigid as it might have been. The text may reflect a change from the word "*egent*" ("need") to "*oportet*" ("it is proper"). McBrien, *supra* note 6, at 41.

17. Orsy, *supra* note 5, at 481.

18. *Id.* at 482.

permission of ecclesiastical authority for the alienation of property or the conclusion of onerous contracts, it was a legal person. If, however, it did not do this, it was not a legal person. In canon law, only legal persons can be the subject of rights and obligations. Colleges and universities which are not legal persons in the eyes of ecclesiastical law can have no obligations under Canon 812 or any other canon.[19] Under a strict interpretation of the canon, since the Code is not retroactive, the duty is imposed only on those individuals who began to teach after November 27, 1983.[20]

Finally Canon 812 raises questions of due process. Book II of the CIC II sets out various rights of the members of the Church. According to Canon 221, all those who hold rights in the Church which are violated may initiate legal action before an ecclesiastical court.[21] Canon 218 states that "those who are engaged in the sacred disciplines enjoy a lawful freedom of inquiry and of prudently expressing their opinions on matters in which they have expertise . . . ."[22] A provision which would have set up regional and national administrative tribunals to decide questions of rights and justice and provide due process was deleted from the Code at the last minute.[23] Thus there are internal inconsistencies in the CIC II which jeopardize the rights of those held to obligations under the Code.

B. The American Catholic University

Before moving on to the civil law aspects of the problem, it is necessary to delve deeper into the factual situation. What is the role of a Catholic college or university in the United States today? How does such an institution understand itself? What is the nature and function of a theology department in the contemporary Catholic university? What are the bases on which decisions regarding the hiring and firing of theology faculty and the content of the-

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19. *Id.* at 482 n.9.

20. *Id.* at 483.

21. *Id.* at 478. *See* CIC II. C.221, § 1, supra note 3, at 73: "The Christian faithful can legitimately vindicate and defend the rights which they enjoy in the church before a competent ecclesiastical court in accord with the norm of law."

22. CIC II, *supra* note 4 at 73.

23. McBrien, *supra* note 6, at 40-41. Nat'l Cath. Rep., Oct. 21, 1983, at 20, col. 3. This left the local diocese and Rome as the only options. The local diocese would be an ineffective forum when the local bishop was a party to the dispute. Rome would also be ineffective as a forum because of time and distance.

ology courses are made?

John Henry Cardinal Newman understood the Catholic university as a "place of teaching universal knowledge."[24] As such, it must teach all branches of knowledge. Either theology must be taught as a branch of knowledge, or it must be presumed that there is no knowledge to be found in the field of religion, which is contrary to demonstrable fact.[25]

Writers today state similar views. "The Catholic university must be first of all a good and genuine university."[26] The university is "that social institution whose function it is to bring the resources of reason and intelligence to bear, through all the disciplines of learning and teaching, on the problems of truth and understanding that confront society because they confront" the human mind.[27] A Catholic university operates under state charter as a civil corporation, run by a board of trustees, and independent of church authority.[28] Thus, "[p]rofessionalism is the new emphasis, not blind . . . or mechanical or unmotivated obedience."[29]

The teaching of theology or religious studies is an integral part of the nature of a Catholic university. However, this is far from any sort of church-controlled indoctrination. It is the right of the university to require that the "quest of religious knowledge should be pursued in the high university style—under properly qualified professors, in courses of high academic content, in accordance with the best methods of theological scholarship . . . ."[30] The standards of academic scholarship in theology and religious studies are the same today for all, regardless of religious affiliation. These standards are determined by the graduate schools in their requirements for the doctoral degree, by university hiring and tenure

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24. J.H. Newman, SELECT DISCOURSES FROM THE IDEA OF THE UNIVERSITY 3 (London 1852).

25. J.H. Newman, DISCOURSES ON THE SCOPE AND NATURE OF UNIVERSITY EDUCATION 39 (Dublin 1852).

26. Van Allen, *The Identity Crisis in Catholic Higher Education*, 65/5 NAT'L CATHOLIC EDUC. ASS'N (NCEA) BULL. 50, 54 (1969).

27. J.C. Murray, WE HOLD THESE TRUTHS 120 (1960).

28. *See* N.Y. EDUC. LAW § 216-18 (West 1969 & Supp. 1983). Hesburgh, *The Changing Face of Catholic Higher Education*, 66/2 NCEA BULL. 54, 56 (1969); *See also* Gleason, *Freedom and the Catholic University*, 65/2 NCEA BULL. 21, 27 (1968), who describes how the boards of Harvard, Yale, Princeton and Amherst changed from clergy to lay control between 1884 and 1926.

29. Hesburgh, *supra* note 28, at 56.

30. J.C. Murray, *supra* note 27, at 136. "[T]he university is committed to the task of putting an end to prejudice based on ignorance. . ." *Id.* at 135.

committees, by the editorial boards of scholarly journals and book publishers, and by the professional associations in the field.[31] Those "in the academic world hold that professional competence and integrity should be the only standards for judging . . . performance, and that the judgment should be made only by . . . professional colleagues."[32] The implementation of Canon 812 could jeopardize the role of the university and peer associations in maintaining standards of theological scholarship.[33]

Academic freedom is as essential in theology/religious studies as it is in any other academic discipline. It is also essential to the nature of the Catholic university. President Theodore Hesburgh of Notre Dame wrote that: "Theology in the Catholic university must enjoy the same freedom and autonomy as any other university subject because, otherwise, it will not be accepted as a university discipline and, without its vital presence, in free dialogue with all other university disciplines, the university will never really be Catholic."[34]

A meeting of the North American Region of the International Federation of Catholic Universities issued this statement: "To perform its teaching and research functions effectively the Catholic university must have a true autonomy and academic freedom in the face of authority of any kind, lay or clerical, external to the academic community itself."[35] The statement further notes that it is the role of the Catholic university objectively to examine and critique all aspects and activities of the Church, and not vice versa.[36] There is no "academic" justification for the interference by external ecclesiastical authority in the teaching of the theology at Catholic universities."[37] Religious discrimination in hiring and

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31. Catholic scholars have served as presidents of the national, nondenominational professional associations. *See* J. HENNESEY, AMERICAN CATHOLICS 325 (1981). Seminaries of all the major denominations including Roman Catholic, offering graduate degrees in theology, have federated into academic consortia sharing faculty, course listings, and library facilities, forming major centers of theological scholarship in Boston, Washington, Chicago and Berkeley. *See id.* at 329.

32. Grisez, *Academic Freedom and Catholic Faith*, 64/2 NCEA BULL. 15, 16 (1967).

33. Williams, *John Paul II's Relations with Non-Catholic States and Current Political Movements*, 25 J. CHURCH & STATE 13, 46 (1983).

34. Hesburgh, *supra* note 28, at 57.

35. International Fed'n of Catholic Univ. (N. Am. Region), Land O'Lakes Statement (July 23, 1967) (cited in J. HENNESSEY, *supra* note 31, at 322, and Grisez, *supra* note 32, at 17).

36. *See* Van Allen, *supra* note 26, at 52-53.

37. Gleason, *Academic Freedom: Survey, Retrospect and Prospects*, 64/1 NCEA BULL. 67, 70 (1967) (citing Neil McCluskey, S.J., lecture at the Univ. of Dayton).

episcopal intervention in the academic appointment of diocesan clerics are regarded as infringements of academic freedom.[38] Any compromise of intellectual integrity or academic freedom would be a compromise of the essential nature of a Catholic university.[39]

The Catholic Theological Society of America and the Canon Law Society of America are at present jointly working on a model set of procedures for resolving doctrinal disputes between theologians and bishops. When completed, the document will be submitted to the National Conference of Catholic Bishops.[40]

A group of Catholic theologians has recently issued a "Charter of Rights of Catholics in the Church."[41] This charter asserts that teachers of theology have the right to academic freedom and to have their teaching judged by their peers.[42] It also affirms the rights to redress of grievances and due process "according to commonly accepted norms of fair administration and judicial procedure without undue delay."[43] Such statements of rights may, however, be empty if appropriate ecclesiastical tribunals do not exist.

Although Pope John Paul II has spoken often in defense of civil liberties and human rights,[44] especially in Poland, he has spoken little about the rights of Catholics in the United States.[45] Archbishop Bernardin of Chicago explained that a reason for this lack may lie in the Pope's belief that such rights are adequately protected by the structures of civil law in the United States.[46] Whether this is indeed the case will be examined in the following section on American civil law.

The question is a two-edged sword in American law. The Constitution protects freedom of religion. When the law serves to uphold this ideal, often the rights of individual members of a religion are infringed. Yet if the law focuses on upholding the rights of individual religious persons, freedom of the religion itself could be

38. *Id.* at 69.

39. Richardson, *supra* note 9, at 17.

40. Nat'l Cath. Rep., July 1, 1983, at 25, col. 1.

41. Association for the Rights of Catholics in the Church (Oct. 25, 1983). *See* Editorial, 149 AM. 321 (1983).

42. *See* Association for the Rights of Catholics in the Church, *supra* note 41, at 3 (no. 20).

43. *Id.* (nos. 9 & 10).

44. Williams, *supra* note 33, at 42. The Pope is also somewhat selective in the rights which he includes among civil liberties. *Id.* at 45.

45. *See generally,* Williams, *supra* note 33.

46. Interview, Nat'l Cath. Rep., Oct. 21, 1983, at 1, col. 4 and 6.

jeopardized. If the American courts were to uphold the freedom of the Roman Catholic Church to implement its new Code of Canon Law, Catholic professors of theology could lose their rights to employment and Catholic universities could be accused of practicing discrimination in employment. Yet if the courts upheld the rights of the individuals and the universities, making implementation of the new Canon 812 impossible, this could, in effect, limit the Roman Catholic Church's free exercise of religion.

The problem, and its possible solution, will be illustrated through consideration of the relevant American law in two subject areas: the resolution of intrareligion disputes over property, and federal regulation of the employment practices of religious organizations.

II. AMERICAN CONSTITUTIONAL LAW ON INTRARELIGION PROPERTY DISPUTES

In the past, religious groups have often been unable to resolve disputes through internal procedures and have asked the civil courts to intervene. The courts have had to walk a constitutional tightrope, avoiding the establishment of either faction and infringement of its free exercise of religion. The courts must decide between intervention, which might lead to the forbidden area of entanglement with questions of religious doctrine, and nonintervention, which might sacrifice the contract, property, or civil rights of the members of the faction which is weaker in the religious forum.[47]

The stakes are generally secular, regarding rights in contract or to property. If the disputants were members of a secular voluntary association instead of a religious organization, the courts would normally adjudicate such disputes and enforce the rights under the law of contract, corporation, property, or trust.[48] If a court refuses to adjudicate a church dispute in the name of free exercise of religion, it may in reality restrict the religious freedom of the organization by making its contracts and property commitments unenforceable. Any organization which does not make legally enforceable contracts will have difficulty establishing itself

47. Ellman, *Driven From the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1383 (1981).

48. *Id.* at 1382.

and growing in the secular world.[49] A court's refusal to adjudicate also denies the rights of the church members which in turn limits their religious freedom. And if membership in religious organizations is at the price of loss of civil rights, this may also inhibit the ability of the religious organization to attract and retain members.

During the past century, the Supreme Court has attempted to develop religiously neutral methods in order to avoid this dilemma. These efforts have wavered between Scylla and Charybdis, and therefore have frequently been less than successful.

The seminal decision of *Watson v. Jones*[50] in 1871 is still cited in most twentieth century opinions on this subject. This post-Civil War case concerned the Walnut Street Presbyterian Church in Louisville, Kentucky, whose members were divided into two factions.[51] The majority supported the General Assembly of the Presbyterian Church in the United States (PCUS) which had denounced those who advocated slavery.[52] The minority, which had possession of the church property, took the opposite view. The intermediate church authorities, the Louisville Presbytery and the Synod of Kentucky, were split along the same lines.[53] The title to the church property was vested in the trustees, who, by church law, were subject to the authority of the church session, which consisted of the minister and ruling elders.[54] Each faction in this case has its own trustees, minister, and elders. The court faced the dilemma of deciding which set of officers had legal ownership of the church property.[55]

The Supreme Court declared that when religious parties submit their internal disputes to a civil court, the court must function as in other cases:[56] "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."[57]

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49. *Id.* at 1383.
50. 80 U.S. (13 Wall.) 679 (1872).
51. *Id.* at 681.
52. *Id.* at 691.
53. *Id.* at 692.
54. *Id.* at 681.
55. *Id.* at 699, 717.
56. *Id.* at 714.
57. *Id.* This seemed to imply an understanding that it was the members who threatened the rights of the church, instead of vice versa.

The Court reviewed Kentucky corporation law and the organizational rules of the PCUS.[58] It distinguished two basic types of church polity. One type was the congregational, which was "strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority,"[59] that is, an "independent organization, governed solely within itself."[60] The other type was the hierarchical, in which the local church "is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization,"[61] that is, it is "part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government."[62]

In a congregational church dispute, the courts would define property rights by the ordinary principles which govern voluntary associations, that is, by the decision of a numerical majority of the members.[63] In a hierarchical church dispute, however, the courts must defer to the highest authority within the church: "Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."[64] The Court in *Watson* was making the presumption that such tribunals existed in every "hierarchical" church.

One reason given for the deference to church authority was that civil court judges lacked sufficient competence in ecclesiastical law and polity.[65] Yet this difficulty could have been overcome through the use of expert witnesses, as in cases involving complex questions of science or medicine. A greater fear, however, was that the courts might become entangled in the quagmire of religious

58. *Id.* at 720.
59. *Id.* at 722.
60. *Id.* at 724.
61. *Id.* at 722-23.
62. *Id.* at 726. The opinion also notes a third type of property dispute when there had been an express trust. In such a case the courts would apply the rules of construction used in ordinary trust law. *Id.* at 723.
63. *Id.* at 725.
64. *Id.* at 727.
65. *Id.* at 729.

doctrine.

The Supreme Court rejected the implied trust doctrine, whereby the property in question was considered donated to a church with the implied condition that the church was to continue to proclaim the same doctrines and to practice the same forms of worship to which it adhered at the time of the donation.[66]

Watson replaced the implied trust doctrine with a theory of implied consent, holding that those who accept membership in a religious organization do so with an implied consent to its government and are forever "bound to submit to it."[67] The *Watson* court stated: "It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."[68] Civil courts were barred from deciding any questions of religious doctrine: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[69]

In rejecting the implied trust doctrine, *Watson* left the churches greater freedom for the development of doctrine and new forms of worship.[70] The Court suggested that churches are voluntary associations and should be governed by the same laws which apply to other voluntary associations.[71] Yet the compulsory deference rule contradicted this premise. The opinion stated that civil courts in religious matters must defer to the decisions of the highest ecclesiastical tribunals of hierarchical churches. This exempted the churches from the civil laws which would be applied to and enforced on voluntary associations. The decision did define some areas which were deemed ecclesiastical questions: theology, church discipline, church government, and morality.[72] However, it left open the matter of determining which authority within a religious organization was the highest tribunal of authority. The flaw in the compulsory deference approach was that it could not work without

66. *Id.* at 733.

67. *Id.* at 729; *See* Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1301 (1980).

68. 80 U.S. at 729.

69. *Id.* at 728.

70. Sirico, *The Constitutional Dimensions of Church Property Disputes*, 59 WASH. U.L.Q. 1, 12 (1981).

71. 80 U.S. at 714; Sirico, *supra* note 70, at 10.

72. 80 U.S. at 733.

some judicial scrutiny of church polity.

Within a few months the Supreme Court modified the compulsory deference rule in *Bouldin v. Alexander*.[73] This case concerned an irregular election of officers and consequent rights to property in a small church of congregational polity.[74] The Court looked at church documents and records to see whether the church had followed its own procedures.[75] This decision permitted greater latitude of judicial inquiry into church polity and examination of church documents in deciding the locus of authority within a church.[76]

A Sixth Circuit Court of Appeals decision, *Brundage v. Deardorf*,[77] modified the principle of compulsory deference in the hierarchical churches when the church tribunal acted "in fraud of the rights of a minority seeking to maintain the integrity of the original compact" of affiliation.[78] Thus the *Watson* deference principle would not apply if the church authority had openly and flagrantly violated the contract which determined the property rights in question.[79]

In 1929 the Supreme Court endorsed the modification of the deference principle in cases of fraud in *Gonzalez v. Roman Catholic Archbishop of Manila*.[80] The dispute concerned the right to income from a collative chaplaincy established in 1820.[81] Plaintiff applied in 1922 for the position, but did not meet the requirements of the Roman Catholic Code of Canon Law (CIC I) promulgated in 1918.[82] The Court examined the will, the decrees of the Council of Trent, and the CIC I.[83] It applied the deference principle to decide

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73. 82 U.S. (15 Wall.) 131 (1872).

74. *Id.* at 138.

75. *Id.* at 138-40.

76. Sirico, *supra* note 70, at 10.

77. 55 F. 839 (N.D. Ohio 1893), *aff'd* 92 F. 214 (6th Cir. 1899).

78. *Id.* at 847-48; *See* Adams & Hanlon, *supra* note 67 at 1302.

79. 55 F. at 846; *See* Adams & Hanlon, *supra* note 67, at 1302.

80. 280 U.S. 1 (1929). *See* Adams & Hanlon, *supra* note 67, at 1303.

81. 280 U.S. at 10-11. The chaplaincy was a *capellania colativa familiar*. *Id.* at 4. The settlor established a trust which funded a chaplaincy and stipulated that preference be given in filling the office to her linear descendants. *Id.* at 10-12.

82. CODEX IURIS CANONICI (1918) (hereinafter CIC I). The requirements according to CIC I were first tonsure (C.108(1)), beginning theology (C.976(1)), clerical status (C.1442), attending seminary (CC.1354, 1364), holding a bachelor of arts degree before beginning theology (C.1365). Also cited was the rule from the Council of Trent that the candidate be at least fourteen years of age. 280 U.S. at 13.

83. 280 U.S. at 12-13.

the case, but in dictum qualified its use in cases of fraud, collusion or arbitrariness.[84] In *Gonzalez*, since the Archbishop followed the CIC, his decision was not considered arbitrary.[85] The Court based its deference on principles of contract rather than on separation of church and state.[86] Its decision applied to religious organizations the principle that the bylaws of corporations or voluntary associations should be construed by the same rules which govern the construction of contracts.[87] The Court allowed strict separation of church and state to be sacrificed in order to uphold the contractual rights of a party which would otherwise have been lost through the fraudulent, collusive, or arbitrary actions of a religious authority.[88] Thus the Court was moving in the direction of defending the civil legal rights of the individual against the potential tyranny of hierarchical religious authority.

The deference rule was constitutionalized in *Kedroff v. St. Nicholas Cathedral*.[89] This dispute concerned the property rights of St. Nicholas Russian Orthodox Cathedral in New York. The church was incorporated under New York law.[90] The corporation held title to the property, with its use vested in the head of the American Russian Orthodox Church.[91]

The Court made a detailed review of the relevant church history. It first noted that the Russian Orthodox Church had its roots in the Church of Constantinople. The Church gradually became self-governing over a period of several centuries until its autonomy was officially recognized in the sixteenth century.[92] The Russian Orthodox Church in the United States, Alaska, and Canada had been founded by missionaries from the Moscow Patriarchate. In 1917, Tikhon, who since 1904 had been Archbishop of New York,

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84. The Court stated "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive . . . ." *Id.* at 16.

85. *Id.* at 18.

86. Ellman, *supra* note 47, at 1390.

87. *Id.*

88. Note, *Church Property Dispute Resolution: An Expanded Role for Courts After* Jones v. Wolf?, 68 GEO. L. J. 1141, 1147 (1979-80).

89. 344 U.S. 94 (1952). *Watson* and *Gonzalez* were decided on the basis of federal common law prior to Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The religion clauses of the first amendment were first applied to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause) and Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause).

90. 344 U.S. at 95. N.Y. RELIG. CORP. LAW § 107 (McKinney 1925).

91. 344 U.S. at 95-96.

92. *Id.* at 100.

was elected Patriarch of Moscow.[93] During the Russian civil war, Tikhon, though imprisoned by the Cheka, granted the American church great autonomy.[94] After the revolution the American church membership had been augmented by the arrival of numerous White Russian emigrés, both priests and lay persons.[95]

A general meeting of the American church, called a *sobor*, took place in Detroit in 1924. There the American church declared its autonomy from Moscow and its self-governing status.[96] This was confirmed by a *sobor* in Cleveland in 1934 and property ownership was reorganized accordingly.[97] After World War II, in 1945, the Moscow Patriarchate reasserted its authority, issuing a document stating requirements for the "reunion" of the American church with Moscow.[98] The American church held a *sobor* in Clevelan in 1946, at which it refusd to accept the conditions contained in the document, and it terminated "administraive recognition of the Synod of the Russian Orthodox Church Abroad."[99] The 1948 amendments to the New York Religious Corporation Law recognized the autonomy of the American church and upheld its rights to church property.[100]

The Supreme Court affirmed the jurisdiction of Moscow over the American church before the Russian Revolution. But then it stated, contrary to evidence already cited in the opinion, that "[n]othing indicates that either the Sacred Synod or the succeeding Patriarchs relinquished authority or recognized the autonomy of the American church."[101] It found that the New York statute impermissibly "transferred" authority from the Moscow Patriarch to the American church.[102]

In *Kedroff*, the Court ignored the well-established tradition within orthodoxy of autocephalous national churches,[103] as well as the evidence of the establishment of autonomy and Moscow's recognition of, or at least acquiescence in, the independent status of

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93. *Id.* at 101.
94. *Id.* at 103.
95. *Id.*
96. *Id.* at 98, 103.
97. *Id.* at 99 n.3.
98. *Id.* at 104-05.
99. *Id.* at 105.
100. *Id.* at 98-99 & n.2.
101. *Id.* at 105-06.
102. *Id.* at 107. *See also id.* at 120.
103. *See id.* at 100. *See* J. MEYENDORFF, THE ORTHODOX CHURCH 143-45 (1962).

the American church in the instant case.[104] The Court regarded the question narrowly as strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarchs of the archdiocese of North America.[105] Yet if this reasoning is followed to its logical conclusion, it could be argued that the Patriarch of Constantinople should have the authority to appoint both the Patriarch of Moscow and the Archbishop of New York.[106]

The *Kedroff* Court gave constitutional protection to the freedom of a church to chose its own clergy, but added a qualification in dictum: "where no improper methods of choice are proven."[107] It exhorted a "spirit of freedom for religious organizations, an independence from secular control or manipulation-in short, power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine."[108] This ignores the problem of interference by a foreign government, such as the Soviet Union. It is of little help in deciding the question at hand of which religious authority has the right to control the church.

On remand the New York Court of Appeals again held for the American church, this time on the basis of common law arguments.[109] The Supreme Court again reversed, finding the New York decision to employ the same principles which it had earlier held unconstitutional.[110]

The majority in *Kedroff* chose not to apply principles of contract.[111] Instead, it looked at historical facts, although selectively, and determined that the Moscow Patriarchate had administrative

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104. *See* 344 U.S. at 103-04.

105. *Id.* at 115.

106. *See id.* at 116. This seems to be almost as if the Court were suggesting that control of the Cathedral of St. John the Divine (the Episcopal cathedral of New York) should be given to the British monarch, or that ownership of U.S. Lutheran churches should be given to the *Evangelische Kirche Deutschlands.*

107. *Id.*

108. *Id.*

109. St. Nicholas Cathedral v. Kreshik, 7 N.Y.2d 191, 164 N.E.2d 687, 196 N.Y.S.2d 655 (1959). The *Kedroff* dissent agreed with the New York court's finding that the New York law was a means of furthering religious freedom. *Kedroff*, 344 U.S. at 126-32 (Jackson, J. dissenting). The dissent declared that the state should be free to make laws unhindered by the laws of a foreign state. *Id.* at 129-31.

110. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

111. Ellman, *supra*, note 47, at 1393.

control over the American church.[112] Thus, it employed the principle of deference to ecclesiastical authority without adequately evaluating which ecclesiastical body actually had real authority.

In 1969 another church property dispute case came before the Court in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (*Hull*).[113] Two local churches wanted to withdraw from the Presbyterian Church in the United States (PCUS) over questions of departure from doctrine.[114] The Georgia courts decided for the right of the local congregations to withdraw from the general church and to retain ownership of their property on the basis of a factual finding of departure from doctrine.[115] The Supreme Court found this constitutionally impermissible. It held that "the departure-from-doctrine element of Georgia's implied trust theory can play *no* role in any future judicial proceedings."[116]

The Court declared that *Watson* had gone too far with its compulsory deference principle, leaving the courts no role.[117] It stated that "there might be some circumstances in which marginal civil court review of ecclesiastical determinations would be appropriate,"[118] such as cases of fraud, collusion, arbitrariness or procedural inconsistencies. The *Hull* court found that consideration of church property disputes by the civil courts did not inhibit free exercise, and, in dictum, it suggested a new method of resolution of such disputes: "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."[119] The Court then exhorted both states and religious organizations to structure relationships involving property so that courts could resolve disputes by neutral principles of law, without being called to review any matters of religious doctrine or practice.[120]

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112. 344 U.S. at 105-06. *See* Adams & Hanlon, *supra* note 67, at 1304.

113. 393 U.S. 440 (1969).

114. *Id.* at 441-42. The issues were ordination of women, membership in the National Council of Churches, and opposition to Bible reading in the public schools.

115. Presbyterian Church in the United States v. Eastern Heights Presbyterian Church, 224 Ga. 61, 72, 159 S.E.2d 690, 701 (Ga. 1968).

116. 393 U.S. at 450 (emphasis in original).

117. *Id.* at 447.

118. *Id.* (*citing* Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872)).

119. 393 U.S. at 449.

120. *Id.* On remand the Georgia court found for the local dissidents on the basis of neutral principles of law, looking at the vesting of title in the deeds. Presbyterian Church in the United States v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658

The *Hull* Court seemed to revive the contract principle and language of *Gonzalez*, taking it one step further with its neutral principles of law approach.[121] It did not define which neutral principles of law might be used or how they were to be applied. Nor did it attempt to explain the relationship between the deference rule and the neutral principles rule.[122]

Concurrently with *Hull* another church property dispute was pending before the Court, *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg* (*Sharpsburg*).[123] Majorities in two local congregations attempted to withdraw from the general church. The general Eldership declared the minorities to be the "true" congregations and therefore to retain property rights to the churches.[124] The Maryland court decided for the local congregations after examining state statutes, property deeds, the general church constitution, and local church charters.[125] The Supreme Court remanded the case for further consideration in light of *Hull*.[126]

The Maryland Court of Appeals on remand concluded that its decision had anticipated *Hull* and had properly applied neutral principles of law.[127] The United States Supreme Court dismissed the appeal of the final Maryland decision.[128] The *per curiam* opinion seemed to give broad discretion to the states: "It follows that a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[129]

The concurrence set out three methods for resolving property disputes. First it reaffirmed the principle of deference as long as the identity of the governing body exercising highest ecclesiastical authority was clear and not a matter of controversy and, if not oth-

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(1969), *cert. denied*, 396 U.S. 1041 (1970).

121. Ellman, *supra* note 47, at 1395.

122. Adams & Hanlon, *supra* note 67, at 1306.

123. 393 U.S. 528 (1969), *vacating and remanding* 249 Md. 650, 241 A.2d 691 (1968), *aff'd*, 254 Md. 162, 254 A.2d 162 (1969).

124. Maryland and Virginia Eldership v. Church of God, 249 Md. 650, 655. 241 A.2d 691, 703 (1968).

125. Adams & Hanlon, *supra* note 67, at 1308.

126. 393 U.S. at 528.

127. 254 Md. at 166, 175, 254 A.2d at 165, 170.

128. 396 U.S. 367, 368-69 (1970).

129. *Id.* at 368 (citing *Hull*, 393 U.S. at 449) (emphasis in original).

erwise specified, in express terms in the instrument of title.[130] The second method was the neutral principles of law approach. The Court spoke of a "formal title" doctrine, whereby civil courts might examine deeds, reverter clauses, and state corporation laws, although they could not enforce any provisions in church constitutions based on the concept of departure from doctrine.[131] The third method was to look at state statutes regarding church property. These should be narrowly drawn to exclude judicial consideration of religious doctrine.[132]

The *Sharpsburg* decision affirmed one application of the neutral principles of law approach; it permitted extensive court inquiry into church polity.[133] The statement excluding review of departure from doctrine provisions suggests that courts may be able to review other provisions of church constitutions.[134] The Supreme Court approved the state court review of the general church constitution and local church charters, because "it involves no consideration of doctrinal matters."[135] This opinion left the courts broad latitude in considering relevant evidence in church property disputes.

The Supreme Court later made a sharp swing back in the direction of compulsory deference in *Serbian Eastern Orthodox Diocese v. Milivojevich*.[136] The issue there was control of the administration, property, and assets of the Serbian Orthodox Church in North America. In 1963 the Serbian Orthodox Patriarch and the Synod of Belgrade, Yugoslavia, suspended Milivojevich as Bishop of the North American diocese, which it reorganized into three dioceses. Bishop Milivojevich refused to recognize this action. Therefore, in 1964 the church authorities in Belgrade defrocked him.[137]

The American diocese had organized itself as a non-profit corporation under the laws of Illinois.[138] The Illinois Supreme Court concluded that Milivojevich's removal and defrockment were "arbitrary" acts, not in accord with the church's constitution and penal code.[139] The U.S. Supreme Court reversed, criticizing the Illi-

130. *Id.* at 369. (Brennan, J., concurring).
131. *Id.* at 370. (Brennan, J., concurring).
132. *Id.*
133. *See* 249 Md. 650, 241 A.2d 691, 699-700 (1968).
134. *See* Sirico, *supra* note 70, at 36.
135. *Sharpsburg*, 396 U.S. at 368.
136. 426 U.S. 696 (1976).
137. *Id.* at 697-98, 704-05.
138. *Id.* at 701.
139. 60 Ill. 2d 477, 328 N.E.2d 268 (1975). *See* 426 U.S. at 708.

nois court for its "impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitut[ing] its own inquiry into church polity."[140] The Court held that the Illinois court's inquiries into "matters of ecclesiastical cognizance and polity and the court's actions pursuant thereto contravened the First and Fourteenth Amendments."[141] In this light, the Court affirmed the *Sharpsburg* principle of non-inquiry into the allocation of power within a church.[142] The *Serbian* Court seemed to prohibit inquiry into church polity, procedures, or law.[143] For this reason it rejected the arbitrariness exception.[144] Yet the opinion cited extensively the constitution and penal code of the Serbian Orthodox Church to show which was the highest ecclesiastical authority in its polity.[145] The opinion also criticized the Illinois court for rejecting the testimony of expert witnesses on canon law and for misinterpreting church law and procedure.[146]

The *Serbian* opinion elevated the compulsory deference doctrine to its highest extreme.[147] Yet the Court grounded the principle on the contractual consent rationale of *Watson*.[148] The Court seemed to base its deference principle on a very questionable definition of religion:

> Indeed it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or

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140. 426 U.S. at 708.

141. *Id.* at 698.

142. *Id.* at 708-09 (citing *Sharpsburg* 396 U.S. at 369) (Brennan, J., concurring).

143. *See Id.* at 713.

144. *See id.* where the court stated: "[N]o arbitrariness exception—in the sense of any inquiry whether the decisions of the highest ecclesiastical tribunal . . . complied with church laws and regulations—is consistent with the constitutional mandate. . . ." *Id.*

145. *Id.* at 716-17, 719.

146. *Id.* at 718-19.

147. In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding on them.

Id. at 724-25. The Court presumes that religions will create such rules and tribunals. It does not deal with the possible situation when a religion does not.

148. 426 U.S. at 713-14. The *Serbian* court did not hold that church laws embodying the terms of the contract may not be examined; rather, it determined upon examination, that those laws manifested a voluntary agreement between the parties to abide by the decisions of the Holy Assembly.

Adams & Hanlon, *supra* note 67, at 1312.

> not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.[149]

This definition runs contrary to modern scholarship in religion and to the self-understanding of most major religious bodies. Scholars have found this sort of authoritarianism to be one of the lowest stages of religious development.[150]

The *Serbian* dissent points out that even if civil courts accept the decisions of ecclesiastical tribunals, they must decide what these decisions are and which decision of which church authority they find definitive.[151] This will involve not only reasons based upon canon law, but also one interpretation of the meaning of canon law as opposed to another interpretation.[152] The dissent states that two alternatives exist, both unacceptable. One suggests that civil courts abdicate jurisdiction over church property disputes altogether, which would leave such disputes "to be resolved by brute force."[153] The other is that the courts simply rubber-stamp all decisions of apparent church authorities: "If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness."[154] Therefore, it is essential that the courts be able to make at least some factual inquiry into church polity and law.[155]

The effect of an extreme doctrine of compulsory deference would be an establishment of one particular religious group and a denial of the free exercise rights of its opponent group.[156] The decision sought to avoid court entanglement in the "dismal swamp" of

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149. 426 U.S. at 714-15.

150. *See generally* J. FOWLER, STAGES OF FAITH: THE PSYCHOLOGY OF HUMAN DEVELOPMENT AND THE QUEST FOR MEANING (1981).

151. 426 U.S. at 726 (Rehnquist, J., dissenting).

152. *Id.*

153. *Id.* at 727.

154. *Id.* at 726.

155. *Id.*

156. The practical effect of such deference is to foreclose to the subordinate body an unbiased review by civil courts; to establish hierarchical churches by requiring civil courts to place their imprimatur on the decisions of the hierarchical body; and inhibit the free practice of religion by restricting its normal growth and development. Note, *"And of your law, look ye to it"—The State's Role in Ecclesiastical Property Disputes—Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, 1977 UTAH L. REV. 138, 145.

religious doctrine and practice:[157] "Instead it confers nearly autocratic powers on hierarchical churches which the churches may use or abuse without the threat of civil court review."[158] The possible exceptions for fraud and collusion were not endorsed, but simply left open for later consideration.[159] The Supreme Court has not yet decided whether these exceptions may be applied and, if so, the extent of permissible inquiry into church polity and law.

Three years later a sharply divided Supreme Court decided *Jones v. Wolf*.[160] The question for decision was whether courts could apply neutral principles of law in disputes arising in hierarchical churches, or whether they must defer to the decision of the highest ecclesiastical tribunal.[161] The majority of the congregation of the Vineville Presbyterian Church of Macon, Georgia, voted to secede from the PCUS, taking its property with it, and to reaffiliate with the Presbyterian Church of America, a smaller, more conservative denomination.[162] The trial court applied neutral principles of law, examining property deeds, the church's corporate charter, and state law. It also examined the constitution of the PCUS, the Book of Church Order.[163] The court found no evidence of PCUS rights to the property[164] and held that the majority faction had the right to represent the local church and to control its property.[165]

The Supreme Court affirmed the use of neutral principles, but it vacated for inadequate explanation of the grounds for deciding for the majority of the local congregation.[166] On remand, the Georgia Supreme Court affirmed for the majority on the basis of neutral principles.[167]

The U.S. Supreme Court opinion noted that "the State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership

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157. Chafee, *The Internal Affairs of Associations Not-for-Profit*, 43 HARV. L. REV. 993, 1021 (1930).
158. Note, *The Role of Civil Courts in Church Disputes*, 1977 WIS. L. REV. 904, 924.
159. 426 U.S. at 713. *See* Ellman, *supra* note 47, at 1397.
160. 443 U.S. 595 (1979).
161. *Id.* at 597.
162. *Id.* at 598.
163. Jones v. Wolf, 241 Ga. 208, 243 S.E.2d 860 (1978); *see* 443 U.S. at 598.
164. 443 U.S. at 601.
165. *Id.* at 599.
166. *Id.* at 609-10.
167. Jones v. Wolf, 244 Ga. 388, 389, 260 S.E.2d 84, 85 (1979).

of church property can be determined conclusively."[168] This right is limited by the first amendment to prohibit resolution of disputes on the basis of religious doctrine or practice and to require deference to the decision of the highest court of a hierarchical church.[169] The Court noted: "Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes."[170]

The majority opinion endorsed the neutral principles approach. It found several advantages in this method. First, it is secular in operation and sufficiently flexible to accommodate "all forms of religious organization and polity."[171] Secondly, it relies on "objective, well established concepts of trust and property law familiar to lawyers and judges."[172] Thirdly, it "frees civil courts completely from entanglement in questions of religious doctrine, polity and practice."[173] And fourthly, it provides "flexibility in ordering private rights and obligations to reflect the intentions of the parties."[174]

The Court expressed the hope that religious organizations would design their documents and contracts to determine in advance property ownership and resolution of disputes.[175] This method would require court examination of church documents, such as constitutions, but using a secular method of analysis not based on any religious presuppositions. Because such a method is neutral and non-entangling, the Court held that a state is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.[176] The Court declared that the neutral principles method would not lessen the free exercise rights of church members because the parties were free to modify documents, deeds, charters, and constitutions according to their desires and intents, and the burden of this was minimal.[177] If the parties indicated their intended resolution of disputes in "legally

168. 443 U.S. at 602.
169. *Id.*
170. *Id.*
171. *Id.* at 603.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 603-04.
176. *Id.* at 604.
177. *Id.* at 606.

cognizable form," the civil courts are bound to give this effect.[178]

The dissent feared that application of the neutral principles approach would lead to impermissible intrusion into church polity.[179] The majority found greater danger of entanglement in the compulsory deference approach, which would require court examination of religious doctrine and polity to determine which church body had the final authority.[180]

In *Jones* the Court approved the use of any neutral principle of law relevant to the resolution of disputes which did not involve consideration of religious doctrine.[181] The approach was thought to be applicable to all forms of church polity.[182] The *Jones* opinion seems to move away from the *Watson* distinction between hierarchical and congregational polity. *Watson* classified the PCUS as hierarchical because local congregations are members of regional and national bodies.[183] Yet in *Jones* the resolution is based on the decision of the majority of the local congregation because the Court could find no evidence of hierarchical relationships in church charters or in the PCUS constitution. The structure of the PCUS did not change between *Watson* and *Jones*. Although the "hierarchical" polity remained, the Court in *Jones*, through the examination of deeds, found title to be vested in the local congregation.

This decision has caused several denominations to reexamine and revise their constitutions to clarify property ownership in secular and legally cognizable terminology.[184] This approach may work for primarily American denominations. It is questionable, however, whether international churches, such as the Roman Catholic or Eastern Orthodox, can or would likely rewrite their laws and constitutions according to the precepts and terminology of the United States courts.

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178. *Id.*

179. *Id.* at 610 (Powell, J., dissenting).

180. *Id.* at 605. *See id.* at 619 & n.6 (Powell, J., dissenting).

181. *See* Note, Jones v. Wolf: *Neutral Principles Standard of Review for Intra-Church Disputes*, 13 LOY. L.A.L. REV. 109, 122 (1979).

182. 443 U.S. at 603.

183. Watson v. Jones, 80 U.S. (13 Wall.) 679 at 722-23 (1871).

184. The United Presbyterian Church in the United States is in the final stages of revision of its constitution in the light of this decision. *See* Presbyterian Layman, June/July 1980, at 1, col.2. The question has also been discussed at the synod of the Lutheran Church, Missouri Synod. *See* Lutheran Perspective Sept. 12, 1983, at 4, col. 1; *id.* Aug. 1, 1983, at 2, col. 3.

Thus, despite strong words against intrusion into church polity and examination of ecclesiastical documents, the Supreme Court has consistently done both in the cases which have come before it.[185] The Court has also affirmed some use of contract principles. *Jones*, however, may not be a final resolution of all the first amendment questions because the Court was closely divided and the opinion left many questions unanswered.[186]

Jones, however, does give constitutional endorsement to the application of neutral principles of law in property disputes.[187] This approach avoids the loss of rights of free exercise and the possibility of entanglement inherent in the compulsory deference doctrine. The resolution of disputes according to secular laws and documents reflecting the intent of the parties maintains far greater neutrality than a presumption of deference to the party with the greatest amount of ecclesiastical power and authority.[188]

In the hypothetical situation of church implementation of the new Canon 812 to negate the rights of a theology professor to continued employment or tenure, the case law on intrachurch property disputes provides some applicable principles. The dominant approach today is the application of neutral principles of law.[189] The courts can use the general law of contracts and specific law regarding employment contracts and tenure. Faculty employment and tenure have been considered property rights by the courts.[190] All relevant documents, such as employment contracts, university constitutions and regulations, and faculty handbooks may be examined. In most cases such documents would be written in legally cognizable form. With this approach, the probability, in a situation

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185. Even in *Serbian* the Court decided that the Belgrade Synod was the ecclesiastical authority to which it chose to defer.

186. *See* Ellman, *supra* note 47, at 1397.

187. Adams & Hanlon, *supra* note 67, at 1332. *See* Mills v. Baldwin, 344 So.2d 259 (Fla. Dist. Ct. App. 1977), *rev'd*, 362 So.2d 2 (Fla. 1978), *vacated and remanded*, 443 U.S. 914 (1979). The Florida Supreme Court came to the opposite conclusion and held that the Presbyterian Church in the United States (PCUS) was a hierarchical church on the basis of the local church's affiliation and implied consent. The U.S. Supreme Court vacated and remanded for consideration in the light of *Jones*.

188. Adams & Hanlon, *supra* note 67, at 1338. In a recent Roman Catholic dispute over dissolution of a cemetery trust, the Indiana Court of Appeals applied neutral principles of law. Grutka v. Clifford, 445 N.E. 2d 1015, 1019 (Ind. Ct. App. 1983), *petition for cert. filed*, 52 U.S.L.W. 3399 (U.S. Nov. 1, 1983) (No. 83-736). The Indiana court examined the CIC I, which was in effect when the dispute arose, and cited relevant canons. *Id.* at 1021 & n.8.

189. *Jones*, 443 U.S. at 603.

190. *See* Perry v. Sinderman, 408 U.S. 593, 601 (1972).

of a breach of contract caused by the intervention of extra-university ecclesiastical authority, would be that the courts would uphold the written contracts and university regulations if otherwise legal and binding. However, if in the future the minority supporting the compulsory deference principle again became a majority on the Supreme Court, since the Roman Catholic Church is inarguably hierarchical, the courts could then defer to ecclesiastical authority.

Contractual right to property is not the only basis on which a Canon 812 case could be argued. Questions may also be raised concerning the rights of government to regulate a religiously affiliated college or university to protect public policy interests.

III. THE FEDERAL GOVERNMENT AND THE RELIGIOUSLY AFFILIATED COLLEGE OR UNIVERSITY

The Constitution prohibits the establishment of any religion. It also prohibits state interference with the free exercise of religion.[191] The tension between these two ideals is nowhere more apparant than in the longstanding controversy over government aid to sectarian education and government regulation of sectarian institutions.

A. Government Aid to Religiously Affiliated Higher Education

Most of the early cases which arose concerning the establishment clause had to do with elementary or secondary schools. The Supreme Court developed a test for deciding which forms of state aid were permissible and which avoided making an establishment of religion. The funding statute must have a secular purpose; its principal effects must be neither to advance nor to inhibit religion, and it must not foster "excessive government entanglement with religion."[192] Peripheral forms of aid, equally available to public school pupils, such as funds for transportation,[193] textbooks,[194] tests,[195] and record keeping[196] were approved.

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191. *See* U.S. CONST. amend. I, § 1.

192. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

193. Everson v. Board of Educ., 330 U.S. 1 (1947).

194. Board of Educ. v. Allen, 392 U.S. 236 (1968). *See* Mueller v. Allen, 103 S. Ct. 3062 (1983), where the Court upheld state tax credits for parental expenditures for school transportation and textbooks. *Id.* at 3071.

195. Wolman v. Walter, 433 U.S. 229 (1977).

196. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

The Supreme Court upheld the constitutionality of grants to church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963[197] in *Tilton v. Richardson*.[198] The grants in question were one time, single purpose, construction grants, given on condition that the facility built could not be used for "sectarian instruction," "religious worship," or for programs of a theological school.[199] The grants challenged in *Tilton* were to four Roman Catholic colleges in Connecticut for the purposes of constructing facilities such as an arts building, a science building, a language laboratory or a library.[200] The Court found that the legislative intent of Congress was to include all colleges and universities, whether church sponsored or not.[201] It found no evidence that any of the colleges had violated the statutory restrictions.[202] The Court held that "[t]here are generally significant differences between the religious aspects of church related institutions of higher learning and parochial elementary and secondary schools."[203] It found college students "less impressionable and less susceptible to religious indoctrination" than elementary or secondary school pupils.[204] The Court examined the required theology courses and found that they were:

> taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. . . . The courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis. Finally . . . these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed.[205]

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197. 20 U.S.C. §§ 711-21 (1964 & Supp V 1969) *repealed* Act June 23, 1972, Pub. L. No. 92-318, tit. I, Part G. § 161(b)(2), 86 Stat. 303.

198. 403 U.S. 672, 674 (1971).

199. *Id.* at 675-76.

200. *Id.* at 676. The four colleges were Sacred Heart, Annhurst, Albertus Magnus, and Fairfield University. *Id.*

201. *Id.* at 677.

202. *Id.* at 680.

203. *Id.* at 685.

204. *Id.* at 687. The court observed: "[B]y their very nature, college and post graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines." *Id.* at 686.

205. *Id.* at 686-87.

Furthermore, the Court found it significant that the colleges subscribed to the American Association of University Professors (AAUP) 1940 Statement on Academic Freedom and Tenure.[206] On this basis the Court held that the grants had a secular purpose and neutral effect; they avoided excessive entanglement with religion and did not inhibit free exercise of religion. Therefore, the grants were constitutionally permissible.[207]

In *Roemer v. Board of Public Works of Maryland*,[208] the Court in a plurality opinion affirmed its previous position. In *Roemer*, a taxpayer group challenged state grants to four Roman Catholic colleges.[209] The Maryland statute[210] permitted grants to private colleges which were accredited by the State Department of Education and which granted one or more non-theological associate or bachelor of arts degrees. The aid was granted on a per student basis, excluding seminary and theological students. It was further restricted in that it could not be used for "sectarian purposes."[211]

The *Roemer* Court held first of all that the purpose of the statute was clearly secular: to support private higher education in general.[212] Secondly, the primary effect was not to aid religion. The Court specified that there should be no aid to institutions which were "pervasively sectarian," in which the secular activities were inseparable from the religious activities.[213] If the two were separable, only the secular activities might be funded. Since this was a question of fact, the Supreme Court relied on the district court's finding that the four colleges were not pervasively sectarian.[214]

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206. *Id.* at 681-82. *See* AMERICAN ASSOC. OF UNIV. PROFESSORS, STATEMENT ON ACADEMIC FREEDOM AND TENURE (1940), which upholds academic freedom and tenure rights as essential to the American college or university.

207. *Id.* at 678. In a subsequent decision concerning state issuance of revenue bonds to aid a sectarian college (Baptist) in South Carolina for the purpose of facility construction, the Court came to the same conclusions. Hunt v. McNair, 413 U.S. 734 (1973). The *Hunt* Court also found significant the fact that there were no religious qualifications for faculty membership at the college. *Id.* at 743.

208. 426 U.S. 736 (1976).

209. *Id.* at 744. The four colleges were the College of Notre Dame, Mount St. Mary's College, St. Joseph College, and Loyola College. A fifth institution Western Maryland, was also named, but dismissed.

210. MD. CODE ANN. art. 77A:65-69 (1975), *repealed*, 1978 Md. Acts ch. 22 § 1.

211. 426 U.S. at 740-41.

212. *Id.* at 754.

213. *Id.* at 755.

214. The bases for this finding were: (a) there existed great institutional autonomy and overall independence from the Roman Catholic Church; (b) "religious indoctrination

Furthermore, the statute required that the aid might only be used for a secular purpose.[215] And thirdly, the statute did not cause excessive entanglement, despite the fact that it required annual review, whereas *Tilton* had approved only one time grants.[216] To a great extent the Court's finding that the colleges were not pervasively sectarian determined the entanglement issue.[217]

From this brief examination of the opinions on aid to sectarian higher education, what emerges is that the Supreme Court placed great significance in the nature of theology courses, departments and faculty hiring, and the presence of academic freedom, especially in regard to Roman Catholic colleges and universities. If implementation of Canon 812 affected the presence of any of these factors, this could make the college or university ineligible for government aid.

B. Tax Exemption of Sectarian Colleges and Universities

The Supreme Court has upheld the constitutionality of tax exemption for religious institutions. In *Walz v. Tax Commissioner*,[218] the Court found that tax exemptions neither advance nor inhibit religion. Thus they do not cause an establishment of religion, but simply spare the exercise of religion from the burdens of "taxation levied on private profit institutions."[219] It distinguished the effect of indirect economic benefit from sponsorship or transfer of state revenue to a religion.[220]

The problem becomes much more complex when a tax exempt religious institution violates the law or public policy. In *Bob Jones*

[was] not a substantial purpose or activity;" (c) a general "atmosphere of intellectual freedom prevailed;" (d) the faculty was free to begin classes with prayer or not; (e) faculty hiring was not based upon religion except for theology positions; (f) students were not admitted or recruited on the basis of religion. *Id.* 755-58.

215. *Id.* at 763.

216. *Id.* at 763-64.

217. Thus after *Roemer* there may be little scope for the entanglement issue in aid to higher education cases. Note, *State Aid to Nonpublic Sectarian Colleges*, 44 TENN. L. REV. 377, 385 (1977). White, in his concurring opinion, spoke of dropping the entanglement issue altogether as "insolubly paradoxical." 426 U.S. at 768 (White, J., concurring). However, the Court recently affirmed the use of all three prongs of the *Lemon* test in Widmar v. Vincent 454 U.S. 263 (1981); *see supra* note 192 and accompanying text. This case also affirmed the distinction between higher education sectarian and parochial schools. *Id.* at 274 n.14.

218. 397 U.S. 664 (1970).

219. *Id.* at 673.

220. *Id.* at 674-75.

University v. United States (*BJU*),[221] the IRS revoked the tax exempt status of BJU, a fundamentalist educational institution with educational levels ranging from kindergarten through graduate school. At BJU all courses were taught according to the Bible and all teachers are required to be "born again" Christians.[222] The institution itself made no claim to secular status. Before 1971 BJU admitted no blacks. From 1971-1975 it admitted no unmarried blacks. After 1975 it admitted all blacks, but prohibited any interracial dating or marriage.[223]

The Court cited a District of Columbia decision which stated that the Internal Revenue Code "must be construed and applied in consonence with the federal public policy against support for racial segregation of schools, public or private."[224] In *BJU* the Court affirmed this policy and stated that there could be no exception for private religious schools.[225]

The Court applied a balancing test. The government has a compelling interest in eliminating discrimination on the basis of race.[226] The Fourth Circuit had found that "certain governmental interests are so compelling that conflicting religious practices must yield in their favor."[227] In this situation the burden on the school seemed minor. It could still operate and discriminate, but was obligated to pay taxes while it did so.[228] Allowing tax exempt status would be contrary to public policy because it would provide indirect public subsidy of the school's policy of discrimination.[229] A tax exempt charity by definition is one which has no purpose contrary to public policy.[230] Therefore, the Court upheld the IRS's revocation of BJU's tax exempt status as nonviolative of the first amendment.[231]

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221. 103 S. Ct. 2017 (1983).

222. *Id.* at 2022. *See also* 639 F.2d 147, 149 (4th Cir. 1980).

223. 103 S. Ct. at 2022-23.

224. Green v. Connolly, 330 F. Supp. 1150, 1160 (D.D.C.), *aff'd per curiam sub nom.*, Coit v. Green, 404 U.S. 997 (1971).

225. 103 S. Ct at 2030.

226. *Id.* at 2035.

227. *Bob Jones Univ.*, 639 F.2d at 154.

228. *Id.* at 153-54. *See* Note, *The Internal Revenue Service's Revocation of the Tax Exempt Status of a Private Religious College Does Not Violate the First Amendment*-Bob Jones University v. U.S., 50 U. CIN. L. REV. 615, 621 (1981).

229. 103 S. Ct. at 2024 (citing *Bob Jones Univ.*, 639 F.2d at 151).

230. *Id.* at 2022. *See also* Rev. Rul. 71-447, 1971-71 C. B. 230. "All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy." *Id.*

231. 103 S. Ct. at 2024, 2036.

Thus, if implementation of Canon 812 resulted in forms of employment discrimination which public policy had a compelling interest in eliminating, a Catholic college or university could lose its tax exempt status. This could make continued operation difficult if not impossible.

C. Government Restriction of the Rights of Religious Institutions as Employers

The free exercise of religion has not been interpreted as an unlimited right in American jurisprudence. In 1878 the Supreme Court distinguished between the right to religious belief which is absolute, and the rights to perform religious actions which is qualified.[232] The Court has had to balance important public interests against the right to free exercise. When the governmental interest involved public health and safety,[233] or the peace, order or defense of society,[234] the governmental interest has prevailed and the free exercise right has been limited. In employment cases the Court has upheld the interest of the state in Sunday closing laws.[235] But it has upheld the right of the individual employee to unemployment benefits, whose religion did not permit continued employment in a context which was contrary to his or her religious beliefs.[236]

The courts have deliberated various aspects of the rights of churches to control their internal affairs as opposed to the respon-

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232. Reynolds v. United States, 98 U.S. 145, 166 (1878). This decision prohibited the Mormon religious practice of polygamy.

233. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (court ordered the compulsory vaccination of children against smallpox, even when it was against their religious beliefs); *See also* State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied,* 424 U.S. 954 (1976) (court prohibited the religious practices of snakehandling and drinking of poison in a small religious sect in Tennessee); Prince v. Massachusetts, 321 U.S. 158 (1944) (court prohibited Jehovah's Witness children from distributing religious literature on the street in violation of child labor laws); Town v. State *ex rel.* Reno, 377 So.2d 648 (Fla. 1979), *cert. denied,* 449 U.S. 803 (1980) (court prohibited the indiscriminate religious use and distribution of marijuana by a small Florida sect); *but cf.* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (California court permitted the religious use of peyote since it was confined to a formal sacrament of the American Indian Church and not used outside this context).

234. *Reynolds*, 98 U.S. 145 (polygamy). *See also* Hamilton v. Regents of the Univ. of Ca., 293 U.S. 245, 264 (1934) (no constitutional right to religious objection to military service, although Congress could legislate such a right).

235. Braunfeld v. Brown, 366 U.S. 599, 608 (1961).

236. Sherbert v. Verner, 374 U.S. 398, 406, 409 (1963) (Seventh Day Adventist who refused to work on Saturday); Thomas v. Review Bd., 450 U.S. 707, 719 (1981) (Jehovah's Witness who refused to work on the manufacture of parts for military equipment).

sibilities of churches to obey the laws of the land. The tension is evident in cases where the church functions as an employer.

In *McClure v. Salvation Army*,[237] the plaintiff, a woman officer and minister, filed a sex discrimination complaint with the EEOC for unequal wages. She complained that her wages were less than those of similarly situated male officers, and also claimed damages for retaliatory discharge which ensued after she had voiced objections to her superiors. The Fifth Circuit affirmed the district court's dismissal of the case on the basis of the exemption of religious organizations from Title VII of the Civil Rights Act of 1964.[238] But the court limited the exemption to the church-minister relationship.[239]

A 1972 amendment to Section 702 of the Civil Rights Act[240] seemed to exempt all activities of religious organizations. In *King's Garden, Inc. v. FCC*,[241] the District of Columbia Circuit Court of Appeals in dicta questioned the constitutionality of the amendment and expressed its preference for the pre-amendment limitation to the religious activities of a religious organization.[242] The court suggested that the amendment was likely to create problems in application.[243] And the court found that the amendment had a purpose which was not secular and a primary effect of "sponsorship" of religious organizations.[244] Despite this court's opinion, however, the 1972 amendment of Section 702 is still in effect.[245]

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237. 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

238. 42 U.S.C. § 2000e (1976).

239. 460 F.2d at 560-61. The Fifth Circuit cited *McClure* in denying jurisdiction in a suit by a discharged minister against his church in Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974).

240. 42 U.S.C. § 2000e-1 (1976)

241. 498 F.2d 51 (D.C.Cir.), *cert. denied*, 419 U.S. 996 (1974). The FCC had found a religious radio station, which it had licensed, guilty of religious discrimination in its employment practices.

242. *Id.* at 61. "It is reasonably clear that the 1972 exemption violates the Establishment Clause." *Id.* at 54 n.7. It "appears unconstitutional on Fifth Amendment grounds as well" as violating equal protection. *Id.* at 57. A federal district court in Maryland called it "a remarkably clumsy accommodation of religious freedom with the compelling interests of the state, providing . . . far too broad a shield for the secular activities of religiously affiliated entities with not the remotest claim to first amendment protection." EEOC v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255, 260 (N.D. Tex. 1980), *aff'd in part and rev'd in part on other grounds*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

243. 498 F.2d at 55, 61.

244. *Id.* at 55.

245. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1538, 1548 (1979).

A California court held for a church which dismissed a part-time organist for his admitted homosexual activity.[246] Despite the local gay rights ordinance,[247] the church fired the man on the basis of its religious belief in the sinfulness of homosexuality.[248] The court sided with the church.

The Supreme Court, in *NLRB v. Catholic Bishop of Chicago*,[249] reviewed the question of whether religious schools were exempt from a duty under the National Labor Relations Act (NLRA)[250] to bargain collectively with teachers' unions. The Court, divided five to four, found a risk of excessive entanglement, but avoided ruling on the constitutionality of the statute by declaring that since there was no clear expression of Congressional intent to include religious schools, the NLRA was inapplicable.[251]

In *United States v. Lee*,[252] the Supreme Court denied Amish employers a religiously based exemption to payment of social security tax. Although defendent was a farmer, who employed only a few workers who were also Amish, and was acting on his religious beliefs, the Court found an "overriding governmental interest" in social welfare.[253] On balance, it found a "broad public interest in maintaining a sound tax system" which completely outweighed the conflicting religious belief.[254]

The courts have allowed religious organizations to discriminate against their employees on the basis of religion and if the employees are considered to be "ministers." Religious schools have been declared exempt from the requirements of the NLRA. However, when there is an important government interest, such as taxation, the religious employer must obey the law. Some courts have questioned the exemption of religious employers from Title VII of the Civil Rights Act. In a Canon 812 situation, a court could uphold the exemption and side with the religious employer. Alternatively, a court could side with the employee and use such a case to

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246. Walker v. First Orthodox Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. S.F. 1980).

247. San Francisco, Ca., Mun. Code art. 33 §§ 3301-10 (1978).

248. 22 Fair Empl. Prac. Cas. at 764. *See* Shaffer, *The Boundaries of a Church's First Amendment Rights as an Employer*, 31 Case W. Res. L. Rev. 363 (1980-81).

249. 440 U.S. 490 (1979).

250. 29 U.S.C. §§ 158 (a)(5) & (a)(1) (1970).

251. 440 U.S. at 502, 507.

252. 455 U.S. 252 (1982).

253. *Id.* at 257-58.

254. *Id.* at 260.

challenge the constitutionality of the exemption.

D. Employment Discrimination in Religiously Affiliated Institutions of Higher Education

The University of Santa Clara, a Jesuit institution, claimed absolute automony as a religious institution to hire and fire its employees as it saw fit.[255] The federal district court invoked the balancing test and denied the university's claim of automony and its motion for summary judgment.[256]

The District of Columbia Circuit Court of Appeals, in *Granfield v. Catholic University of America*,[257] held that religious discrimination in the form of lower salaries for clerical law faculty than for their lay colleagues was permissible. It viewed the situation as a religion, through an affiliated institution, discriminating against its own members.[258] The court observed that: "[t]he salary scale for priests in a church-related institution clearly appears to be an internal matter of the religious institution affected."[259] Therefore the court held that the dispute "must be resolved within the confines of the religious body involved," since this was an area in which the "courts have traditionally refused to become involved."[260] The fact that the church-minister relationship was a central aspect of the case may have swayed the balance to the side of the religion. Yet a university is not a church and the ministerial status of the plaintiffs was basically irrelevant to their employment status as law professors. This solution gives little hope for the vindication of the rights of the clerical faculty members.

The Supreme Court in *NLRB v. Yeshiva University*[261] excluded college professors from rights under the NLRA.[262] Its rationale was that the authority which university faculty exercised would be considered equivalent to that of management in other contexts. Therefore, the Court found that faculty came under the

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255. NOW v. President of Santa Clara College, 16 Fair Empl. Prac. Cas. (BNA) 1152 (N.D. Cal. 1975).

256. *Id.* at 1159.

257. 530 F.2d 1035 (D.C. Cir.), *cert. denied*, 429 U.S. 821 (1976).

258. *Id.* at 1047.

259. *Id.*

260. *Id.*

261. 444 U.S. 672 (1980).

262. *See supra* note 250.

managerial exemption from the Act.[263] This decision ignored the common reality that in many colleges and universities decisions regarding faculty hiring, salaries, and tenure come under the veto power of administrators who are not members of the faculty.

In a pair of sex discrimination cases the Fifth Circuit debated the constitutional issues in relation to a seminary and a college. In *EEOC v. Southwestern Baptist Theological Seminary*,[264] the court affirmed the right of a seminary to discriminate on the basis of sex or religion with respect to its faculty, whom the court considered as ministers, but not with respect to its administration or staff. One problem with this decision is a question of factual accuracy. In many seminaries, the administrators are most likely to be clergy, whereas many of the faculty are laypersons.

The other Fifth Circuit case, *EEOC v. Mississippi College*,[265] involved a woman psychology professor who had not been hired for a full-time position at a Baptist college, where she taught part-time. She filed charges of race and sex discrimination. The college argued that it had discriminated only on the basis of religion, rejecting her because she was not a Baptist. Religious discrimination in hiring was permissible under Title VII of the Civil Rights Act.[266] The court held that if the evidence demonstrated that the real cause of employment discrimination was religious, then the EEOC had no jurisdiction to investigate the religious institution.[267] However, the court dismissed the college's broader argument that the employment relationship between religious institutions and their faculty is exempt from Title VII. It found, on the contrary, that a college is not a church, and its faculty and staff are not ministers or their equivalents. Thus "[t]he employment relationship between Mississippi College and its faculty and staff is one intended by Congress to be regulated by Title VII."[268] Only employment decisions made by religious institutions on the basis of religious discrimination are exempt from Title VII and therefore from government regulation.[269]

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263. 444 U.S. at 686. The NLRA upholds the rights of employees, but not those of managers. *See* 29 U.S.C. §§ 152(3) and (11), 164 (a) (1976).

264. 651 F.2d 277 (5th Cir. 1981).

265. 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

266. 42 U.S.C. § 2000e-1 (1976). *See* 626 F.2d at 484.

267. 626 F.2d at 485.

268. *Id.*

269. *Id.* at 487.

In *Mississippi College*, the court found neither excessive entanglement for establishment, nor prohibition of free exercise.[270] It concluded that "the government's compelling interest in eradicating discrimination is sufficient to justify the minimal burden imposed upon the College's free exercise of religious beliefs that results from the application of Title VII."[271]

Mississippi College implies that sex discrimination, like race discrimination, outweighs the burden on free exercise caused by a Title VII investigation of an institution's employment practices.[272] The decisions in this case and in *BJU* may indicate that a "religious claim unrelated to actual worship, ritual or other integral religious activities of a church is outweighed as a matter of law by the governmental interest in maximizing equal opportunity."[273]

Thus in the area of government regulation of religiously affiliated colleges and universities there are a broad spectrum of principles which might be applied to a Canon 812 situation. The courts have looked closely at the nature of Catholic universities and their theology departments in determining the permissibility of government aid. Institutions which affirm academic freedom, which are economically and organizationally independent of a church, and which apply professional standards in the teaching of theology and in the hiring of faculty, were considered not "pervasively sectarian." Such institutions are, therefore, eligible for aid. In a Canon 812 situation a university could be called to compromise its commitment to academic freedom and to professional standards in theology hiring and curriculum. Such a decision on the part of a Catholic university could be at the cost of its eligibility for state and federal funds.

The courts have balanced government public policy interests against possible burdens on the free exercise of religion in regard to tax exemption and application of federal regulations. In the area of race discrimination, the courts have found a compelling governmental interest which unquestionably outweighs any burden on free exercise. In the area of discrimination on the basis of religion, religious institutions are presently free to do much as they like. However, in the area of sex discrimination, the law is presently un-

270. *Id.* at 488.

271. *Id.* at 489.

272. *See* Note, *EEOC v. Mississippi College: The Applicability of Title VII to Sectarian Schools*, 33 BAYLOR L. REV. 380, 389 (1981).

273. Bagni, *supra* note 245, at 1344.

clear. The Fifth Circuit decision in *Mississippi College*[274] may indicate the beginning of a trend toward compelling religious institutions to refrain from sex discrimination in employment. Since Canon 812 could well be used to force hiring of Roman Catholic clerics to teach theology, all of whom are at present male and most of whom are white, this could be a relevant factor.[275] Thus if the race issue were raised in a Canon 812 case, or if prevention of sex discrimination in employment were held to be a sufficiently compelling public policy interest, Catholic universities could not only face sanctions under the Civil Rights Act, but could also possibly lose their tax exempt status.

IV. CONCLUSION

The tension remains between the law's attempt to protect the free exercise of religion and to prevent its establishment. Courts have often cited Jefferson's image of a "wall of separation between church and state" as their ideal.[276] Yet in practice the courts have had to become involved in religion through adjudication of intrareligious disputes and litigation over the constitutionality of tax exemption and government aid to and regulation of religious institutions. Most would agree that such a "wall of separation" is even less feasible today than it was when Jefferson first wrote these words.

One of the greatest problems experienced by the civil courts in their venture into religion cases has been their employment of a limited and inadequate definition and model of "religion." This model, which originated in the United States between the seventeenth and nineteenth centuries, understood "religion" in the conceptual framework of American Protestantism of that period. Such a model would later prove inadequate when the courts were confronted with cases involving the Orthodox and Roman Catholic churches.

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274. 626 F.2d 477.

275. A recent directive from the Vatican urged U.S. bishops to remove lay persons and religious women from teaching positions in Catholic seminaries. Nat'l Cath. Rep., Oct. 7, 1983, at 1, col. 3. *See also* Abuhoff, *Title VII and the Appointment of Women Clergy: A Statutory and Constitutional Quagmire*, 13 COLUM. J.L. & SOC. PROBS. 257 (1977).

276. Letter to Danbury Baptist Association (Jan. 1, 1802). *See* 98 U.S. at 164; 330 U.S. at 16.

One of the earliest cases, *Watson,*[277] formed the often cited distinction between churches of congregational and hierarchical polity. Yet this distinction was severely inadequate because its understanding of "hierarchical" was based upon the American Protestant model of a national denomination which had various administrative levels, each of which offered procedural tribunals for due process in adjudicating disputes. This distinction has now been more or less abandoned by the courts.

In the beginning, despite the first amendment problems, the Supreme Court presumed that religious organizations should be treated the same as other voluntary associatons when they came before the courts. The Court later turned about-face, developed and frequently applied its principle of compulsory deference to the highest ecclesiastical authority. Yet in each case it found itself examining ecclesiastical documents and polity. The Court often acknowledged the unworkability of this method because of the lack of criteria for deciding what the highest ecclesiastical authority actually was when this was a matter of controversy. And some voices also raised the question of the potential travesty of the rights of those deemed to have less ecclesiastical power. The Court tried to ameliorate this situation with its exceptions to the deference rule in cases of fraud, collusion, or arbitrariness.[278] But it then took away the third exception, leaving the first two intact.[279]

The guidelines for resolving intrareligious disputes today are unclear. The deference principle is still present, having been affirmed recently in *Serbian.*[280] But even in this opinion's strong denunciation of inquiry into church polity and examination of church documents, the Court, in fact, made such inquiry and examined relevant documents.[281] The most recent statement, in *Jones,*[282] is that the courts are free to use any method as long as they stay out of religious doctrine and practice. The Court has recommended the application of neutral principles of law as a more neutral and more workable approach than deference.[283]

The courts have issued a warning to the churches: write docu-

277. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).
278. Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929).
279. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976).
280. *Id.* at 724-25.
281. *Id.* at 716-17, 719.
282. *Jones v. Wolf,* 443 U.S. 595 (1979).
283. *Id.* at 603.

ments in "legally cognizable form" and they will be enforced.[284] This is well and good for the American Protestant churches. But it is difficult for the large international churches to write documents in American "legalese." Moreover, even if their local institutions have done so, a court could still ignore these documents and defer to an international ecclesiastical tribunal which might have no knowledge of the local situation and no regard for the rights of those involved.

The American courts have upheld the tax exempt status of and government aid to religious institutions, despite the vociferous opposition of antiestablishment groups.[285] Yet the courts have recently suggested that the tax exempt status is contingent on compliance with federal public policy of nondiscrimination, at least in the area of race.[286] And from the beginning, state aid to religious institutions of higher education has been contingent upon the character of these institutions. The Supreme Court found "significant differences" between higher education and the lower schools, because in the former the students were not subject or susceptible to religious indoctrination.[287] It was found important by the Court that theology courses were "taught according to the academic requirements of the subject matter and . . . professional standards."[288] Courts also noted the fact that both courses and faculty were ecumenical.[289] The Supreme Court further clarified its position in *Roemer*.[290] Government aid to "pervasively sectarian" institutions is unacceptable.[291] The Court listed factors which are significant in determining whether or not an institution is "pervasively sectarian." Among these are institutional autonomy, economic and organizational independence from the sponsoring church, no purpose of religious indoctrination, and intellectual and academic freedom.[292] The Court allowed the possibility of long-term annual government investigation of the practices of institutions receiving grants.[293]

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284. *Id.* at 606.
285. Walz v. Tax Comm'r, 397 U.S. 664 (1970).
286. Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983).
287. Tilton v. Richardson, 403 U.S. 672, 685-86 (1971).
288. *Id.* at 686.
289. *Id.*
290. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976).
291. *Id.* at 755.
292. *Id.* at 756-58.
293. *Id.* at 763-64.

The advent of these court opinions, as well as the requirements of federal and state funding statutes, caused many church-affiliated universities to secularize. Fordham, and other Catholic colleges in New York, went to the extreme of becoming "nonsectarian" for the purpose of meeting the requirements of the New York Constitution.[294]

Despite its constitutional mandate, the free exercise of religion has never been unlimited. The courts and legislators have distinguished between the unlimited freedom to believe and the limited freedom to act on that belief. They have set limits when religious practices, such as polygamy, contravened public mores,[295] or when acts such as snakehandling, child labor, or drug use threatened public health or safety.[296]

The courts developed a balancing test to use in such situations. If the governmental interest was found to be compelling or even important, it could outweigh the burden on free exercise of religion. In certain areas, such as taxation, military service and public health and safety, the government interest generally won without much struggle.[297] In the area of employment discrimination, the courts have ruled both ways. When the discrimination was within the internal affairs of a religion, such as the church-minister relationship, the courts have generally allowed the religion to do as it liked.[298] Yet even there a limit was suggested to a religion's choice of its own clergy: only "where no improper methods of choice are proven."[299] The implications of this dictum have not yet been explored, especially in the area of sex discrimination.

A religion has the greatest immunity from government or court intrusion when it acts strictly within its own boundaries. The courts have affirmed a church's right to determine and control its own internal organization. But as a religious institution ventures out from the center and becomes involved in secular activities, the

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294. N.Y. CONST. art. 11, § 3. *See* W. Gellhorn & K. Greenawalt, THE SECTARIAN COLLEGE AND THE PUBLIC PURSE (1970); J. HENNESEY, *supra* note 30; Greenawalt, *Constitutional Limits on Aid to Sectarian Universities*, 4 J. COLLEGE & UNIV. L. 177, 180-81 (1976-77). J. HENNESEY, *supra* note 31, at 323, notes that of the 239 Roman Catholic colleges in New York State at this time, 235 changed to secular status for this reason.

295. Reynolds v. United States, 98 U.S. 145 (1859). *See supra* note 232 and accompanying text.

296. *See supra* note 233 and accompanying text.

297. *See supra* note 234 and accompanying text.

298. *See supra* notes 235-275 and accompanying text.

299. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

possibility of government regulation increases.[300] A religious organization has "no claim to automony when it deals with outsiders who have not agreed to be governed by its authority," such as merchants or building contractors.[301] When the religious institution is an employer, the government will not tolerate violation of Title VII of the Civil Rights Act to condone race discrimination.[302] The Fifth Circuit has suggested that this may also be true for sex discrimination.[303] It declared that the relationship between a religious college and its faculty is not exempt from Title VII.[304]

Where does this leave the problem? First of all, if the Roman Catholic Church were to implement Canon 812 and try to remove present theology faculty members in violation of their contractual rights to employment or tenure,[305] the courts basically have two choices: to revive the compulsory deference principle and side with church authority, or to apply neutral principles of contract law, which would probably put them on the side of the faculty.

It may be suggested that the deference principle has never been workable and that now, after *Jones*, it is obsolete.[306] The deference approach ignores the realities of the situations of religions, the differences between the democratic polity of American Protestant churches, and the autocratic and international structures of churches such as the Roman Catholic and Eastern Orthodox. The deference rule also ignores the facts of change and development in church doctrine, law, and polity. In refusing to consider church documents, laws, and polity, the courts left themselves a fragmentary evidentiary base for their decisions.[307] In a Canon 812 dispute,

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300. Bagni, *supra* note 245, at 521.

301. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1406 (1981).

302. 103 S. Ct. at 2022.

303. EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

304. *Id.* at 485.

305. CIC II is not retroactive. But it does apply to anyone hired or tenured after November 27, 1983. A case could arise, for example, in which an employee, who had been hired or tenured in December, 1983, could be fired under Canon 812 in 1984.

306. 443 U.S. at 602. The deference rule still could be revived in the future. It has not been overruled.

307. Laycock, *supra* note 301, at 1391. For example, throughout the past century, the Roman Catholic Church has consistently and officially affirmed human rights, including the rights to organize labor unions and to bargain collectively. *See* LEO XIII, *Rerum Novarum* (1890); PIUS XI, *Quadragesimo Anno* (1931), DIVINI REDEMPTORIS (1937); JOHN XXIII, *Mater et Magistra* (1961), PACEM IN TERRIS (1963); VATICAN II, *Pastoral Constitution on the*

it would be crucial for the courts to be able to examine the Code of Canon Law and to ask whether there has been compliance with the Code's own precepts, such as due process and non-retroactivity.[308] Finally the deference principle can create an unconstitutional establishment of a religion or of the most powerful group within a religion.

Furthermore, if implementation of Canon 812 resulted in church interference with academic standards in theology departments or with faculty hiring, firing, or tenure decisions, this could cost the university its state and federal funds and possibly even its tax exempt status if it involved forms of discrimnination other than religious.[309] For the courts to allow religious institutions a broad exemption from the Civil Rights Act also could raise problems of an unconstitutional establishment of religion.

What would be the position of the universities and the academic community if such a situation arose? Historically in the United States one of the most important goals which universities have pursued and for the most part now accomplished has been independence and autonomy in matters such as choice of faculty and academic standards.[310] Government regulation today is, however, not viewed as a problem. Recent polls have shown that the academic community generally approves increased government regulation and is committed to the same social justice goals as federal policy.[311] Moreover, those in the academic community are well aware that a separation of Roman Catholic theology from the professional standards of the field would lead to its demise as an academic discipline in the university. There are few today who would wish an end to the now highly respected field of academic theology and a return to religious indoctrination.

Church in the Modern World (Gaudium et Spes) (1965), *Declaration on Religious Freedom* (Dignitatis Humanae) (1965). It may be suggested that this fact might have been considered relevant to the cases in which the courts upheld the refusal of Catholic schools and hospitals to recognize labor unions. *See* NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

308. *See supra* notes 78-79, 86-88, 106-07, 145-46 and accompanying text. The implied consent theory, which has been used as a justification for compulsory deference, would not be appropriate in a situation in which it is unclear to which authority, law, or policies church members actually gave their consent. *See Watson* 80 U.S. (13 Wall.) at 729.

309. *See supra* notes 198-230 and accompanying text; EEOC v. Southwest Baptist Theological Seminary, 651 F.2d at 286.

310. Lacovara, *How Far Can the Federal Camel Slip Under the Academic Tent?* 4 J. COLLEGE & UNIV. L. 223, 226, 230 (1976-77).

311. Oaks, *A Private University Looks at Government Regulation*, 4 J. COLLEGE & UNIV. L. 1, 2 (1976-77).

Ultimately what is at stake is the continued existence of the American Catholic college and university. The Catholic university may have to choose between its own self-understanding and vision of its purpose, and submission to canon law. As long as such institutions are separately incorporated, ecclesiastical authorities probably could not have recourse to the civil courts to enforce their claims to authority over faculty, curricula, or property. If an institution chose to submit to Canon 812, subsequent judgments against it[312] and loss of government funds could force its closure. If it chose to ignore ecclesiastical authority, the Church could sever its affiliation with the institution and with the individuals involved. Neither alternative is desirable for the Catholic university.

An American Jesuit wrote recently:

> The university's respect for its constituencies and the wise use of its intrinsic authority to cause the least harm and the most good for the commonwealth of its constituencies should give the university an authoritative autonomy sufficient to stand up to the pressures applied by outside communities and institutions. But because the university happens to be one of the most influential institutions in the nation, whose decisions inevitably and deeply affect society at large, it must continually resist those who attempt to own it by manipulating it to enhance the interests of a particular business, government, church group, or other constituency.[313]

This Comment expresses the hope that Canon 812 will never be implemented. When a legal system attempts to enforce a law which is contrary to the mores of the community upon which it is imposed, enforcement becomes difficult, if not impossible, and the whole legal system loses respect in the eyes of the community.[314] The Roman Catholic Church has proclaimed social justice in all areas, including that of employment, in its official teachings.[315] It is unfortunate that the new Code of Canon Law contains precepts in Canon 812 which could cause ecclesiastical authorities to act in

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312. A priest faculty member brought suit against Loyola Marymount University for unjust dismissal, claiming $300,000 in compensatory damages and $1 million in punitive damages. Nat'l Cath. Rep. Sept. 9, 1983, at 3, col. 1.

313. D. HASSEL, CITY OF WISDOM: A CHRISTIAN VISION OF THE AMERICAN UNIVERSITY 56 (1983).

314. Implementation of a canon such as CIC II, C.812 could lead to the disregard of the new Code of Canon Law by U.S. Catholics and to the demise of its authority in much the same way as the encyclical of PAUL VI, *Humanae Vitae*, caused a disregard of papal authority in the area of sexual ethics. *See* J. HENNESEY, *supra* note 31, at 328.

315. *See supra* note 307.

ways contrary to the Church's teachings and to American law and public policy.

The American constitutional concept of freedom of religion is a value to be affirmed. Freedom does not, however, mean license to do acts which will harm others or destroy their civil rights. Ultimately the exercise of freedom by one person or group causes a limitation of the freedom of others. The courts must weigh the balance, carefully choosing which values they allow to outweigh other values and seeking freedom of religion without tyranny of religious power groups.

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