NOTE

CHURCH PROPERTY AND INSTITUTIONAL FREE EXERCISE: THE CONSTITUTIONALITY OF VIRGINIA CODE SECTION 57-9

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THIS Note argues that Section 57-9 of the Code of Virginia interferes with the free exercise of religion in violation of the U.S. Constitution. Section 57-9 is at the forefront of a national dispute over church property resulting from the departure of conservative congregations from the Episcopal Church of the United States. The statute purports to determine property rights in the event of a church division, but in doing so challenges the constitutional boundaries of a religious institution's free exercise rights. Although Virginia's statute is unique, its implications with respect to the ability of the government to regulate religious polity and the role of courts in resolving church property disputes are broadly applicable. Not surprisingly, people from across the country have been following recent litigation involving the statute.

Section 57-9 highlights historic uncertainty regarding the scope of free exercise rights for religious institutions, particularly in the context of church property. In the face of this uncertainty, three possible applications of the statute are addressed. One considers the statute narrowly within the context of the "neutral principles of law" approach for resolving church property disputes. A second discusses Section 57-9 as a neutral and generally applicable law. Finally, a third considers the statute broadly, as a special statute that regulates

[*] J.D. Expected 2010, University of Virginia School of Law. I would like to thank Troutman Sanders LLP for the opportunity to work on litigation related to § 57-9 of the Code of Virginia during my employment as an associate in the summer of 2008 and in a research assistance capacity in the fall and winter of 2008. The opportunity exposed me to the important issues surrounding the statute and helped to motivate my own independent research, which formed the basis of this Note.

property holdings of religious institutions. Despite the various ways to characterize the statute, under each view Section 57-9 violates the free exercise rights of the religious institutions it regulates.

INTRODUCTION

Virgina Code Section 57-9[1] is at the forefront of a national dispute over church property. The statute purports to determine property rights in the event of a church division, but in doing so challenges the constitutional boundaries of a religious institution's free exercise rights. The extent to which the Free Exercise Clause of the First Amendment protects a religious institution's internal governance structure from state interference is uncertain. If the state regulates religious property, to what extent can it infringe upon the manner in which religious institutions organize property rights? Should the state exempt itself altogether from property disputes that involve religious doctrine? Can the state provide special rules governing religious property disputes that are distinct from the rules for voluntary secular organizations? Answers to these questions are unclear, and, as a result, religious institutions struggle to shape their internal governance structure in a way that is consistent with religious beliefs and state requirements.

Schisms in religious institutions create flashpoints for controversy over the state's role. Often, competing factions of the formerly united religious institution vie for the rights to the religious property, and civil courts are called upon to interpret the governance structure and resolve questions of entitlement. Recent disputes over property resulting from splits within the Episcopal Church of the United States (the "Episcopal Church") have highlighted the need to clarify the constitutional boundaries. Across the nation, conservative congregations of the Episcopal Church have broken away from the church over theological issues.[2] The result-

[1] Va. Code Ann. § 57-9 (2008).

[2] Michelle Boorstein & Jacqueline L. Salmon, Court Ruling Boosts Breakaway Churches, Wash. Post, Apr. 5, 2008, at B1 (discussing the national conservative movement); Alan Cooperman & Michelle Boorstein, Congregants in Legal Limbo Over

ing fight over property rights to the local churches has erupted in civil litigation.[3]

Section 57-9 of the Code of Virginia has helped to place Virginia at the center of the Episcopal Church controversy. Section 57-9 is a Civil War era statute that addresses which party retains legal title to church property when a division occurs within a church whose property is held by trustees.[4] The statute only applies to religious institutions and treats hierarchical and congregational churches separately.[5] It controversially places a congregational form of governance on hierarchical churches by granting congregations the right to determine, by majority vote, to which branch of the church the congregation wishes to belong. In combination with a statutory scheme that regulates property of religious institutions in Virginia, Section 57-9 also restricts the ways in which hierarchical churches can hold property.

Nine Episcopal congregations in Virginia invoked the statute after they voted to leave the Diocese of Virginia and the Episcopal Church in December 2006.[6] The congregations argued there was a "division" in the church, which created a "branch" of the church. The congregations asserted they had become a part of the new branch and retained ownership of the real and personal property held by the parishes' trustees.[7] As a hierarchical church, the Episcopal Church challenged the application of Section 57-9, which led

Who Gets the House, Wash. Post, Jan. 29, 2007, at B3 (providing as examples theological disputes over the ordination of women, changes in the Book of Common Prayer, and more recently the consecration of a homosexual bishop).

[3] Boorstein, supra note 2, at B1, B5 (noting lawsuits in Virginia, California, and Ohio).

[4] Va. Code Ann. § 57-9(A) (2008).

[5] "Religious institution" and "church" are used interchangeably for the most part, even though the concepts discussed are applicable to all faiths and not just those that form churches.

[6] In re Multi-Circuit Episcopal Church Prop. Litig., 76 Va. Cir. 785, 826 (Va. Cir. Ct. 2008) [hereinafter In re Multi-Circuit Episcopal I] (discussing only eight of the nine congregations). See the April 10, 2007, Final Order transferring and consolidating the cases into the *In re Multi-Circuit Episcopal Chuch Litigation*, which notes that Church of the Word is the omitted ninth congregation that challenged that application of § 57-9. See also Laurie Goodstein, National Briefing South: Virginia: Church Claims Ownership of Property, N.Y. Times, Jan. 20, 2007, at A12.

[7] In re Multi-Circuit Episcopal I, 76 Va. Cir. at 830; see also Michelle Boorstein, State Files to Join Episcopal Case, Wash. Post, Jan. 12, 2008, at B3.

to litigation in 2007 with the congregations in Virginia.[8] The litigation has been watched closely by other major denominations, including Methodists and Presbyterians, who are also facing splits within their organizations and are battling in court over who owns the church property.[9] Also, Episcopalians across the country are following the case because it could set a precedent for conservatives who want to break away and hold onto property.[10]

Although Virginia's statute is unique, it raises broadly applicable constitutional issues with respect to church property and religious institutional autonomy. States have struggled with the constitutionality of their own statutes that regulate religious property. For example, in 2009 the California Supreme Court upheld a state statute governing religious property in an Episcopal Church property dispute and in effect granted the property rights to the national church.[11] Also in 2009, a Texas legislator introduced a bill modeled on Virginia Code Section 57-9, which was designed to help breakaway Episcopal congregations keep the property.[12] Statutes aside, states are also divided on the proper role of civil courts in resolving church property disputes, and courts have adopted a variety of methods to determine property rights. Thus, religious institutions, especially those that traverse state boundaries, face a minefield of uncertainty as they attempt to organize their property rights. As society continues to evolve, fissures in religious denominations will persist, with the inevitable consequence of property disputes. The litigation over Section 57-9 provides an opportunity to clarify the constitutional limits on state interference with church property, while setting a standard that can help create consistency among the states.

This Note will argue that Section 57-9 interferes with the free exercise of religion in violation of the U.S. Constitution.[13] Part I

[8] Michelle Boorstein, Trial Begins in Clash Over Virginia Church Property, Wash. Post, Nov. 14, 2007, at B1, B5.

[9] Boorstein, supra note 2, at B1, B5.

[10] Michelle Boorstein, Property Fight Drags on, and Legal Costs Grow, Wash. Post, Jan. 10, 2008, at B6.

[11] Episcopal Church Cases, 198 P.3d 66, 84 (Cal. 2009).

[12] Sam Hodges, Bill Would Alter Law on Church Land Disputes, Dallas Morning News, Jan. 30, 2009, at 3B.

[13] This Note assumes that the Virginia and U.S. constitutional free exercise privileges are construed identically. See Elliott v. Commonwealth, 593 S.E.2d 263, 269

will consider Section 57-9's text and the history surrounding its adoption, along with Virginia's related statutory scheme governing property held for religious purposes. This Part also will examine applications of the statute and its potential to burden religious institutions. Finally, Part I will clarify historic uncertainty underlying the nature of Section 57-9's challenge to free exercise rights. In order to understand whether Section 57-9 violates the Free Exercise Clause, Part II will take a broad view of the scope of free exercise rights that religious institutions enjoy. This Part will review the uncertainty regarding religious institutional autonomy from state interference and will examine it in the context of church property. Part III will focus on the role of civil courts in resolving internal religious property disputes.

The final three Parts will turn to the possible applications of Section 57-9. Part IV will consider the statute most narrowly. It examines Section 57-9 within the context of the neutral principles approach, as either a presumptive rule of majority representation or a neutral principle (or method) for resolving disputes that avoids doctrine. Part V will discuss the possibility of Section 57-9 as a neutral and generally applicable law. Finally, Part VI will consider the statute most broadly, as a special statute that regulates property holdings of religious institutions. Despite the various ways to characterize the statute, under each view, Section 57-9 violates the free exercise rights of the religious institutions it regulates.

I. VIRGINIA CODE SECTION 57-9

Section 57-9 of the Virginia Code only applies to religious institutions and "recognizes a distinction between an autonomous congregation and one which is part of a supercongregational or hierarchical denomination in providing for the determination of property

(Va. 2004) (stating that the First Amendment and Virginia Constitution are "coextensive" with respect to free speech provisions); Va. Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682, 691 (Va. 2000) (stating that Article I, § 16 of the Virginia Constitution is a parallel provision to the Establishment Clause). Note, however, that the Supreme Court of Virginia has never directly addressed whether the Free Exercise Clause and Article I, § 16 should be treated identically. Given both the difference in the language between the clauses and Virginia's history regarding a robust interpretation of free exercise rights, it might be argued that Virginia should be more protective of those rights. See infra Section I.D.

rights upon a division of a church or congregation."[14] Section 57-9(A) applies when a division has occurred "in a church or religious society, to which any . . . congregation . . . is attached."[15] If the congregation's property is held by trustees, the "members . . . over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong."[16] Subsection A thus applies to a supercongregational or hierarchical church whose property is held by trustees, such as Episcopalian, Methodist, and Presbyterian churches.[17] Other hierarchical churches, such as the Roman Catholic Church, are unaffected by the statute because their title to church property is held by ecclesiastical officers.[18] Section 57-9(B), in contrast, applies to a congregational church, "which, in its organization and government, is a church or society entirely independent of any other church or general society."[19] Upon a division in this type of church, the majority of the members are "entitled to vote by its constitution" or "where it has no written constitution, entitled to vote by its ordinary practice or custom."[20] Such a vote decides the "right, title, and control of all property held in trust for such congregation."[21] Thus, for congregational churches, such as the Baptist church, the state defers to the organization's constitution or custom, while for hierarchical churches the state imposes the rule of local or congregational majority vote. Finally, decisions made under subsections A and B are to be reported to the circuit court and shall be conclusive as to the title to the property.[22]

[14] Norfolk Presbytery v. Bollinger, 201 S.E.2d 752, 755 (Va. 1974).
[15] Va. Code Ann. § 57-9(A) (2008).
[16] Id.
[17] See Baber v. Caldwell, 152 S.E.2d 23, 26–27 (Va. 1967).
[18] In re Multi-Circuit Episcopal Church Prop. Litig., 76 Va. Cir. 894, 922 (Va. Cir. Ct. 2009) [hereinafter In re Multi-Circuit Episcopal II] (noting the practice among the Greek Orthodox, Foursquare, and Latter-Day Saints Churches as well).
[19] Va. Code Ann. § 57-9(B) (2008).
[20] Id.
[21] Id.
[22] Id.

A. History Surrounding the Adoption of Section 57-9

Section 57-9 was enacted in 1867[23] against a historical backdrop of church divisions. From the early to mid-nineteenth century there were various splits within multiple religious denominations across the country.[24] One of the most prominent divisions was in the Methodist Episcopal Church, which is a hierarchical church.[25] In 1844, the Methodist Episcopal Church's General Convention adopted a formal plan of division that split the church into northern and southern branches.[26] The plan provided for congregations in areas bordering on the line of the division to choose, by majority vote, whether to affiliate with the northern or southern branch.[27] This division led to litigation in Virginia and other states, as congregations for the next two decades sought to change their affiliation and establish property rights.[28]

After the Civil War, in 1867, the Virginia General Assembly enacted a procedure for determining property rights in the event of church divisions. The statute's sponsor, John Baldwin, was then Speaker of the House of Delegates and a Methodist.[29] The statute provided,

> [W]hereas divisions have occurred in some churches or religious societies to which such religious congregations have been attached, and such divisions may hereafter occur, it shall in any such case be lawful for the communicants . . . by a vote of a ma-

[23] 1867 Va. Acts 649–50.

[24] In re Multi-Circuit Episcopal II, 76 Va. Cir. 894, 918 (Va. Cir. Ct. 2009); see also In re Multi-Circuit Episcopal I, 76 Va. Cir. 785, 835–63 (Va. Cir. Ct. 2008) (noting expert testimony indicating splits among Methodists, Baptists, and Presbyterians).

[25] See Humphrey v. Burnside, 67 Ky. (4 Bush) 215, 225–26 (1868) (stating the separation "was an event that . . . formed a part of, the history of the country, of which no well-informed man could be ignorant").

[26] See Smith v. Swormstedt, 57 U.S. 288, 298–99, 301 (1853).

[27] See Brooke v. Shacklett, 54 Va. (13 Gratt.) 301, 321–22 (1856).

[28] See Hoskinson v. Pusey, 73 Va. (32 Gratt.) 428 (1879); *Shacklett*, 54 Va. (13 Gratt.) 301; *Humphrey*, 67 Ky. (4 Bush) 215.

[29] In re Multi-Circuit Episcopal I, 76 Va. Cir. 785, 843 (Va. Cir. Ct. 2008); see also Hamilton James Eckenrode, The Political History of Virginia During the Reconstruction 41 (The John Hopkins Press 1904) (J.M. Vincent et al., eds.).

> jority of the whole number . . . to determine to which branch of the church or society such congregation shall thereafter belong.[30]

Furthermore, such votes were "conclusive as to the title to and control of any property held in trust for such congregation."[31] By permitting the local or congregational majority vote to control property in hierarchical churches, the statute effectively codified the arrangement ordered by the Methodist Episcopal Church. Not long after its adoption, a Methodist congregation, represented in court by John Baldwin himself, invoked the statute in its favor.[32] Twenty-nine petitions were made to the court for approval under Section 57-9. Twenty-five were congregations attached to the Methodist Episcopal Church (voting to join either the northern or southern branch) and the other four congregations were Presbyterian.[33]

B. Virginia's Statutory Scheme Governing Property Held for Religious Purposes

Section 57-9 is connected to a larger statutory scheme in Virginia that governs property held for religious purposes.[34] Overall, the code emphasizes a distinction between congregational and hierarchical churches.[35] It also requires that a trust for an indefinite beneficiary (such as an individual or unincorporated body) be expressly validated by statute.[36] Section 57-7.1 validates transfers of religious property that are "made to or for the benefit of any church, church diocese, religious congregation or religious society."[37] There are two sections of the code that provide alternative methods for hold-

[30] 1867 Va. Acts 649–50. The original statute, much like § 57-9, included a separate provision for divisions in congregational churches.

[31] Id.

[32] See *In re Multi-Circuit Episcopal I*, 76 Va. Cir. at 843.

[33] Id. at 844.

[34] Va. Code Ann. §§ 57-7.1 to -17 (2008).

[35] See Reid v. Gholson, 327 S.E.2d 107, 112–13 (Va. 1985); Norfolk Presbytery v. Bollinger, 201 S.E.2d 752, 755 (Va. 1974).

[36] See *Norfolk Presbytery*, 201 S.E.2d at 757.

[37] Va. Code Ann. § 57-7.1 (2008). The Supreme Court of Virginia interpreted "church," "religious congregation," and "religious society" in § 57-7 to mean the local congregation, not a larger part of a hierarchical entity. *Norfolk Presbytery*, 201 S.E.2d at 757. The Supreme Court of Virginia has not, however, determined whether that interpretation applies to § 57-7.1.

ing religious property. Section 57-16(A), enacted in 1942, permits church property to be held in the name of an ecclesiastical officer.[38] Section 57-16.1, enacted in 2005, permits an unincorporated church or religious body to create a corporation to hold, administer, and manage its real and personal property.[39] Thus, if a hierarchical body wants to avoid having the congregational form of governance imposed on it by Section 57-9(A), the alternative options of incorporating or titling the property in the name of an ecclesiastical officer are found in the other statutes. Finally, Section 57-15 addresses alterations made to church property outside of the context of a church division.[40]

C. Applications of Section 57-9 and the Burden on Religious Institutions

There is little case law involving the application of Section 57-9.[41] In *Baber v. Caldwell*, the Supreme Court of Virginia in 1967 considered a dispute within a congregation over a pastor and the use and control of church property.[42] The Court found that the church was autonomous, or congregational, and so subsection B of the statute was applicable. Applying subsection B, the Court stated that the majority of the congregation "cannot, by reason of a change of views on religious subjects, divert the use of the property 'to the support of new and conflicting doctrine.'"[43] Finding no such change of views, the Court remanded the case for a determination on the validity of the majority vote meeting.[44] Not until the Episcopal Church property dispute erupted in the Circuit Court of Fairfax County in 2007 did a Virginia court address either subsection A or the statute more broadly. In the recent conflict, the Episcopal

[38] Va. Code Ann. § 57-16(A) (2008).

[39] Va. Code Ann. § 57-16.1 (2008). This was enacted in response to the court's holding in *Falwell v. Miller*, 203 F. Supp. 2d 624, 626 (W.D. Va. 2002).

[40] Va. Code Ann. § 57-15(A) (2008).

[41] See In re Multi-Circuit Episcopal I, 76 Va. Cir. 785, 850–63 (Va. Cir. Ct. 2008) (reviewing Virginia case law related to church divisions); see also Green v. Lewis, 272 S.E.2d 181, 184 (Va. 1980) (citing § 57-9 to support the proposition that courts in Virginia must look to the organizational structure of the church); *Norfolk Presbytery*, 201 S.E.2d at 754–55 (same).

[42] 152 S.E.2d 23 (1967).

[43] Id. at 25 (quoting Cheshire v. Giles, 132 S.E.2d 479, 481 (Va. 1926)).

[44] Id. at 27–28.

Church challenged the applicability of the statute, by focusing on the meaning of the word "division" and whether the Episcopal dispute constituted the type of division implied by the statute.[45] The Circuit Court held that there was a "division" and, as part of a hierarchical church, the congregation had properly invoked Section 57-9(A).[46] The Episcopal Church also challenged the constitutionality of the statute,[47] but the court ruled that, as applied, Section 57-9 was constitutional.[48]

The recent application of the statute to the Episcopal Church dispute provides an example of the free exercise burden Section 57-9 imposes on religious institutions. The central claim is that permitting a congregation to control church property by majority vote invades the internal governance of the Episcopal Church. Virginia courts have recognized that "[i]n the case of a supercongregational or hierarchical church . . . the will of a majority within the local church or parish does not decide property rights. Such a church is subject to the constituted authorities of the general church."[49] The Episcopal Church does not employ local or congregational majority vote with respect to how it organizes its property. The constitutions of the church state that the church property is held in trust for the Diocese and cannot be disposed of or encumbered without the permission of the diocesan authorities.[50] In direct conflict, Section 57-9 imposes a default form of congregational governance. Thus, it interferes with the decision of the Episcopal Church on how to structure property rights—a decision that is informed by religious faith and makes an impact on buildings devoted solely to religious worship. The Church is further burdened by Virginia's statutory scheme that does not recognize trusts for hierarchical churches. Instead, Virginia forces the Church either to

[45] See Meghan Cecilia McElroy, Note, Possession is Nine Tenths of the Law: But Who Really Owns a Church's Property in the Wake of a Religious Split Within a Hierarchical Church?, 50 Wm. & Mary L. Rev. 311, 338–47 (2008) (proposing a rubric for understanding the term "division" in § 57-9).

[46] In re Multi-Circuit Episcopal II, 76 Va. Cir. 894, 897 (Va. Cir. Ct. 2008).

[47] Section 57-9 was challenged under the Free Exercise, Establishment, Equal Protection, and Takings Clauses. See id. at 898.

[48] Id. at 912.

[49] Diocese of Sw. Va. v. Buhrman, 5 Va. Cir. 497, 502 (Clifton Forge Cir. Ct. 1977).

[50] Raymond J. Dague & R. Wicks Stephens, Considerations Specific to Episcopalians, *in* A Guide to Church Property Law: Theological, Constitutional and Practical Considerations 118, 123–25 (Lloyd J. Lunceford ed., 2006).

hold property in the name of an ecclesiastical officer (something that goes against the religious beliefs of the Episcopal Church) or, starting in 2005, to incorporate. Therefore, Section 57-9 has potential to create a burden on religious institutions by requiring certain forms of property ownership and imposing a form of governance at odds with religious belief.

D. Section 57-9's Challenge to Free Exercise Rights

In considering how Section 57-9 challenges free exercise rights, it is necessary to consider Virginia's role in shaping those rights. Article 1, Section 16 of the Virginia Constitution states, in part, "[t]hat religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[51]

Virginia has led the development of the principles that guide the free exercise of religion in this country from its inception. Long before the Free Exercise and Establishment Clauses of the U.S. Constitution were proposed in 1789 and ratified in 1791,[52] the American colonies struggled with the relationship between church and state. Although the meaning of the free exercise of religion was shaped by a variety of perspectives given the religious diversity of the colonies,[53] no state was more at the forefront of the debate than Virginia.[54] James Madison and Thomas Jefferson were two of the most prominent figures in the development of free exercise principles.

[51] Va. Const. art. I, § 16.

[52] The First Amendment to the U.S. Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

[53] In Virginia, the Church of England was established and dedicated to governmental control over religion. This type of organization stood in stark contrast to Calvinists in New England who created a system of governance where authority was decentralized. See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1429–30 (1990) (reviewing the various approaches to church-state relations in the colonies).

[54] See Mathew D. Staver & Anita L. Staver, Disestablishmentarianism Collides with the First Amendment: The Ghost of Thomas Jefferson Still Haunts Churches, 33 Cumb. L. Rev. 43 (2002) (discussing Virginia's history with respect to the disestablishment of religion and analyzing the constitutionality of Virginia's now repealed prohibition against church incorporation).

Their influence shaped Virginia's 1776 Bill of Rights,[55] which served as a model for other state constitutions and eventually for the federal constitution.[56]

At its founding, Virginia favored a robust protection of the free exercise of religion. During the debate regarding the language of the religious liberty clause of the Virginia Bill of Rights, George Mason proposed using John Locke's vocabulary of "toleration of religion."[57] Madison, however, objected to the use of "toleration" on the ground that the word implies an act of legislative grace.[58] Instead, he offered a substitute: "all men are equally entitled to the full and free exercise of religion according to the dictates of conscience." This more sweeping philosophy—not just the "exercise," but the "free exercise" of religion—was accepted with only minor alteration.[59]

Compared to other states, Virginia also took an aggressive stance in protecting the scope of the right to free exercise of religion. The use of the word "exercise" allowed for religious liberty to extend beyond beliefs to include personal conduct and actions. Some states limited the protection of conduct to include only acts of "worship," which indicated rituals or ceremonial acts of religion.[60] Virginia took a broader approach by defining religion as "the duty which we owe to our Creator, and the manner of discharging it." In the biblical tradition, "duties" to God included actions, not just speech and opinion, and so free exercise rights extended to all of a believer's duties and included a choice of means as well as ends.[61] The federal Free Exercise Clause followed Virginia's more expansive model by protecting all aspects of religious exercise, rather than just worship.[62] Thus, Virginia helped direct the country toward a vibrant free exercise doctrine.

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[55] See Va. Bill of Rights of 1776, *reprinted in* 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States, at 1908 (Perley Poore ed., Government Printing Office 1878).

[56] McConnell, supra note 53, at 1436–37, 1455–56, 1460, 1480–81, 1488; see also Thomas E. Buckley, Church and State in Revolutionary Virginia, 1776–1787, at 155–64 (University Press of Virginia 1977).

[57] McConnell, supra note 53, at 1443.

[58] Id.

[59] Id. at 1462–63.

[60] Id. at 1459–60.

[61] Id.

[62] Id. at 1459–61.

The guarantee of the right to free exercise did not, however, clarify the nature of the state interest that could supersede a free exercise claim. A likely explanation is that this silence resulted from the inability of the Virginia legislature to decide between conflicting formulations proposed by Mason and Madison.[63] During the debate, Mason proposed "that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society."[64] Madison objected to the breadth of such a state interest limitation. He submitted instead that free exercise should be protected "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered."[65] This exception for state interference was much narrower than Mason's, which, with the inclusion of "happiness," would encompass most forms of legislation.[66]

The debate between Mason and Madison over the nature of the state interest that could supersede a free exercise claim persists today. Section 57-9 challenges the scope of the protection of religious liberty and has once again put Virginia at the forefront of free exercise controversy. In determining which party retains legal title to church property when a division occurs within churches whose property is held by trustees, Section 57-9 infringes on the right to free exercise of religion in two ways. First, as regulation of religious polity, the statute raises the question of the extent to which the state can interfere with a religious institution's internal governance. Second, as evidenced by the recent litigation in the Episcopal Church property dispute, the statute provides a method for civil courts to resolve issues over property rights. On both counts, the constitutional boundaries are unclear. Part II considers institutional religious autonomy over polity, while Part III focuses on the role of civil courts.

[63] Id. at 1463.
[64] Id. at 1462.
[65] Id. at 1463.
[66] No other state adopted a proviso as narrow as Madison's and only Delaware adopted one as broad as Mason's. Id. at 1463.

II. INSTITUTIONAL RELIGIOUS AUTONOMY

A. Free Exercise Rights for Religious Institutions

Section 57-9 implicates the scope of free exercise rights for religious institutions and the extent to which they extend to internal governance. The free exercise protections of the First Amendment have been applied beyond individuals to religious institutions. Such extension is straightforward. As Justice Brennan argues, "[r]eligion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause."[67] On one level, religious institutions reflect an aggregation of individuals "who hold in common a set of foundational beliefs and experiences."[68] Religious institutions, however, are often so large and complex that they are at times only tangentially shaped by the actions of individuals. Instead, they act as "ongoing and independent entities that influence in their own right how individuals think, express themselves, and act."[69] The interdependent nature makes religious communities "the vehicle for the development of doctrine."[70] Institutions allow for joint development of religious ideas and beliefs and permit individuals to put those beliefs into action.[71] As a result, they intertwine religious belief, individual conduct, and the development of religious doctrine.

One way in which institutions raise a unique set of free exercise issues is in their ability to reflect religious beliefs through their polity, or their governance and operational structure. Like individuals, institutions act in ways that intersect with government regulation. For example, litigation has involved disputes over the application

[67] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 341–42 (1987) (Brennan, J., concurring) (quoting 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, 1389 (1981)).

[68] Frederick Mark Gedicks, Toward a Constitutional Jurisprudence of Religious Group Rights, 1989 Wis. L. Rev. 99, 107 (1989).

[69] Id.

[70] Kathleen A. Brady, Religious Organizations and Free Exercise: The Surprising Lessons of *Smith*, 2004 BYU L. Rev. 1633, 1676 (2004).

[71] Id.

of federal civil rights statutes to employment decisions,[72] contractual agreements,[73] certification and curriculum requirements for church operated schools,[74] and zoning and historic preservation regulation.[75] Unlike individuals, however, institutions structure themselves in ways that are closely tied to religious values. This is reflected in the variety of forms of religious organizations. For example, Baptists, believing there is no need for an intermediary, arrange themselves in the congregational form with autonomous local units.[76] Conversely, hierarchical entities are organized as a body with other churches of similar faith and doctrine and have a common ruling convocation or ecclesiastical head.[77] The Roman Catholic Church, for example, believes in a permanent assembly where the Roman Pontiff is the head and the bishops govern churches assigned to them.[78] Although this distinction between congregational and hierarchical is most common, there is a broad spectrum of religious polity.[79] The link between doctrine and polity leads some to go as far as to argue that when the state "interferes with the allocation of authority and influence within a church, it interferes with

[72] See Equal Employment Opportunity Comm'n v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800–05 (4th Cir. 2000).

[73] See Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681, 683–84 (Ill. App. Ct. 1994); McKelvey v. Pierce, 800 A.2d 840, 856–59 (N.J. 2002).

[74] See Johnson v. Charles City Cmty. Sch. Bd. of Educ., 368 N.W.2d 74, 76 (Iowa 1985); State ex rel. Douglas v. Faith Baptist Church, 301 N.W.2d 571, 573 (Neb. 1981).

[75] See St. Bartholomew's Church v. City of New York, 914 F.2d 348, 350 (2d Cir. 1990); Soc'y of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 572 (Mass. 1990).

[76] See Michael W. McConnell et al., Religion and the Constitution 283 (2nd ed. 2006) (citing Normal H. Maring and Winthrop S. Hudson, A Baptist Manual of Polity and Practice chs. 3–5 (rev. ed. 1991)).

[77] Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 110 (1952).

[78] See McConnell, supra note 76, at 284 (citing the Catechism of the Catholic Church § 880, at 233 (1994)).

[79] See Catherine M. Knight, Comment, Must God Regulate Religious Corporations? A Proposal for Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act, 42 Emory L.J. 721, 726–27 (1993) (adding a third type of polity: the hierarchical presbyteral form, with power resting in decentralized administrative bodies, rather than individuals); Michael W. Galligan, Note, Judicial Resolution of Intrachurch Disputes, 83 Colum. L. Rev. 2007, 2023–25 (1983) (discussing multiple forms of church polity). See generally 2 J.L. Schaver, The Polity of the Churches (4th ed. 1947) (discussing the background history of Christian Reformed History and the Reformed Church Polity).

the very process of forming the religion as it will exist in the future."[80]

The manner in which religious institutions hold and distribute their property is closely tied to the overarching polity and religious values. The internal governance structure of a church reflects a carefully crafted distribution of power—power that determines how the entity organizes property rights. For example, congregational churches hold their property at the local level and tend to employ majority rule when there is a dispute.[81] Other religious forms that mix in hierarchical features manage property differently, often holding it in the name of an ecclesiastical officer or in trust for the general governing body.[82] Although these rights cover liquid assets and property, such as schools and hospitals, they also cover properties dedicated entirely to religious use. Thus, the polity chosen reflects the interconnected relationship between religious belief and property.

In addressing the free exercise rights of institutions, the Supreme Court has recognized the freedom of churches not only to determine their religious doctrine, but also to organize their internal structure.[83] The Court most prominently upheld the church's autonomy to be governed by its own polity in *Kedroff v. St. Nicholas Cathedral*, where it affirmed "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."[84] Also, in cases dealing with the role of civil courts in church property disputes, the Court has emphasized that courts should avoid resolving issues related to internal governance. Under one approach, for instance, civil courts are bound to accept the decisions of the highest judicatories of hierarchical religious organizations "on matters of discipline, faith, *internal organization*, or ec-

[80] Douglas 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, 1391–92 (1981).

[81] See McConnell, supra note 76, at 283.

[82] See A Guide to Church Property Law 123–25 (Lloyd J. Lunceford ed., 2006).

[83] See Andrew Soukup, Note, Reformulating Church Autonomy: How *Employment Division v. Smith* Provides a Framework for Fixing the Neutral Principles Approach, 82 Notre Dame L. Rev. 1679, 1709 (2007).

[84] Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107, 116 (1952).

clesiastical rule, custom, or law."[85] If courts alternatively use an approach that applies neutral principles of law to resolve the dispute, the Court stresses that courts must "completely" abstain from resolving "questions of religious . . . *polit[y]* and practice."[86]

B. Uncertainty over the Scope of Free Exercise Rights

Although the Court has recognized a right for religious institutions to organize according to their own doctrinal precepts, the degree to which the state can interfere with that right in light of the protection afforded by the Free Exercise Clause is unclear. To the extent that there is a doctrine related to autonomy for religious institutions, it evolved separately from the *Sherbert v. Verner*[87] test that balanced burdens on religious conduct with state interests. It also evolved before the Court's transformative holding in *Employment Division v. Smith*,[88] thus leaving unanswered questions about whether religious institutions might receive exemptions from neutral laws of general applicability. Instead, the doctrine is derived largely from a line of intra-church disputes in which courts were asked to determine which entity controlled property after a church division.[89] As a result, the doctrine is limited. Church property dispute cases only address the role of civil courts in interpreting religious documents and consider that role solely against the state's interest in peaceful resolution of disputes.[90] The Supreme Court has not directly addressed the scope of free exercise protec-

[85] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1975) (emphasis added).

[86] Jones v. Wolf, 443 U.S. 595, 603 (1979) (emphasis added). Also, the Supreme Court of Virginia has stated that "what is or is not an 'ecclesiastical dispute' is often debatable," but it is clear that "issues of church governance and matters of faith and doctrine are unquestionably outside the jurisdiction of the civil courts." Bowie v. Murphy, 624 S.E.2d 74, 78 (Va. 2006) (citing Reid v. Gholson, 327 S.E.2d 107, 111–13 (Va. 1985)).

[87] 374 U.S. 398, 404–06 (1963).

[88] 494 U.S. 872, 872 (1990).

[89] Soukup, supra note 83, at 1686–92; see also McConnell, supra note 76, at 295–96; Brady, supra note 70, at 1633–36.

[90] See *Jones*, 443 U.S. at 602; Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445 (1969).

tion when government regulation interferes with the internal affairs and governance of religious institutions.[91]

This Note focuses on religious institutional autonomy specifically with respect to polity and assesses the constitutionality of Section 57-9 across a range of views. At one end of the spectrum, it is argued that the doctrine supports a distinctive constitutional autonomy for religious institutions, one that permits exemptions from neutral laws of general applicability. This creates freedom from state interference that is, at least in certain spheres, complete.[92] Scholars argue that complete freedom for an institution, as opposed to an individual, is justified because religious groups play an essential role in formulating and shaping religious ideas. In order to protect those ideas institutions must be able to operate in an autonomous sphere.[93] The broad language the Supreme Court uses regarding religious freedom over doctrine and governance bolsters the argument for exemptions.[94] Finally, scholars argue that free exercise rights should extend beyond what the Court has recognized as judicial deference in religious controversies. Since government regulation "always imposes external rules," it acts as a greater intrusion into church affairs than judicial resolution of disputes.[95]

[91] Cases where the Court left the scope of free exercise protections for religious organizations unresolved include: *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334–40 (1987) (holding that an exemption permitting religious organizations to discriminate on the basis of religion in employment did not violate the Establishment Clause); *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 627–28 (1986) (abstaining from resolving the constitutionality of an exemption from state and federal antidiscrimination laws for a religious school); *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 506–07 (1979) (avoiding resolving First Amendment issues with the application of the National Labor Relations Act in religious schools).

[92] See Bruce N. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum. L. Rev. 1514, 1539 (1979) (arguing for autonomy over purely "spiritual" matters at the "core or heart" of the church); Brady, supra note 70, at 1636 (arguing for a broad right of church autonomy that extends to all aspects of church affairs); Soukup, supra note 83, at 1684 (arguing for three defined spheres of autonomous conduct: power over doctrine, power over structure, and power over ministerial relationship).

[93] See McConnell, supra note 76, at 308 (arguing that non-entanglement under the Establishment Clause and the potential for hybrid claims with other rights might be additional grounds for granting religious institutions a distinctive constitutional autonomy).

[94] See infra Section III.A.

[95] Laycock, supra note 80, at 1396; see also Brady, supra note 70, at 1633, 1638–39.

Thus, it is argued that religious institutions should receive deference in the form of exemptions from state laws that are neutral and generally applicable.

Whether the Free Exercise Clause protects a religious institution's polity with respect to property holdings to the extent that an institution can receive an exemption from a neutral law of general applicability is an open question. The Supreme Court has never extended the sphere of church autonomy to constitutionally mandated exemptions. The closest it came was in 1987 in *Corporation of the Presiding Bishop v. Amos* where the Court held that Congress could exempt "secular nonprofit activities of religious organizations" from Title VII's prohibition against religious discrimination without violating the Establishment Clause.[96] Lower federal courts have been willing to extend the exemption further.[97] The most common exemption is the "ministerial exception," which excuses the hiring of spiritual leaders from Title VII's nondiscrimination requirements.[98] There are no cases, however, indicating that any religious autonomy exemptions apply directly to church property laws or, more broadly, to government action that infringes on polity.

At the other end of the spectrum, it is argued that the state has the right to shape religious institutions through neutral laws of general applicability when the institution undertakes certain actions in society. This view essentially applies the *Smith* rule for individuals to institutions.[99] When a church wants to own property, make contracts, receive gifts, and run hospitals or schools there are

[96] 483 U.S. at 329–30. The Court did "assume for the sake of argument that the [religious-activities-only] exemption was adequate in the sense that the Free Exercise Clause required no more," but has not affirmatively answered that question. Id. at 336.

[97] See Catholic Bishop of Chicago v. Nat'l Labor Relations Bd., 559 F.2d 1112, 1130 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979); Carter v. Baltimore Annual Conference, No. 86-2543 SSH, 1987 WL 18470, at *1 (D.D.C. 1987).

[98] See Petruska v. Gannon Univ., 462 F.3d 294, 299 (3d Cir. 2006) (noting that the Third Circuit was the eighth federal circuit to use the ministerial exception); McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972) (dismissing the sex discrimination suit of a female minister who sought equal pay); see also Note, The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test, 121 Harv. L. Rev. 1776, 1777–80 (2008) (discussing the history and constitutional justifications for the ministerial exception).

[99] Brady, supra note 70, at 1635.

additional state interests at stake beyond resolving an internal religious dispute. In such situations, as long as the government regulation is neutral and generally applicable, the institution should adapt to laws reflecting those interests, no matter how much they interfere with internal governance.[100] The Supreme Court has not, however, extended *Smith* to government regulation that interferes with the internal affairs of religious groups. As a result, there remains substantial uncertainty over whether modern free exercise jurisprudence entitles religious institutions to heightened protection, either in the form of limits on the burdens imposed by the state or outright autonomy in certain spheres.[101]

III. THE ROLE OF THE COURTS IN RESOLVING INTERNAL PROPERTY DISPUTES

The doctrine involving church autonomy is primarily derived from a line of cases where the Supreme Court addressed the role of civil courts in church property disputes. Since Section 57-9 purports to operate in such a dispute, this Part now turns to that line of cases and their protection of free exercise rights. For the most part, resolutions of disputes among factions of religious groups have not involved legislatures. Rather, judicial approaches have developed as aspects of state common law and often consider what the religion clauses together require.[102] The Supreme Court has long recognized that civil courts have a role in resolving internal church property disputes. As the Court wrote in the seminal nineteenth-century case, *Watson v. Jones*, "[r]eligious 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."[103] The First Amendment, how-

[100] For example, a church may have to become a corporation because state law does not permit unincorporated associations to own land. See McConnell, supra note 76, at 283.

[101] Brady, supra note 70, at 1635–36.

[102] 1 Kent Greenawalt, Religion and the Constitution: Free Exercise and Fairness 261 (Princeton University Press 2006).

[103] 80 U.S. (13 Wall.) 679, 714 (1871).

ever, "severely circumscribes the role that civil courts may play in resolving church property disputes."[104]

The central requirement is that courts are prohibited from resolving church property disputes on the basis of religious doctrine and practice.[105] This principle was first enunciated by the Court in 1871, in *Watson v. Jones*, when it approved a "deference" approach requiring courts to defer to the judgment of hierarchical churches' highest tribunals on issues of doctrine or polity.[106] It was again reflected in 1979, in *Jones v. Wolf*, where the Court approved a "neutral principles of law" approach by which courts can apply "objective, well-established concepts of trust and property law familiar to lawyers and judges" in order to resolve disputes.[107] The *Jones v. Wolf* opinion, however, raised considerable uncertainty about the approach, creating conflicting results across the spectrum of state courts.[108] There is disagreement over what it meant by a "neutral principle,"[109] the proper process for applying them,[110] the degree of deference owed to the religious institution,[111] and even over whether certain components of the approach, such as an inquiry

[104] See Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).

[105] Id.; see also Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976); Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 368 (1970).

[106] 80 U.S. (13 Wall.) at 722–24, 726–27.

[107] Jones v. Wolf, 443 U.S. 595, 602–03 (1979).

[108] See Ashley Alderman, Note, Where's the Wall?: Church Property Disputes Within the Civil Courts and the Need for Consistent Application of the Law, 39 Ga. L. Rev. 1027, 1039–51 (2005); John E. Fennelly, Property Disputes and Religious Schisms: Who is the Church?, 9 St. Thomas L. Rev. 319, 342–43 (1997); Jeffrey B. Hassler, Comment, A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife, 35 Pepp. L. Rev. 399, 415–16 (2008); Natalie L. Yaw, Comment, Cross Fire: Judicial Intervention in Church Property Disputes after *Rasmussen v. Bunyan*, 2006 Mich. St. L. Rev. 813, 826 (2006).

[109] See Episcopal Church Cases, 198 P.3d 66, 84–86 (Cal. 2009) (Kennard, J., concurring and dissenting) (arguing that the statute is not a neutral principle because it is applicable solely to religious corporations).

[110] See Patty Gerstenblith, Civil Court Resolution of Property Disputes Among Religious Organizations, 39 Am. U. L. Rev. 513, 530–32 (1990); Alderman, supra note 108, at 1043.

[111] Kathleen E. Reeder, Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits, 40 Colum. J.L. & Soc. Probs. 125, 144–58 (2006); Soukup, supra note 83, at 1694.

into a trust, are essential requirements.[112] Adding further complexity, the extent to which free exercise rights are constitutionally protected under the two approaches is vague, and the Court left the door open for states to apply alternative approaches.[113]

A. Departure from Doctrine and Deference Approaches

First, in considering the deference approach, *Watson v. Jones* substantially shifted the judicial approach toward a more limited role for civil courts in resolving religious disputes. The case was decided in 1871, after the initial adoption of Section 57-9.[114] In the wake of the Civil War, proslavery and antislavery factions each claimed to be the true representatives of the Presbyterian Church and disputed control over the use of local church property. The antislavery group claimed the proslavery members failed to adhere to the religion's basic principles and had effectively seceded from the national church.[115] Previously, English courts had been willing to decide which of the contending parties adhered to the "true standard of faith in the church organization."[116] Such an inquiry was known as the "departure-from-doctrine rule" or the "doctrine of implied trust," because it permitted the court to make an implied trust in favor of a general church dependent upon its faithfulness to pre-existing doctrines and practices.[117] The Court in *Watson v. Jones*, however, held that civil courts must accept decisions on discipline, faith, or ecclesiastical rule, custom, or law by the highest church judicatories as final and binding.[118]

The Court recognized that the inherent meaning of religious institutions depends on their right to control the adjudication of religious disputes. "The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine[] and to create tribunals for the decision of controverted

[112] See infra Subsection IV.A.2.

[113] Jones v. Wolf, 443 U.S. 595, 602 (1979) (leaving states to adopt any number of approaches to church property disputes); Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

[114] Watson v. Jones, 80 U.S. (13 Wall.) 679, 679 (1871).

[115] Id. at 690–93, 717.

[116] Id. at 727.

[117] Hassler, supra note 108, at 408–09.

[118] 80 U.S. (13 Wall.) at 727.

questions of faith within the association . . . is unquestioned."[119] The Court reasoned that for the category of cases where a religious body holding property is a subordinate member of a general organization with ecclesiastical tribunals,[120] the members implicitly consented to submit to the tribunal.[121] The Court stressed that it is impermissible and indeed would lead to "the total subversion" of religious tribunals if civil courts were permitted to adjudicate religious questions.[122] The Court recognized that "[i]t is of the essence of these religious unions, and of their right to establish tribunals" that the decisions of religious tribunals are binding.[123] Thus, the Court in *Watson v. Jones* granted religious institutions complete autonomy in their right to organize and operate tribunals deciding religious matters.

The modern framework for civil court involvement in church property disputes developed between 1969 and 1979.[124] In 1969, in *Presbyterian Church v. Hull Church*, the Supreme Court again addressed a situation where local churches withdrew from the Presbyterian Church.[125] This time the Court explicitly rejected the use of the departure-from-doctrine element of implied trust theory, holding that it violated the First Amendment.[126] The Court found that *Watson*'s focus on the essence of religious institutions left "civil courts no role in determining ecclesiastical questions in the process of resolving property disputes."[127] The Court elaborated on First Amendment values, stating that they are "plainly jeopardized when church property litigation is made to turn on the resolution

[119] Id. at 728–29.

[120] See id. at 722 (discussing two other categories of cases).

[121] Id. at 729.

[122] Id. at 728–29. Such questions involve "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." Id. at 733–34.

[123] Id. at 729 (arguing also that "[i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith" as the religious tribunals). Id.

[124] Greenawalt, supra note 102, at 265. Although, the Supreme Court in 1929 in *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16, explained that civil courts may examine church rulings alleged to be the product of "fraud, collusion, or arbitrariness."

[125] 393 U.S. 440, 440–41 (1969).

[126] Id. at 450.

[127] Id. at 447.

by civil courts of controversies over religious doctrine and practice."[128] The Court identified two First Amendment hazards: "inhibiting the free development of religious doctrine" and "implicating secular interests in matters of purely ecclesiastical concern."[129]

In 1976, the Court clarified the scope of this judicial deference in religious disputes in *Serbian Eastern Orthodox Diocese v. Milivojevich*.[130] The dispute involved control over a diocese in the hierarchical Serbian Orthodox Church. The church had replaced and defrocked the bishop of the diocese who sought to retain control over the property.[131] Thus, the dispute did not involve a departure-from-doctrine issue, but rather questions of ecclesiastical governance. The Illinois Supreme Court agreed with Milivojevich that his removal as bishop violated the constitution of the church, but the U.S. Supreme Court reversed.[132] The Court held that it cannot "[reject] the decisions of the highest ecclesiastical tribunals of this hierarchical church," as to do so would "impermissibly substitute[] [a court's] own inquiry into church polity."[133] The Court once again emphasized *Watson*'s language regarding the essence of religious unions[134] and stated that the principle established in *Presbyterian Church v. Hull Church* "applies with equal force to church disputes over church polity and church administration."[135]

The principles set forth above describe what has been termed the "deference approach" to church property disputes.[136] As the

[128] Id. at 449. The Court in *Kedroff v. St. Nicholas Cathedral* similarly recognized, "[e]ven in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion." 344 U.S. 94, 120–21 (1952).

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

[130] 426 U.S. 696 (1976).

[131] Id. at 697–98.

[132] Id. at 708–09.

[133] Id. at 708.

[134] Id. at 709–11.

[135] Id. at 709–10. In support, the Court noted the language from *Watson* stating that civil courts should avoid disputes over "'church discipline'" and "'ecclesiastical government.'" Id. at 714 (citing Watson v. Jones, 80 U.S. (13 Wall.) 679, 733–34 (1871)).

[136] Gerstenblith, supra note 110, at 531–33 (reviewing constitutional standards as applied); Greenawalt, supra note 102, at 268–69; Hassler, supra note 108, at 409–10, 423–31 (same); Reeder, supra note 111, at 131–42 (reviewing the Court's development of

name plainly suggests, the doctrine requires that civil courts defer to assessments of intra-church judicial bodies in disputes involving hierarchical churches on issues of doctrine and polity. Kent Greenawalt elaborates, noting that deference is really the key component of a "polity approach."[137] A civil court first must decide the religious institution's type of polity. Traditionally, courts acknowledge only two forms: congregational and hierarchical.[138] If the church organization is congregational, then courts assume that it governs itself like an ordinary voluntary association.[139] Often this means that in a dispute between a local church and national church, the local church controls its destiny, or in a dispute between members of a local church, the majority rules.[140] In the case of a hierarchical church, the decisions of the highest church adjudicators are binding, often leading to an outcome where the property is held for the national or general entity.[141]

B. Jones v. Wolf*: Neutral Principles of Law Approach*

1. The Neutral Principles of Law Method

The Supreme Court has held that the deference approach is not the only constitutionally permissible method for civil courts to use to resolve church property disputes. In 1970, in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, the Court upheld an adjudication of a church property dispute between two secessionist congregations because "the dispute involved no inquiry into religious doctrine."[142] In a concurring opinion, Justice Brennan stated that "a State may adopt *any* one of various approaches for settling church property disputes . . ." and

the deference approach); Alderman, supra note 108, at 1032–33, 1039–42 (reviewing state courts that adopted the deference approach).

[137] Greenawalt, supra note 102, at 268.

[138] Id. at 268–69; see also Jones v. Wolf, 443 U.S. 595, 619 (1979) (Powell, J., dissenting); Watson v. Jones, 80 U.S. (13 Wall.) 679, 722–23 (1871); McConnell, supra note 76, at 283.

[139] See *Watson*, 80 U.S. (13 Wall.) at 722.

[140] See Greenawalt, supra note 102, at 268–69; McConnell, supra note 76, at 283–84.

[141] Greenawalt, supra note 102, at 269.

[142] 396 U.S. at 368 (Brennan, J., concurring).

discussed three options.[143] One was the deference approach from *Watson*. The other two were the use of "'[n]eutral principles of law, developed for use in all property disputes'" and "special statutes governing church property arrangements."[144] When the Court revisited the role of courts in church property disputes for the last time in 1979, in *Jones v. Wolf*, it agreed that "[s]ubject to [certain] limitations . . . the First Amendment does not dictate that a State must follow a particular method . . . ."[145]

In *Jones v. Wolf*, the Court approved a "neutral principles of law" approach.[146] Since the local congregation itself was divided about whether to withdraw from the Presbyterian Church, there was an additional step in the Court's analysis.[147] First, the Court had to determine whether the property should remain with the local congregation or general church.[148] Then, if the local congregation was entitled to the property, the Court had to determine which faction of the formerly united local entity was its true representative.[149] In a 5-4 vote, the Court upheld Georgia's use of a "neutral principles of law" method to make both determinations.[150]

The neutral principles of law approach permits civil courts to adjudicate church property disputes, but "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges."[151] Courts may use such neutral principles to "ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members" and are "bound to give effect to the result indicated by the parties, pro-

[143] Id. at 368–70 (Brennan, J., concurring). The Court provided very little analysis in its holding, and thus Justice Brennan's analysis in his concurrence has received significant attention.

[144] Id. (citing Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952)).

[145] 443 U.S. 595, 602 (1979).

[146] Id. at 595.

[147] See id. at 606–07.

[148] See id. at 601 (noting that Georgia courts had found that the local congregation had legal title).

[149] See id. at 602 (noting that the issue being disputed was which faction of the formerly united congregation is entitled to possess the property). Justice Powell's dissent also described the "two-stage analysis." See id. at 610–11 (Powell, J., dissenting).

[150] Id. at 602, 604 (stating that "[a]t least in general outline, we think the 'neutral principles of law' approach is consistent with the foregoing constitutional principles").

[151] Id. at 603.

vided it is embodied in some legally cognizable form."[152] The approach involves applying neutral principles to the deeds to the properties, state statutes dealing with implied trusts, the corporate charter of the religious association, and the constitution of the general church.[153] In *Jones v. Wolf*, Georgia courts had searched those sources for language of a trust in favor of the general church, and finding none, accordingly held that legal title to the property of the church was vested in the local congregation.[154]

Next, the Court determined which faction of the local congregation was entitled to possess the property. Although the petitioners argued that the question is inherently ecclesiastical in nature, the majority stated that a presumptive rule of majority representation (a rule that a voluntary religious association is represented by a majority of its members) might be a constitutionally permissible way to determine the identity.[155] In order for such a presumption to be consistent with the First Amendment, the Court required that it be "defeasible upon a showing that the identity of the local church is to be determined by some other means . . . ."[156] The Court preserved at least three means: a provision in the corporate charter, a provision in the constitution, or a provision that the property is held in trust. It stated,

> [a]ny rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other

[152] See id. at 603–04, 606.

[153] Id. at 600–01. Although it approved this method for applying "neutral principles" in Georgia, the Court has not provided a precise definition of the approach. The farthest the Court went was to describe the "neutral-principles analysis." The Supreme Court of Virginia has provided its own definition of neutral principles (as *Jones* allows). See Green v. Lewis, 272 S.E.2d 181, 185–86 (Va. 1980) (following the "neutral principles" holding of *Norfolk Presbytery* and stating that property disputes between a general church and a congregation are decided by "look[ing] to our own statutes, to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties").

[154] 443 U.S. at 600.

[155] Id. at 607–08. The Court reasoned that majority rule is generally employed in the governance of religious societies and that the majority faction can be identified without resolving questions of doctrine or polity.

[156] Id. at 607.

> way, or by providing that the church property is held in trust for the general church and those who remain loyal to it.[157]

The case was remanded for a determination as to whether Georgia had adopted such a rule.[158] The Court emphasized that if at any point "the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[159]

2. Free Exercise Rights Under Neutral Principles of Law

In discussing the constitutional principles that inform the neutral principles approach, the Court recognized that there are two primary advantages to the method.[160] First, it "is completely secular in operation."[161] Since the approach relies on objective, well-established concepts of trust and property law, it "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[162] If a civil court should address such a question, then it must revert back to the deference approach and its free exercise protection. Second, the neutral principles approach is "flexible enough to accommodate all forms of religious organization and polity."[163] The Court stated,

> [f]urthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization

[157] Id. at 607–08.
[158] Id. at 608–10.
[159] Id. at 604 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976)).
[160] Id. at 603.
[161] Id.
[162] Id.
[163] Id.

> can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.[164]

Thus, the right of persons to enter into religious associations of their choice requires that civil courts give effect to the provisions and agreements of such religious associations.[165] This is akin to the deference approach, whereby courts must give effect to religious questions decided by religious tribunals. Deference to both property arrangements and tribunals recognizes the right, initially articulated by *Watson*, that religious associations have to govern themselves freely. Since there is autonomy for polity with respect to forming and operating tribunals, there is autonomy for polity with respect to organizing and holding property.[166]

The notion that the First Amendment protects a religious institution's freedom over organizing its property rights is bolstered by the majority's argument that the neutral principles approach is consistent with free exercise rights because "the outcome of a church property dispute is not foreordained."[167] A religious institution can always communicate its intent to ensure that the faction loyal to the hierarchical church will retain the church property prior to the dispute. The Court provided two specific methods for doing so. First, religious bodies can always "modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church."[168]

The dissent argued that the approach unconstitutionally infringes on the free exercise rights of religious institutions. Justice Powell, joined by three other justices, dissented on the ground that the use of neutral principles increases the involvement of civil courts in church controversies.[169] Powell argued that the First Amendment requires more religious autonomy than the neutral principles approach permits. A central objection was to the re-

[164] Id. at 603–04.

[165] Episcopal Church Cases, 198 P.3d 66, 82 (Cal. 2009).

[166] See Knight, supra note 76, at 738, 743–44, for a parallel argument with respect to church incorporation.

[167] *Jones*, 443 U.S. at 606.

[168] Id.

[169] Id. at 610–11 (Powell, J., dissenting).

quirement that the rules of church government must be expressed in specified documents with explicit reference to church property.[170] The dissent reasoned that this "interference by the civil courts with the resolution of religious disputes within the church is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice."[171] The dissent argued for complete autonomy, arguing that courts should give effect to all "decisions of the church government agreed upon by the members before the dispute arose."[172] Furthermore, the dissent highlighted the uncertainty on the scope of constitutional rights, pointing out that the majority left open "the possibility that the state courts might adopt some restrictive evidentiary rule that would render the petitioners' evidence inadequate to overcome the presumption of majority control.[173] The majority provided "no guidance as to the constitutional limitations on such an evidentiary rule; the state courts, it says, are free to adopt any rule that is constitutional."[174]

IV. SECTION 57-9 IN THE NEUTRAL PRINCIPLES OF LAW APPROACH

This Part now turns to the possible ways to view Section 57-9, a statute that both regulates religious polity and provides a method for courts to resolve church property disputes. Since the doctrine regarding institutional autonomy developed largely from church property dispute cases, one possibility is to cabin Section 57-9 narrowly within the context of those cases. The controversies tend to involve hierarchical churches and so the primary focus of this Part is on Section 57-9(A).[175] Since subsection A does not defer to a tribunal on religious questions, the questions surrounding its application relate to the neutral principles approach. There are two ways to view the statute within the approach: as a presumptive rule of majority representation or as a neutral principle or method that avoids inquiry into doctrinal questions. Since the approach is as much about the process as it is about principles, this Part will also

[170] Id. at 612–13.
[171] Id. at 613.
[172] Id. at 614.
[173] Id. at 615.
[174] Id. at 616.
[175] Section 57-9(B) essentially defers to a congregational church's constitution.

focus on Section 57-9 as it was applied in 2007 and 2008 by the Circuit Court of Fairfax County.

A. Section 57-9 as a Presumptive Rule of Majority Representation

One possible way to view Section 57-9 is as a statute that creates a presumptive rule of majority representation. As approved by the Court in *Jones v. Wolf*, a state can turn to a presumption of majority rule in order to determine the identity of a divided local church.[176] Such a presumption is permissible after it has been determined that the property rights remain with a seceding local church and as long as the presumption can be overcome by certain provisions articulated by the Court.[177] The overarching problem with this view is that Section 57-9 employs a method substantially different from the one approved in *Jones v. Wolf*. Both Virginia's Code governing religious property and the Circuit Court's application shift the use of Section 57-9 in a direction that interferes with the free exercise rights of a hierarchical church to the point where it becomes unconstitutional.

1. Violating Free Exercise Rights by Restricting Options for Polity

Section 57-9, in conjunction with Virginia's statutory scheme that limits the way a hierarchical church can hold property, is inconsistent with *Jones v. Wolf*'s minimum requirements for any method of overcoming a rule of majority representation. The majority in *Jones* stated, "[m]ost importantly, *any* rule of majority representation can *always* be overcome" by a provision "in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, *or* by providing that the church property is held in trust for the general church and those who remain loyal to it."[178] Thus, by explicitly providing that "any rule" can "always" be overcome by a certain method, the Court set a minimum level of protection. Reli-

[176] Georgia's Code contained a provision providing that "'[t]he majority of those who adhere to its organization and doctrines represent the church.'" The defendants, however, did not claim a right under that provision and on remand it was determined that it only applied to congregational churches. See *Jones*, 443 U.S. at 608 n.6 (citing Ga. Code § 22-5504 (1978)).

[177] See id. at 607–08.

[178] Id. (emphasis added).

gious institutions can organize and express their polity with respect to property in any of those three ways (statement in the corporate charter, statement in the church constitution, or statement that the property is held in trust). Virginia's statutory scheme, however, only allows a hierarchical church to overcome the presumption by titling the property in the name of an ecclesiastical officer of the general church or holding the property in corporate form. Such options are more limited than those in *Jones*, both with respect to the type of ways institutions can hold property and the variety of ways they can express intent. In particular, the statutory scheme burdens institutions that have a polity somewhere in the middle of the spectrum between hierarchical and congregational, in which local congregations hold their property in trust for the general church. Virginia's reduction in the range of ways an institution can organize its property directly conflicts with the Court's minimum level of protection of free exercise rights. Thus, even under a singular focus on *Jones*, Section 57-9's role in creating a majority presumption leads to an impermissible infringement on the free exercise rights of religious institutions.

There is some uncertainty over whether all three methods of expression for overcoming a majority presumption outlined in *Jones* are compulsory. The alternative view is that the state only needs to provide one method to overcome the presumption. This interprets *Jones v. Wolf* to only require an "escape hatch" for the institution to express itself differently.[179] This view gets its support from the Court's statement in *Jones* that "the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy."[180] The problem is that the Court did not clarify the free exercise rights. In failing to do so, it did not explicitly articulate whether an alternative approach might permit the state to limit the ways in which an institu-

[179] See In re Multi-Circuit Episcopal II, 76 Va. Cir. 894, 923–24 (Va. Cir. Ct. 2009). This court is unique in taking this view. Courts otherwise consider at least all three forms of expression. See Bishop & Diocese of Colorado v. Mote, 716 P.2d 85, 99 (Colo. 1986); Piletich v. Deretich, 328 N.W.2d 696, 702 (Minn. 1982); Foss v. Dykstra, 342 N.W.2d 220, 225–26 (S.D. 1983).

[180] *Jones*, 443 U.S. at 608.

tion can hold property beyond the three stated in *Jones*.[181] If a state can limit the methods of expression and only provide a single "escape hatch," then Section 57-9 might be constitutional because Virginia's statutory scheme provides two ways of overcoming the majority presumption. The most natural reading of *Jones*, however, indicates that the state must, at a minimum, provide all three methods of expression.

First, it is unlikely that the approach approved by *Jones v. Wolf* permits any infringement on religious polity. The use of neutral principles permits some interference by civil courts in that it requires religious institutions to express property holdings in certain forms. There is an important distinction, however, in the nature of the burden imposed between requiring the expressions to be written in documents in a legally cognizable form and limiting the manner in which an organization may arrange its polity and hold property. If the state restricts the number and type of legally cognizable forms of expression too far, it creates an impermissible burden on the polity. If the state leaves enough of a variety of legally cognizable forms of expression, however, then religious institutions retain autonomy over their internal governance of property. This distinction between a burden of written expression and burden of having polity restricted is essential to understanding *Jones.* The Court in *Jones* refers to the former when it notes the "minimal" burden of taking the steps to express the manner in which property is held. The Court states that the approach accommodates all types of religious organization and polity.[182] The Court thus appears to assume that the three forms of expression it articulates are capable of accommodating all types of polity.

Second, even if the approach permits state interference with a religious institution's polity, there is no indication that it intended to open the door to all types of impairments. Although the Court asserted that "the State may adopt *any method* of overcoming the majoritarian presumption,"[183] it also stated "*any rule* of majority

[181] This reflects the dissent's concern in *Jones v. Wolf* about the majority leaving open the possibility that states might adopt a "restrictive evidentiary rule" without affording "guidance as to the constitutional limitations." Id. at 615–16 (Powell, J., dissenting).

[182] Id. at 603.

[183] Id. at 608 (emphasis added).

representation can always be overcome" by certain expressions.[184] The most natural reading of the two statements is that the Court permits the state to expand the inquiry or adopt different means, but at a minimum it has to recognize the three expressions articulated in *Jones v. Wolf*. Furthermore, the escape hatch theory is particularly problematic because it provides no conceptual limit on the degree to which the state can regulate property. Such a reading would permit a state to place a hierarchical body in a Catch-22 where either of the two options requires the institution to hold property in a form that is antithetical to its religious values. Section 57-9, as applied, creates a limited set of options by requiring a church to hold all property in the name of a bishop or corporate form. For some types of institutional polities, those options are no less problematic than Section 57-9's default imposition of a rule vesting control of property in congregational majorities. Such direct control over the internal governance of religious institutions burdens free exercise rights beyond the minimum limit articulated by *Jones*, since it does not permit a dispute to be resolved in accordance with the desires of the institutions members.

2. Undermining Free Exercise Rights by Excluding a Trust Inquiry

Section 57-9 and Virginia's statutory scheme, by prohibiting hierarchical institutions to hold property in trust, increase the likelihood that the statute exceeds the free exercise boundary articulated by *Jones v. Wolf*. The lack of a trust inquiry significantly diverges from the method approved by *Jones.* Not only does it eliminate a way in which the Court permits churches to overcome the presumption of local or congregational majority rule, but it also undermines the central inquiry of the neutral principles approach as articulated in *Jones*.[185] Furthermore, states have uniformly assumed that the neutral principles approach involves an inquiry into

[184] Id. at 607–08 (emphasis added).

[185] See id. at 600–01 (stating that "the court found no basis for a trust in favor of the general church in the deeds, the corporate charter, or the state statutes dealing with implied trusts. The court observed, however, that the constitution . . . contained an express trust provision in favor of the general church"); see also id. at 604 (stating that "[t]he neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents . . . for language of trust in favor of the general church").

trusts.[186] Virginia's prohibition of such an inquiry undercuts the import of *Jones* because the majority's statement that the approach protects all forms of polity is based on an assumption that includes a trust inquiry. This assumption is explicit when the Court states that the approach preserves the "flexibility in ordering private rights" because it allows religious societies to specify what happens to church property "[t]hrough . . . trust provisions."[187] Thus, Virginia's prohibition removes that flexibility, thereby decreasing the scope of free exercise rights in a way that makes Section 57-9 unconstitutional as a presumptive rule of majority representation.

In fact, the lack of a trust inquiry is what puts the outcome of the dispute for Episcopal churches in Virginia squarely at odds with the outcome of other Episcopal property disputes. In Episcopal Church property disputes courts almost universally rule in favor of the diocese and national church.[188] Since the Episcopal Church is hierarchically structured, courts sometimes apply the deference approach that ultimately permits the national church and diocese to control the local property.[189] When courts apply the alternative neutral principles approach, the outcome is the same.[190] This is largely because in 1979, three months after the *Jones v. Wolf* decision, the Episcopal Church adopted the "Dennis Canon." The canon states, "all real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located."[191] Although courts rely on the canon in

[186] See Alderman, supra note 108, at 1039–50 (discussing state searches for a trust); Hassler, supra note 108, at 415–16 (same); Yaw, supra note 108, at 826 (same).

[187] *Jones*, 443 U.S. at 603.

[188] See Reeder, supra note 111, at 147.

[189] See Bennison v. Sharp, 329 N.W.2d 466, 475 (Mich. Ct. App. 1982); Protestant Episcopal Church v. Graves, 417 A.2d 19, 24 (N.J. 1980).

[190] See Reeder, supra note 111, at 147–57. One exception was *Protestant Episcopal Church v. Barker*, 171 Cal. Rptr. 541 (Ct. App. 1981). This holding has been superseded by a ruling of the California Supreme Court, which held that local churches are bound by the constitution and canons of the Episcopal Church and that the canons impress a trust in favor of the general church. See Episcopal Church Cases, 87 Cal. Rptr. 3d, 275, 290–92, 295 (Cal. 2009). Thus, the only remaining exception is *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583, 586–87 (Ky. 1988).

[191] Dague, supra note 50, at 129–30. The Episcopal Church responded directly to *Jones v. Wolf*'s statement that parties can ensure that the faction loyal to the hierarchical church will retain the church property by having the canons recite an express trust. See *Jones*, 443 U.S. at 607–08.

a variety of ways, under neutral principles they consistently find the creation of a trust in favor of the diocese and national church.[192] Since Virginia bypasses the trust inquiry and applies the default rule that local congregations can obtain the property by majority vote, the outcome in Virginia is reversed.

3. Confusion over the "Two Step Process"

Finally, the problems with the restrictions on polity and lack of a trust inquiry are compounded by the fact that Section 57-9, as applied by the circuit court, avoided the initial inquiry described in *Jones* that determined whether the property were controlled by the local or general church. First determining whether the legal title is vested in the local congregation and then determining which entity controls the local congregation is the process the Court adopted in *Jones v. Wolf*. There is an open issue whether *Jones* actually requires the first step. Some courts have started with the majority presumption, thus blending the two steps,[193] while others have adhered to the steps in order.[194] Empirically it is not clear that distinguishing between these two steps has made any difference. In the first step, courts search for a trust in favor of the general church and consistently look to the deeds, the corporate charter, and the constitution of the general church. Thus, when they get to the second step, *Jones v. Wolf*'s guidance to look to a corporate charter or constitution for the identity of the local church or a trust[195] is repetitive.

In Virginia, however, it is possible that if courts followed *Jones* and started with an inquiry into the agreement between the local

[192] See Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 105 n.15 (Colo. 1986) (finding the Canon confirmed a preexisting implicit trust relationship); Episcopal Diocese of Mass. v. Devine, 797 N.E.2d 916, 923 (Mass. App. Ct. 2003) (concluding that the Canon's establishment of an express trust was a significant factor); In re Church of St. James the Less, 888 A.2d 795, 807–08 (Pa. 2005) (finding the local church bound to the Canon because voluntary associations are bound by amendments to the associations rules).

[193] See Fluker Cmty. Church v. Hitchens, 419 So. 2d 445, 446 (La. 1982); Piletich v. Deretich, 328 N.W.2d 696 (Minn. 1982).

[194] See *Bishop and Diocese of Colo.*, 716 P.2d at 99 (requiring the two step process because it is "more consonant with a truly neutral analysis"); Foss v. Dykstra, 342 N.W.2d 220, 225–26 (S.D. 1983).

[195] 443 U.S. 595, 607–08 (1979).

church and general entity (rather than starting with Section 57-9) there would be a difference in the outcome. Under such an inquiry, courts might not apply the restrictions of Virginia's statutory scheme and might instead look for a trust. Either way, to the extent that the first step is required, it strengthens the notion that civil courts must give effect to the intention of the parties and search for a trust. The fact that Virginia avoids the analysis again indicates an infringement upon free exercise rights with respect to polity.

B. Section 57-9 as a Method for Resolving Disputes that Avoids Doctrine

Another possibility within the neutral principles approach is that Section 57-9 is not a specific application of a majority presumption, but rather a neutral principle, or more generally, a method that the state has adopted to resolve property disputes without considering religious doctrine.[196] It is unclear whether Section 57-9 is a "neutral principle" as intended by the Court in *Jones*. The use of a statute that dictates that property rights are determined by local or congregational majority vote (unlike a statute dealing with implied trusts) does not fit comfortably within the Court's description of a method that "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges."[197] Majority vote is not an established concept of either trust or property law. Section 57-9 might alternately be viewed as a neutral principle in the sense that it is a rule a civil court could apply that does not require a determination of doctrine.[198] Support for this view is found originally in Justice Brennan's concurrence in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, where he stated, "a State may adopt *any* one of various approaches for settling church property disputes so long as

[196] This discussion assumes doctrine and polity are distinct, despite their interdependent nature in religious institutions.

[197] *Jones*, 443 U.S. at 603.

[198] See In re Multi-Circuit Episcopal II, supra note 18. Section 57-9 requires a court to categorize the institution's polity as hierarchical or congregation. See Greenawalt, supra note 102, at 270–77, for a related discussion on the problems with differentiating between the two forms.

it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[199]

Either way that Section 57-9 is used within the neutral principles approach, its interference with a religious institution's polity still impermissibly burdens free exercise rights. Although the approach calls on courts to use secular, neutral principles to resolve church disputes, the avoidance of doctrine is not the only requirement that must be met in order to avoid free exercise interference. First, Justice Brennan's language should not be read in a vacuum. The Court in *Jones v. Wolf*[200] and the concurrence in *Maryland and Virginia Churches*[201] state that the First Amendment protects interference with both doctrine *and* polity. Second, the statute must meet the specific requirements in *Jones* that assure that "the outcome of a church property dispute is not foreordained."[202] The Court stated,

> [a]t any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.[203]

Thus, the Court's more general requirement for the approach essentially mirrors the conditions for overcoming a presumptive rule of majority representation. The Court's use of the passive voice in

[199] *Jones*, 443 U.S at 602 (quoting Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 368 (1970)).

[200] 443 U.S. at 602 (stating "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice" and "the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity").

[201] 396 U.S. 367, 370 (1970) (stating that "the *Watson* approach is consonant with the . . . First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity" and that "statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies").

[202] *Jones*, 443 U.S. at 606.

[203] Id.

describing the possible "alternative[s]" suggests it intended that religious institutions could hold their property by "whatever method the church structure contemplated."[204] This reading accords with the Court's discussion that the aim of the approach is to adhere to the intent of the parties. Section 57-9 fails to meet the minimum requirements in *Jones v. Wolf*, since the text of the statute and Virginia's statutory scheme in prohibiting trusts for hierarchical churches conflict with both requirements. Again, although the approach might minimally burden religious institutions by requiring them to communicate their intent in a legally cognizable form, that is a separate consideration from burdening polity. As the California Supreme Court stated in interpreting its own statutes governing religious property, "[r]equiring a particular method to change a church's constitution . . .would infringe on the free exercise rights of religious associations to govern themselves as they see fit. It would impose a major, not a "minimal," burden on the church governance."[205] Thus, under both views of neutral principles, Section 57-9 fails to meet the minimum requirements of *Jones v. Wolf* because it interferes with polity and therefore imposes a substantial burden on a religious institution's free exercise rights.

V. SECTION 57-9 AS A NEUTRAL LAW OF GENERAL APPLICABILITY

A. Free Exercise and Neutral Laws of General Applicability

Another option is to assess Section 57-9 outside of the immediate context of the neutral principles approach as a statute that more broadly regulates religious institutions. The neutral principles approach addresses the resolution of a property dispute by a civil court, which is a separate issue from the extent to which a state can interfere with a religious institution's internal organization of property.[206] The Court in *Jones v. Wolf* stated, "[t]he neutral principles approach cannot be said to 'inhibit' the free-exercise of religion, any more than do *other neutral provisions of state law* governing

[204] Episcopal Church Cases, 87 Cal. Rptr. 3d 275, 292 (Cal. 2009).

[205] Id.

[206] Kent Greenawalt emphasizes the distinction by pointing out that the "neutral principles approach . . . should not be confused with the idea of laws that are neutral and of general application." Supra note 102, at 269.

the manner in which *churches own property*, hire employees, or purchase goods."[207] Thus, the Court holds that the Constitution provides a distinct level of free exercise protection for churches from state interference with their ownership of its property. Such a boundary, however, is not delineated. When viewing Section 57-9 outside the neutral principles approach, it is imperative to consider both the principles that inform the doctrine related to courts resolving church property disputes and free exercise principles more broadly. Taking this broader view has the advantage of capturing any additional state interest beyond peacefully resolving disputes.

The doctrine related to the free exercise of religion and neutral provisions of state law has developed substantially since the reference in *Jones v. Wolf* and has emphasized neutral treatment between religious denominations and between religious and secular institutions. In 1982, in *Larson v. Valente*, the Court held that state laws granting a denominational preference should be treated as suspect, and courts should apply strict scrutiny in adjudging their constitutionality.[208] The holding focused on the Establishment Clause, but the Court also argued that the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."[209] The Court explained,

> Madison once noted: "Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects." Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and

[207] 443 U.S. at 606 (emphasis added); see also McConnell, supra note 53, at 306 (stating that "[t]he 'neutral principles' approach for intra-church disputes recalls the rule of *Employment Division v. Smith* that 'neutral and generally applicable laws' do not violate the Free Exercise Clause").

[208] 456 U.S. 228, 246 (1982) (striking down a Minnesota statute that imposed heightened requirements on religious organizations that did not meet certain contribution standards). Id. at 230, 255.

[209] Id. at 245.

> propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference.[210]

In 1990, in *Employment Division v. Smith*, the Court expanded on the concept of neutrality.[211] With respect to the free exercise of religion, the Court confirmed the views from earlier cases that the Constitution forbids the government to "impose special disabilities on the basis of religious views or religious status"[212] or to "lend its power to one or the other side in controversies over religious authority or dogma."[213] The Court stated, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[214] It held, however, that the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.'"[215] Thus, even if the law has the incidental effect of burdening religious practice, as long as it is a neutral law of general applicability, it need not be justified by a compelling government interest. The Court reasoned, in part, that otherwise our "nation made up of people of almost every conceivable religious preference" would be "courting anarchy."[216]

Then, in 1993, in *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court addressed the interrelated requirements of neutrality and general applicability.[217] The Court found the Free Exercise Clause dispositive in a case where the petitioners alleged that

[210] Id. (citing The Federalist No. 51, 326 (H. Lodge ed. 1908)). The Court also cited Justice Goldberg's statement, "'[the] fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.'" Id. at 246 (quoting Abbington Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

[211] 494 U.S. 872 (1990).

[212] Id. at 877 (citing McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953); cf. *Larson*, 456 U.S. at 245).

[213] Id. (citing Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445–52 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95–119 (1952); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–725 (1976)).

[214] Id.

[215] Id. at 879.

[216] Id. at 888 (citations omitted).

[217] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–32, 547 (1993) (striking down ordinances governing the ritual of animal sacrifice).

the state had singled out and burdened their religion.[218] With respect to neutrality, the Court stated:

> [t]o determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.[219]

The Court also found that the Free Exercise Clause further guards against "governmental hostility which is masked as well as overt."[220] With respect to general applicability, the Court stated, "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[221] The Free Exercise Clause "protect[s] religious observers against unequal treatment and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[222] Furthermore, the "principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious be-

[218] Id. at 532. The Court explained that "our Establishment Clause cases . . . for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion." Id.

[219] Id. at 533. The Court pulled back on an expansive interpretation of *Lukumi* in *Locke v. Davey*, 540 U.S. 712 (2004), finding that when a State's disfavor of religion "is of a far milder kind," a statute that is not facially neutral is not presumptively unconstitutional. *Locke*, 540 U.S. at 720. There the Court emphasized the State's strong antiestablishment interests and upheld a statute that withheld state funding for students pursuing a degree in theology. Id. at 716, 722, 725. The Court emphasized that the State's disfavor of religion was mild since the state "merely [chose] not to fund a distinct category of instruction" and there was a "historic and substantial state interest." Id. at 721, 725. The case is inapplicable to the issues surrounding § 57-9 because there are not antiestablishment interests at play, and, in fact, the State's codification of certain religious policies has been challenged under the Establishment Clause. Also, the State's disfavor of religion is far from a "mild" withholding of funding, since it regulates the internal affairs of religious institutions in a way that it does not for other voluntary associations. Finally, as discussed below, there is no state interest in treating religious institutions separately from other voluntary associations.

[220] *Lukumi*, 508 U.S. at 534.

[221] Id. at 542.

[222] Id. at 542–43 (citations omitted).

lief is essential to the protection of the rights guaranteed by the Free Exercise Clause."[223] A law that is not neutral nor generally applicable must survive strict judicial scrutiny; that is, it must be justified by a compelling government interest and must be narrowly tailored in pursuit of those interests.[224]

B. Section 57-9 is Not a Neutral Law of General Applicability

Since Section 57-9 discriminates between religious and secular voluntary associations, it cannot be justified as a neutral law of general applicability. Section 57-9 is not facially neutral, since subsection A applies only to churches or religious societies, and therefore directly refers to a "religious practice." In *only* applying to religious entities, it follows that it can have no secular meaning discernible from the language or context.[225] By treating religious entities differently from secular entities on account of religious status, the statute also fails the general applicability test. There is no similar statute applicable to secular voluntary associations, such as unions, lodges, and fraternities. More specifically, Virginia law does not allow the majority of a local entity of a hierarchical secular voluntary association to break away from that larger organization and retain the property, as Section 57-9(A) permits.[226] Even if Section 57-9 is narrowly applied as a presumption of majority rule, the statutory scheme still limits the manner in which hierarchical

[223] Id. at 543.

[224] Id. at 546. In 2002, the United States District Court for the Western District of Virginia applied the requirements of neutrality and general applicability to strike down Virginia's constitutional prohibition against incorporation of churches. Falwell v. Miller, 203 F. Supp. 2d 624, 629–32 (W.D. Va. 2002). The court held that the provision failed the test because it plainly referred to a religious practice and distinguished churches from other groups in the broader context of Virginia law. Id. at 630–31.

[225] The circuit court argues that § 57-9(A) is facially neutral because it refers to "a means of holding church property." In re Multi-Circuit Episcopal II, supra note 18, at 918. The fact that it is "church" property, however, prevents it from having meaning within the secular context.

[226] Virginia enforces the rules of voluntary associations as contractually binding on their members. See Unit Owners Ass'n of Buildamerica-1 v. Gillman, 292 S.E.2d 378, 385 (1982); Gottlieb v. Economy Stores, 102 S.E.2d 345, 351 (1958); see also 6 Am. Jur. 2d, Associations and Clubs § 5 (2008). The principles of voluntary association law subject members to the constitution and bylaws of the organization, 6 Am. Jur. 2d, Associations and Clubs § 7 (2008), and generally do not allow members who disaffiliate to retain control of property, even if diversion of the property is favored by a majority. 6 Am. Jur. 2d, Associations and Clubs §§ 23, 24 (2008).

religious organizations can hold property in ways it does not for secular organizations. Virginia burdens how religious associations organize property, but does not create similar burdens for secular associations.

Furthermore, Section 57-9 distinguishes both between hierarchical and congregational religious institutions, and between hierarchical religious institutions that hold their property in trust and those that do not. This treatment further solidifies the statute's lack of neutrality and generality as described above, and, per *Larson v. Valente*, calls for strict scrutiny on free exercise grounds. In the church property dispute line of cases the Supreme Court has suggested that religious institutions can generally be categorized as congregational and hierarchical.[227] It does not follow, however, that all distinctions between the two forms of governance are constitutional. *Larson* is relevant because it was decided after the church property dispute cases and indicated that distinctions between religious entities should be subject to strict scrutiny. As the Court explained, free exercise does not exist without equal liberty between denominations to exercise and propagate their beliefs.[228] Under Section 57-9, hierarchical organizations are not free to organize their polity according to their beliefs, while congregational forms of governance are permitted to do so. Although the distinction between the two forms of governance in Section 57-9 does not directly state specific denominations, the statute is effectively specific to denominations because no denomination can fall under both subsections A and B. The principles that inform *Larson* with respect to equal liberty are thus applicable.

Section 57-9 does not survive strict judicial scrutiny. The Supreme Court has recognized that the state has a compelling interest in resolving religious property disputes peacefully. Furthermore, the state might conceivably have an administrative interest in ensuring property rights are recorded in a recognizable manner. The state does not, however, have a legitimate interest in designing the polity of religious organizations, nor does it have an interest in the outcome of property disputes. As a result, Section 57-9 is both

[227] The deference approach draws the distinction along with a presumptive rule of majority representation, which implicitly permits states to treat hierarchical organizations like a congregational ones, but within certain boundaries.

[228] Larson v. Valente, 456 U.S. 228, 245 (1982).

over- and underinclusive. Section 57-9(A) is overinclusive by imposing a rule of congregational majority on hierarchical churches, even when a hierarchical church has already created a rule of decision for resolving property disputes in a legally cognizable form.[229] The state has no compelling interest in restricting the set of legally cognizable forms for determining property rights within religious institutions. Section 57-9(A)'s restriction is particularly difficult to uphold given Virginia's willingness to adhere to the church constitution as a rule of decision under subsection B for congregational forms of governance.

Section 57-9 is underinclusive because it does not apply to secular voluntary associations. Neutral principles of trust and property law familiar to all lawyers and justices should apply the same to both religious and secular voluntary associations. There is no explanation for why civil courts need to impose the congregational form of governance on hierarchical religious institutions, but not on hierarchical secular institutions, if the only state interests are administrative convenience and peaceful resolution of disputes. Furthermore, subsection A is underinclusive because it only applies to hierarchical churches that hold their property in trust. There is no reason why the state needs to create a majority presumption for some hierarchical churches, but not others. The absence of narrow tailoring suffices to establish the invalidity of the statute as a neutral law of general applicability.[230]

VI. SECTION 57-9 BEYOND NEUTRAL LAWS OF GENERAL APPLICABILITY

A. Special Statutes Governing Church Property Arrangements

A final possibility is that as a statute specifically governing the resolution of church property disputes, Section 57-9 might not be bound by a requirement to be a neutral and generally applicable law.[231] Justice Brennan, concurring in *Maryland and Virginia Churches*, stated that a possible approach for resolving disputes "is

[229] Virginia's prohibition against a trust inquiry conflicts with *Jones v. Wolf* regarding legally cognizable forms.

[230] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).

[231] See In re Multi-Circuit Episcopal II, supra note 18, at 919.

the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine."[232] On the one hand, it is possible to interpret this language as indicating that statutes may legally single out religious institutions. On the other hand, this statement is the only reference to such statutes in Supreme Court jurisprudence,[233] and the statement should not be read in isolation of the Court's emphasis on neutrality. The concurrence was written prior to the Court's statement in *Jones v. Wolf* that tied the protection of free exercise rights to "neutral provisions of state law governing the manner in which churches own property."[234] It was also written prior to *Employment Division v. Smith*, an opinion that substantially altered the Court's approach to the Free Exercise Clause. Finally, Justice Brennan's statement does not necessarily sanction treating religious and secular voluntary associations differently, nor does it suggest that a state might distinguish between denominations.

It is unlikely that Section 57-9 meets the requirements of such a special statute, even if only viewed within the language of Justice Brennan's concurrence. Justice Brennan stated, "[s]uch statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies."[235] Section 57-9 directly infringes on such control. Furthermore, Justice Brennan cited *Kedroff v. St. Nicholas Cathedral* [236] as an example of the limit on state interference. The opinion is instructive because it is the only one where the holding addresses the ability of a state to interfere with a religious institution's polity outside the context of resolving a church property dispute.

In *Kedroff*, the Court invalidated a statute that transferred control of Russian Orthodox New York churches from the central governing hierarchy of the church in Moscow to the governing authorities of the church in America.[237] The Court found that legisla-

[232] 396 U.S. 367, 370 (1970) (Brennan, J., concurring).

[233] See *Episcopal Church Cases*, 87 Cal. Rptr. 3d 275, 293 (Cal. 2009) (noting California's statute as an example).

[234] 443 U.S. 595, 606 (1979).

[235] *Md. & Va. Churches*, 396 U.S. at 370; see also *Episcopal Church Cases*, 87 Cal. Rptr. 3d at 293, 297 (approving of the statute because it leaves control of ecclesiastical policy and doctrine to the church).

[236] 344 U.S. 94 (1952).

[237] Id. at 107.

tion that regulates church administration, operation, and the appointment of clergy "passes the constitutional limits," as it "prohibits the free exercise of religion."[238] The Court was particularly concerned that the transfer of control was by "legislative fiat and subject to legislative will."[239] The Court stated, "[b]y fiat [the statute] . . . passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment."[240] Most prominently, the Court stated that religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[241] The Court later emphasized these principles in *Serbian East Orthodox Diocese for the United States and Canada v. Milivojevich*.[242] It stated, "[i]t suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs . . . the Mother Church constitution commit[s] such questions of church polity to the final province of the Holy Assembly."[243]

Section 57-9 exceeds the constitutional limits established by *Kedroff* and therefore impermissibly burdens the free exercise of religion. Viewed most narrowly, *Kedroff* prohibits government interference with polity if such interference involves the transfer of control between religious entities. The statute in the case substituted the authority from the central governing hierarchy of the Russian Orthodox Church to the governing authorities in America. Section 57-9 similarly substitutes authority from the central governing hierarchy to the majority of the local congregation. Section 57-9, in combination with Virginia's statutory scheme, is arguably less burdensome because it permits the central hierarchy to prevent a switch through incorporation or titling in the name of an ecclesiastical officer. Nonetheless, it "'intrudes for the benefit of one

[238] Id. at 107–08.
[239] Id. at 108.
[240] Id. at 119.
[241] Id. at 116.
[242] 426 U.S. 696, 721–22 (1976).
[243] Id. at 721.

segment of a church the power of the state'"[244] and thus crosses the line with respect to religious freedom.[245]

B. Exemptions for Religious Institutions over Polity

As a final point, under any view of modern free exercise jurisprudence that entitles religious institutions to heightened protection from state interference, Section 57-9 would create an unconstitutional burden on free exercise rights. As noted at the outset in Section II.B., autonomy for religious institutions is an unsettled topic. The *least* protective view of free exercise rights argues that institutions are subject to the *Smith* rule that requires neutral laws of general applicability. All the other views on the spectrum argue for heightened protection and indicate that even if Section 57-9 were a neutral law of general applicability, it would still impermissibly intrude into the internal affairs of religious institutions. The most protective view is that religious institutions should have complete autonomy.[246] Under this view, Section 57-9 is easily rejected. An alternative view is autonomy in certain spheres. One such sphere protects a church's power to organize its internal structure.[247] Here Section 57-9 would fail for interfering with the institution's internal governance of property. Since the Supreme Court has not expressly ruled on the extent of this protection, there is uncertainty over whether it protects all aspects of the internal affairs and governance of a church, or only limited areas.[248] If it is only lim-

[244] Id. at 730 (citations omitted).

[245] For support, see *Goodson v. Northside Bible Church*, 261 F. Supp. 99, 103–04 (S.D. Ala. 1966), aff'd, 387 F.2d 534 (5th Cir. 1967) (cited with approval in *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 370 n.5 (1970) (Brennan J., concurring)), where a statute similar to § 57-9, The Dumas Act, was rejected. The Act permitted a sixty-five percent majority of members for local churches within a hierarchical structure to control the property. *Goodson*, 261 F. Supp. at 100. The court rejected it, in part, because it granted the "legislative body the right, power and authority to change established systems of church ownership without regard to the ecclesiastical law of the denomination." Id. at 103–04. Also, this shifting control standard permits state statutes that address specific denominations and incorporate religious entities to meet Free Exercise Clause requirements.

[246] See Brady, supra note 70, at 1635.

[247] Soukup, supra note 83, at 1709, 1712 (relying on the Court's statements about polity in *Kedroff* and *Milivojevich*).

[248] Id. at 1713 (lower courts generally conclude that the internal decision-making power of a church can be infringed upon by statute only if the intrusion does not af-

ited areas, there is the most support for protecting autonomy in cases where a religious dispute concerns the decisionmaking power within the organization. In such cases, interference with polity is impermissible. This narrower view of autonomy is supported by the Supreme Court's protection of polity when there are "religious controversies" and issues of "authority."[249] Since Section 57-9 specifically applies when there is a division, it will be contested solely during disputes over decision-making power.[250] Thus, the fact that the statute asserts control over polity during such a dispute makes it invalid under even this narrowest view of heightened protection.

CONCLUSION

Virginia Code Section 57-9 interferes with the free exercise rights of the religious institutions it regulates in violation of the U.S. Constitution. There is uncertainty in the doctrine related to both the court's role in church property disputes and the state's ability to regulate the internal governance of religious institutions more broadly. Additionally, there are a variety of ways to characterize Section 57-9, since it straddles both issues. Despite the diversity of options, Section 57-9 consistently fails to meet the minimum level of protection for the free exercise rights of religious institutions. When confined within the neutral principles approach, the statute falls below the Court's explicit requirements with respect to

fect the structure of the church) (citing Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006)).

[249] Id. (quoting Jones v. Wolf, 443 U.S. at 605, 608; Gen. Council on Fin. & Admin. v. Cal. Super. Ct., 439 U.S. 1369, 1373 (1978); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1975); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 106 (1952)).

[250] Kentucky, New York, and New Jersey have statutes addressing the impact of a church division on property rights, but none assert control over polity against a religious institution's will. Section 273.120 of the Kentucky Code states, "[i]n case of a division in a religious society, the trustees shall permit each party to use the church and property for divine worship a part of the time, proportioned to the members of each party." Ky. Rev. Stat. Ann. § 273.120 (2008). It only applies temporarily until the church authorities or a majority makes a decision. Thomas v. Lewis, 6 S.W.2d 255, 261 (Ky. 1928). New York and New Jersey's codes address specific denominations. Section 92 of the New York Religious Corporations Code applies after a division of a Roman Catholic parish. N.Y. Relig. Corp. Law § 92 (2008). Section 16:12-23 of the New Jersey Code applies when any diocese of the Protestant Episcopal Church is divided into two or more dioceses. N.J. Rev. Stat. § 16:12-23 (2008). Section 16:12-23 refers to Reformed congregations.

the variety of ways an institution can express its intent on property rights. Failing to meet this minimum impermissibly limits free exercise rights, since it restricts the institution's polity and intrudes into a domain where property, governance, and religious belief and doctrine are interwoven. If viewed as a neutral law of general applicability that might legitimately make such an intrusion under *Smith*, Section 57-9 falls very short, since it blatantly targets religious institutions and goes as far as to treat different types of religious organizations separately. Finally, any view of Section 57-9 as a special statute that regulates property, at a minimum, only affirms the Supreme Court's protection for polity. Such a view likely only tilts the doctrine toward a more robust view of free exercise rights, making it all the more likely that Section 57-9 is unconstitutional.