NOTE

CONFUSION AND COERCION IN CHURCH PROPERTY LITIGATION

*Brian Schmalzbach**

INTRODUCTION

IF, after a relatively calm decade in the 1990s, the Protestant Episcopal Church thought its role on the church property front of the American *Kulturkampf* was over, it was in for a rude awakening. The 2003 ordination of Gene Robinson, an openly homosexual bishop, ignited a firestorm of dissent and ultimately provoked dozens of Episcopal parishes and even whole dioceses to leave one of the oldest Protestant denominations in America.[1] The conflict reached a head in 2006, when eleven Virginia parishes withdrew from the Episcopal Church and affiliated with the Convocation of Anglicans in North America.[2] The massive, multimillion dollar litigation over property worth tens of millions of dollars[3] that followed concerned one simple question: Is the local parish or the supercongregational denomination entitled to retain control of church property?[4] Answering this question has implicated a host of exceedingly complex constitutional problems.

Unfortunately, the Supreme Court has only made the situation worse by giving the states incomplete guidance as to how to adjudi-

* J.D. expected May 2010, University of Virginia School of Law; B.A. 2007, University of Virginia. I would like to thank the members of the *Virginia Law Review*, and Alexander Ibrahim in particular, for careful editing and insightful suggestions. All errors are my own.

[1] In re Episcopal Church Cases, 198 P.3d 66, 71 (Cal. 2009); see Elizabeth Adams, Going to Heaven: The Life and Election of Bishop Gene Robinson 231–49 (2006). The Protestant Episcopal Church was organized in America in 1789.

[2] Michelle Boorstein & Jacqueline L. Salmon, Diocese Sues 11 Seceding Congregations Over Property Ownership, Wash. Post, Feb. 1, 2007, at B4.

[3] Michelle Boorstein, Property Fight Drags On, And Legal Costs Grow, Wash. Post, Jan. 10, 2008, at B6.

[4] For ease of discussion, this Note will use the term "parish" to refer to a local church belonging to a larger supercongregational body. It will also use the terms "supercongregational" and "hierarchical" interchangeably. Although the churches referenced in this Note do not always use all of these terms themselves, courts have generally adopted the terminology this Note will use.

cate these church property disputes. Part I of this Note will explain the different approaches to hierarchical church property disputes, rooted in the religion clauses of the First Amendment, which the Supreme Court has endorsed at one time or another. Part II will show that the Supreme Court's most recent guidance for these controversies, which it calls the "neutral principles" approach, has created a tremendous amount of confusion and unpredictability in state courts. Specifically, Part II will track a representative sample of state court decisions pertaining to schisms within the Protestant Episcopal Church and the United Presbyterian Church to show that those denominations are treated differently in different states. Then, Part III will develop an argument that these inconsistencies raise practical concerns which, in the church property context, actually amount to constitutional defects.

To remedy those defects, this Note will propose a federal statute to simplify and standardize the law of church property disputes. Part IV will begin by examining some other potential approaches to the neutral principles problem and conclude that they all give far too little weight to the inconsistency problem. Then, this Note will detail the structure and function of a proposed federal statute that would resolve that problem. Although a federal statute would solve many of the practical and constitutional issues raised by the current federalist system of church property dispute resolution, it would also raise constitutional questions of its own. Part V anticipates three such constitutional objections and will argue that the proposed statute would survive constitutional review under current doctrine.

I. APPROACHES TO THE PROBLEM OF HIERARCHICAL CHURCH PROPERTY DISPUTES

In order to show what constitutional concerns the Supreme Court takes into account when dealing with hierarchical church property cases, this Part explains three potential approaches to the problem. Though the Court has soundly rejected the first—the implied trust approach—its reasons for doing so are relevant to church property jurisprudence today. The second—the deference approach—is still occasionally used today but, more importantly, was the only method blessed by the Supreme Court during the time when most extant parishes were organized. The final approach—

neutral principles—is the most common modern approach and the cause of the confused and coercive state of church property litigation.

A. Implied Trust Approach

Had the American legal system adopted the English approach to church property disputes along with much of the rest of the common law, church property litigation would be quite different than it is today. The English rule provided that church property was held subject to an implied trust that allowed the recipient (generally the parish) to keep the property so long as it did not stray from the doctrine of that church at the time the gift was made.[5] Otherwise known as the departure-from-doctrine test, this approach actually requires civil courts to decide questions of doctrine in order to determine ownership of church property.

Not surprisingly, the Supreme Court decisively rejected the English approach. In *Watson v. Jones*,[6] a pre-*Erie* case developing the federal common law of church property jurisprudence, the Supreme Court announced that it would not apply a restrictive departure-from-doctrine trust on church property. Because American law need not—indeed, cannot—allow for an establishment of religion, it knows "no heresy and is committed to the support of no dogma."[7] This was and should have been an easy decision; civil judges are "woefully ill-suited" to adjudicate disputes over religious doctrine and should not be allowed, under the establishment clause, to stifle the development of doctrine in individual churches.[8] The Supreme Court reaffirmed its rejection of the English departure-from-doctrine rule, even in state courts, on a federal constitutional basis in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.[9]

[5] See Dallin H. Oaks, Trust Doctrines in Church Controversies 33 (1984).

[6] 80 U.S. (13 Wall.) 679 (1871).

[7] Id. at 728

[8] Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts Over Religious Property, 98 Colum. L. Rev. 1843, 1851 (1998). But see Justin M. Gardner, Note, Ecclesiastical Divorce in Hierarchical Denominations and the Resulting Custody Battle over Church Property: How the Supreme Court Has Needlessly Rendered Church Property Trusts Ineffectual, 6 Ave Maria L. Rev. 235, 238 (2007).

[9] 393 U.S. 440, 450 (1969).

B. Deference Approach

Instead of the English rule, the Supreme Court in *Watson* blessed a quite different approach for disputes involving "a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete."[10] Rather than requiring an inquiry into the parties' fidelity to doctrine, the *Watson* approach required civil courts merely to accept the decision of the relevant ecclesiastical tribunal. This rule in fact prohibited inquiry into doctrine, because civil courts were required to defer to the determination of the ecclesiastical court "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories."[11] This approach appeared to be the sole acceptable method of resolving church property disputes for over one hundred years.

The *Watson* deference rule, while ostensibly favorable to the national churches, laid a trap for those denominations such as the Protestant Episcopal Church and United Presbyterian Church that relied on it. Because deference to ecclesiastical tribunals does not require the national church to create explicit trust documents with its parishes in order for a court to find for the denomination when the parish breaks away, denominations largely avoided creating such explicit trusts with individual parishes. This was a reasonable decision at the time; the legal system produced the result that individual parish trusts would have created anyway, but without the added cost and awkwardness.[12] When the Supreme Court pulled the rug out from under the national churches in 1979 by sanctioning a new, non-deference approach to church property disputes, however, the denominations that relied on *Watson* often lost the ability, previously secure, to control the property of breakaway

[10] 80 U.S. at 722.

[11] Id. at 727.

[12] See Kent Greenawalt, 1 Religion and the Constitution 279 (2006) ("For some modern cases involving religious bodies, crucial transactions took place years ago under a legal regime in which . . . decisional law . . . adopted implied trusts in favor of general churches. General churches could understandably have taken the view that express trust language in their favor was unnecessary."); id. ("[F]or reasons similar to those that disincline engaged couples from facing how they will distribute property if they get divorced, church members may resist detailing the consequences of a split in their spiritual community.").

parishes. This reasonable assumption of national churches, now rendered suspect by the Supreme Court and the states, is a primary reason why this Note argues that national churches need more protection.

Watson itself dealt with a dispute between the national General Assembly of the Presbyterian Church and parish, regional, and statewide representatives of the Kentucky church. While the Kentucky representatives successfully argued in state court that the General Assembly's support of the Emancipation Proclamation constituted an abandonment of the true doctrine of the Presbyterian Church, representatives of the General Assembly, who claimed diversity jurisdiction in federal court, convinced the Supreme Court that the determination of the General Assembly was binding.[13] *Watson* is characteristic of most applications of the deference approach in that the national hierarchy prevailed—after all, the rule indicates that the highest ecclesiastical court is entitled to make the decision in its own self-interest.

C. Neutral Principles Approach

The Supreme Court eventually clarified in 1979 that while the *Watson* deference rule is a permissible approach to church property disputes, it is not the only acceptable method. In *Jones v. Wolf*, a narrow majority, over a dissent that argued that the deference approach was the sole permissible method, declared that states could also use "neutral principles of law" to adjudicate competing claims for ownership of church property.[14] The primary concern in such cases, Justice Blackmun explained for the majority, was that "civil courts [not] resolv[e] church property disputes on the basis of religious doctrine and practice."[15] The neutral principles approach avoids this danger by relying "exclusively on objective, well-established concepts of trust and property law."[16]

Judges can rely only on specific types of evidence in the neutral principles method.[17] Such evidence includes "the language of the

[13] *Watson*, 80 U.S. at 690–94, 727.
[14] 443 U.S. 595, 604, 614 (1979).
[15] Id. at 602.
[16] Id. at 603.
[17] Id. at 611 (Powell, J., dissenting).

deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property."[18] Under this approach, judges will first determine which party has legal title to the property, and then decide whether the other party has a trust in the property. Courts can look to secular documents for evidence regarding the existence of a trust, but they may also look to religious documents—in particular, the constitution and canons of the local church's denomination—so long as those documents do not require civil courts to investigate doctrinal matters.[19] Ultimately, the existence of a trust depends on the underlying common and statutory law in each state.

At this point, an explanation of some of the differences between the church property trusts used in the neutral principles approach and the more familiar trusts that might be covered in a standard course on trusts and estates will be helpful. In the paradigmatic non-church property trust, a settlor transfers property to a trustee to hold legal title to the property for the benefit of the beneficiary, who has an equitable interest in the trust corpus. To create the trust, the settlor almost always uses a trust document which sets forth the agreement between settlor and trustee.[20] The document also commonly specifies the purposes for which the trustee is to use the corpus—in other words, how the trustee is to use the property to benefit the beneficiary and under what circumstances the beneficiary may sue the trustee. If a national church were to use this sort of trust in the property of its parishes, it would have to create as many different trust documents as there are parishes because the agreement of each individual parish would be necessary.

The church property trusts used in the neutral principles approach, however, are very rarely created by an explicit agreement between the settlor and the trustee. This is because the settlor and the trustee are normally the same entity—the local parish. The trust relationship between the trustee-parishes and beneficiary-

[18] Id. at 603 (majority opinion).

[19] Id. at 604 (citation omitted).

[20] Greenawalt, supra note 12, at 279 ("Courts have consistently been hesitant to create trusts in favor of parties who do not hold property, deciding that express trusts exist only if the language creating them is explicit, and deciding that implied trusts exist only when the considerations favoring them are strong.").

national church arises not from a trust document—or as many trust documents as there are parishes—but rather from an implied trust which courts infer from the parish-denomination relationship. Some judges are more willing to find such implied trusts because, prior to *Jones v. Wolf*, most national churches reasonably assumed that their control over parishes was secured by operation of law under the *Watson* deference approach and therefore did not bother to create explicit trust agreements with their parishes.[21] Over the last twenty-five years, when courts have ceased to give automatic *Watson* deference to hierarchical assertions of trust in parish property, most neutral-principles states have begun the church property trust inquiry by looking for a trust provision in denominational constitutions as evidence of the implied trust relationship.[22] Despite the similar starting points, the next Part demonstrates that states have interpreted these constitutional trust provisions in quite different ways, even though the same trust provision applies to all parishes of the same denomination in every state.

In *Jones v. Wolf* itself, the dispute concerned which faction of a Georgia Presbyterian parish was entitled to retain control of the parish property. The majority faction voted to disaffiliate from the denomination, whereas a minority remained faithful to the Augusta-Macon Presbytery.[23] The Supreme Court of Georgia held that lower courts had properly determined that the property belonged to the local church, and that the majority faction constituted the local church.[24] Perhaps surprisingly, the United States Supreme Court affirmed. Even though the state courts had not given deference to the determination of the Presbyterian denomination's own tribunals, as would be required under *Watson*, the Supreme Court held that it was proper for state courts to examine property documents and relevant portions of church constitutions to determine which party was entitled to the property under state law and

[21] See supra text accompanying note 12.

[22] See infra Part II. Note that the constitutional trust provisions are not traditional trust documents because they do not necessarily manifest the agreement of each individual parish to serve as trustee of parish property for the national church. It is only in the unique circumstances of church property law that a national church could designate itself as the beneficiary of property whose legal title is held by the parish without the parish's explicit agreement.

[23] *Jones*, 443 U.S. at 598.

[24] Id. at 599.

whether the Augusta-Macon Presbytery had a trust in that property.[25] Unlike the vast majority of cases under the deference approach, it was perfectly permissible—though by no means required—that the breakaway faction of the local parish retain the church property under the neutral principles approach. Although the neutral principles method is more complicated than the deference method, as many as twenty-nine states have adopted some form of neutral principles for church property adjudication.[26]

II. NEUTRAL PRINCIPLES CONFUSION

This Part shows that states have had a very hard time applying the neutral principles approach consistently. In particular, this Part tracks two supercongregational churches—the Protestant Episcopal Church and the United Presbyterian Church—in order to show that different states have treated the same church differently. These two churches provide useful examples for evaluating the neutral principles approach because they have been the targets of significant amounts of church property litigation and because their local parishes often hold title to parish property while the national churches have adopted constitutional amendments that purport to reserve a trust interest in that property. This situation has resulted in controversial legal inconsistencies between different states applying ostensibly the same neutral principles approach. Such inconsistencies are not caused by differences in trust language because both the Protestant Episcopal Church and the United Presbyterian Church have adopted one constitutional provision meant to apply to the parishes of every state equally. Instead, as this Part shows, under the current neutral principles model of *Jones v. Wolf*, these inconsistencies are caused by differences in state statutes governing church property disputes and differences in state common law approaches to property in general. After establishing that state law differences cause such inconsistencies, this Note uses these inconsistencies to argue in the next Part that the current neutral princi-

[25] Id. at 604.

[26] 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, 457–63 (2008).

ples regime creates burdens on the constitutionally guaranteed free exercise rights of hierarchical churches.

A. Protestant Episcopal Church of the USA

The Protestant Episcopal Church of the USA ("PECUSA," or the Episcopal Church) has been especially troubled recently by parish defections following its ordination of an openly gay bishop in 2003.[27] Although it amended its constitution in 1979 with one trust provision meant to apply to all Episcopal parishes,[28] states have given drastically different weight to this measure depending on differences in common and statutory law. In practice, these differences in state law mean that the Episcopal Church has not been able to retain predictable control over the property of its parishes in the way that the Church's doctrines require.

The Supreme Court of California recently took an approach to the California statutory and common law of trusts that favored the hierarchy far more than other states have. In *In re Episcopal Church Cases*, an Episcopal parish that held title to its property voted to disaffiliate from the Episcopal Diocese of Los Angeles, but the Diocese quickly sued, claiming that it had a trust in the property.[29] In particular, the parish's 1949 articles of incorporation specified that "the Constitution and Canons in the Diocese of Los Angeles . . . always form a part of the By-Laws and Articles of Incorporation of the corporation hereby formed and shall prevail against and govern anything . . . repugnant."[30] In 1979, in response to *Jones v. Wolf*, the Episcopal Church adopted the Dennis Canon, a constitutional amendment which provided that "[a]ll real and personal property held by or for the benefit of any Parish . . . is held in trust for this Church."[31] Luckily for the Diocese, a 1982 amendment to the California Corporations Code indicated that

[27] Kathleen E. Reeder, Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits, 40 Colum. J.L. & Soc. Probs. 125, 125–26 (2006).

[28] Protestant Episcopal Church in the United States of America, Canon I.6.4 (1982) [hereinafter 1982 Canon] ("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.").

[29] 198 P.3d 66, 79 (Cal. 2009).

[30] Id. at 71.

[31] 1982 Canon, supra note 28.

such provisions in the "governing instruments of a superior religious body" are sufficient to create a trust.[32] Although other California statutes seemed to indicate that "clear and convincing proof" far beyond what the Diocese offered in this case would be necessary to show the existence of a trust,[33] the court insisted that the California common and statutory law of trusts had created one for the Diocese.

Unlike California law, the South Carolina common law of trusts makes it almost impossible for hierarchical churches to demonstrate trusts in parish property, resulting in a marked disparity between California and South Carolina treatment of church property. In *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina*, substantially identical issues as in *In re Episcopal Church Cases* were raised when a single parish that held title to its property withdrew by majority vote from the Diocese of South Carolina and elected a new vestry.[34] The minority that remained loyal to the Diocese attempted to elect a competing board, and a declaratory action followed. Although the Diocese had executed a quit-claim deed in 1903 that unambiguously vested legal title to the property in the parish corporation,[35] those loyal to the Diocese claimed that the subsequent Dennis Canon reserved a beneficial trust interest in lieu of legal title. The Supreme Court of South Carolina flatly rejected this argument, stating that as a matter of state trust law, the Dennis Canon could never create the claimed trust interest.[36] This reasoning created a dramatic split with California less than one year after *In re Episcopal Church Cases* and illustrated the inconsistency created by reliance on state law for resolution of church property disputes.

[32] *In re Episcopal Church Cases*, 198 P.3d at 81 (citing Cal. Corp. Code § 9142(c)(2) (West 2006)).

[33] See id. at 84 (citing Cal. Evid. Code § 662 (West 1995)). In *Protestant Episcopal Church in the Diocese of Los Angeles v. Barker*, 171 Cal. Rptr. 541, 553–54 (Cal. Ct. App. 1981), a California appellate court determined that the same portion of the California Evidence Code precluded the existence of a trust for the diocese.

[34] 685 S.E.2d 163, 166–67 (S.C. 2009).

[35] Id. at 174.

[36] Id. ("[A] person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another."). This statement is in tension with the language of *Jones v. Wolf*. See supra text accompanying note 18.

The Colorado law of church property trusts differs from both California and South Carolina law in a way that makes it impossible for the Episcopal Church to maintain one system of property ownership that is effective in all three states. In *Bishop and Diocese of Colorado v. Mote*, the Supreme Court of Colorado determined that unlike South Carolina, which refused to find the requested trust on the basis of a denominational constitution, and unlike California, which required an explicit statement of trust in "governing instruments of a superior religious body,"[37] "Colorado recognize[d] that the intent to create a trust can be inferred from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular documents or language employed, and the conduct of the parties."[38] The court found such intent because the parish in *Mote* included in its articles of incorporation a resolution "promising obedience to the canons of the national church and of the diocese"; one such canon forbade parishes from selling or mortgaging property without the bishop's consent.[39] The court also found that the so-called "Dennis Canon" confirmed—but was not necessary for—the existence of a trust.[40] The Diocese of Colorado was therefore entitled to retain its parish's property, but if the Diocese had sued under identical circumstances under South Carolina law, it would have failed.[41]

[37] *In re Episcopal Church Cases*, 198 P.3d at 81 (citing Cal. Corp. Code § 9142(c)(2) (West 2006)).

[38] 716 P.2d 85, 100 (Colo. 1986).

[39] Id. at 88.

[40] Id. at 105.

[41] The Episcopal Church cases have been inconsistent throughout other states as well, though the hierarchy prevails somewhat more often than not. Compare Protestant Episcopal Church in the Diocese of L.A. v. Barker, 171 Cal. Rptr. 541, 555–56 (Cal. Ct. App. 1981) (finding no trust for the Diocese in the parish), Bjorkman v. Protestant Episcopal Church in the U.S. of the Diocese of Lexington, 759 S.W.2d 583, 586–87 (Ky. 1988) (same), and In re Multi-Circuit Episcopal Church Property Litigation, CL 2007-0248724, Letter Opinion on the Constitutionality of Va. Code § 57-9(A) *23 n.24 (Va. Cir. June 27, 2008), available at http://www.fairfaxcounty.gov/courts/cases/in_re_multi-circuit_episcopal_church_litigation/PDFs/Constitutionality_579_062708.pdf (same), with Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn., 620 A.2d 1280, 1282 (Conn. 1993) (finding a trust for the Diocese in the parish), Episcopal Diocese of Mass. v. Devine, 797 N.E.2d 916, 924-25 (Mass. App. Ct. 2003) (same), Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920, 925 (N.Y. 2008) (same), Daniel v. Wray, 580 S.E.2d 711, 719 (N.C. Ct. App. 2003) (same), and In re Church of St. James the Less, 888 A.2d 795, 810 (Pa. 2005) (same).

B. United Presbyterian Church of the USA

The United Presbyterian Church of the USA ("UPCUSA") has not fared well in church property litigation. The church's misfortune cannot be blamed on ineffective or inconsistent trust language; like the Episcopal Church, the UPCUSA has adopted a constitutional amendment with language quite similar to the Dennis Canon, which purports to apply equally to all Presbyterian parishes in every state. The UPCUSA's constitution now provides that "[a]ll property held by or for a particular church . . . is held in trust nevertheless for the use and benefit of [UPCUSA]."[42] The church's lack of success in litigation may have as much to do with where its breakaway parishes happen to be located as with its own efforts to plan for defections. Under current law, hierarchy-unfriendly states can overcome almost any attempt by a national church to secure control of parish property. The difference in the way that different states treat local branches of the national denomination is an unfortunate illustration of this problem.

The New York courts have relied on the New York common and statutory law of trusts to reject the UPCUSA's claimed interest in parish property. Citing a state trust statute,[43] a New York state trial court in *Presbytery of Hudson River v. First Presbyterian Church* dismissed the possibility that the defecting parish's church property was encumbered by a trust in favor of the Presbytery by stating, "[i]t is hornbook property law that only the owner of real property can convey an interest in the property; B can not create a future interest in A's property without A's consent."[44] This argument, which does not take the special circumstances of church property trusts into account, would be sufficient to render ineffective all trust provisions in denominational constitutions. The Presbytery also tried to argue that by remaining inside the UPCUSA for twenty-five years after the trust provision was adopted into the Book of Order, the parish had acceded to that trust as a matter of state common

[42] Constitution of the Presbyterian Church (U.S.A.), Part II: Book of Order, G-8.0200 (2009), available at http://www.pcusa.org/oga/publications/boo07-09.pdf.

[43] N.Y. Gen. Oblig. Law § 5-703 (McKinney 2009) ("An estate or interest in real property . . . or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing.").

[44] 821 N.Y.S.2d 834, 837 (N.Y. Sup. Ct. 2006).

law. The court rejected that argument, stating that "mere silence" was "an insufficient expression of an intent to create a trust."[45] At least in New York, statutes and the common law prevented the nationally applicable UPCUSA trust from securing an interest in parish property.

Unlike those in New York, California courts continue to employ state statutes and common law doctrines that respect the force of the UPCUSA's constitutional trust provision. In *Korean United Presbyterian Church of Los Angeles v. Presbytery of the Pacific*, the California Court of Appeals found that the existence of the Presbyterian version of the "Dennis Canon" was sufficient to create a trust that prevented the breakaway parish from taking the church property.[46] Citing the same provision of the California Corporations Code that would later figure prominently in *In re Episcopal Church Cases*, the court stated that there was a presumed trust in favor of the Presbytery which was confirmed by the constitutional trust provision.[47] More generally, the court relied on the California Nonprofit Religious Corporation Law, which requires nonprofit religious corporations, like the parish at issue, to conduct their affairs pursuant to bylaws that incorporate "religious documents such as canons, constitutions, or rules of other religious bodies; church traditions if sufficiently ascertainable; rules of a religious superior; and similar sources."[48] The court held that the trust language in the Book of Order therefore applied to the parish, and California apparently has no common law that would prevent the recognition of such a trust.

Unlike California but much like the New York state courts, Ohio has also failed to find a trust in favor of the UPCUSA despite the universal trust provision in the Book of Order. In *Hudson Presbyterian Church v. Eastminster Presbytery*, the Ohio Court of Appeals dealt with a parish that voted to disaffiliate from the UPCUSA in 2006.[49] Although the parish had incorporated in 1982—the year before the trust provision was adopted in the

[45] Id. at 839.

[46] 281 Cal. Rptr. 396, 414 (Cal. Ct. App. 1991).

[47] Id. at 412 (citing Cal. Corp. Code § 9142(c)(2)); see also supra note 32.

[48] *Korean United Presbyterian Church of L.A.*, 281 Cal Rptr. at 409 (quoting 1B Ballantine & Sterling's Cal. Corporation Law (4th ed. 1990) § 418.04).

[49] 2009 WL 249791 at *1 (Ohio Ct. App. Feb. 4, 2009).

UPCUSA's constitution—and its articles of incorporation agreed to "submit[] to the authority and form of government as set forth in the Constitution (as amended) of the [UPCUSA]," the Court of Appeals refused to disturb the trial court's ruling that the Presbytery had no trust interest.[50] Although the court upheld the trial judge's narrow ruling that the Presbytery had failed to introduce adequate evidence regarding the Book of Order, it also implied that even admissible evidence of the denominational constitution would be insufficient to create a trust because of state common law. The court held that "[u]nless the settlor and the trustee of a trust are the same person or entity, the mere assertion that property is held in trust, without the transfer of the legal interest or title to the property, cannot create an express trust."[51] Ultimately, state law would prevent the UPCUSA's nationally applicable trust from working in Ohio.[52] Therefore, idiosyncratic state statutes and common law rules have created dramatic inconsistency in the application of the neutral principles approach for the Protestant Episcopal Church of the USA and the United Presbyterian Church of the USA—two of the largest denominations in the United States.[53]

III. THE COERCION PROBLEM WITH NEUTRAL PRINCIPLES

The results of the Episcopal Church and the UPCUSA are strikingly unpredictable in state-by-state church property litigation. Be-

[50] Id. at *1–2, 9.

[51] Id. at *4–5, 7 (citation omitted).

[52] The results of UPCUSA church property litigation were inconsistent even in the period directly following the 1984 adoption of a trust provision in the Book of Order. Compare Presbytery of Donegal v. Calhoun, 513 A.2d 531, 536–37 (Pa. 1986) (holding that a local parish was entitled to retain its property), and Presbytery of Beaver-Butler v. Middlesex Presbyterian Church, 489 A.2d 1317, 1325 (Pa. 1985) (same), with Fairmount Presbyterian Church, Inc. v. Presbytery of Holston, 531 S.W.2d 301, 305–06 (Tenn. Ct. App. 1985) (finding a trust for the Presbytery).

[53] Even smaller denominations with less geographic diversity have suffered from the inconsistency problem. For example, the Cumberland Presbyterian Church, a hierarchical denomination that adopted a nationally applicable trust provision in its constitution in 1984, has faced different results in different states despite its universal trust provision. Compare Arkansas Presbytery v. Hudson, 40 S.W.3d 301, 310 (Ark. 2001) (holding that a local parish was entitled to retain its property), with Cumberland Presbytery v. Branstetter, 824 S.W.2d 417, 422 (Ky. 1992) (finding a trust for the Presbytery), and Bethany Independent Church v. Stewart, 645 So.2d 715, 721–22 (La. Ct. App. 1994) (same).

cause different states have adopted different statutes and developed different common law rules, it is almost impossible for many national hierarchical churches to govern their affairs consistently and effectively.[54]

Surprisingly, this approach was adopted and has been praised subsequently by one legal scholar for precisely this reason:

> The majority [in *Jones v. Wolf*] appeared willing to give states an opportunity to develop their own state constitutional law. In addition, the majority was willing to allow states more leeway in adopting local state law concepts to the entire area of church state relations. . . . States were perfectly free to follow *Watson*. They would also be free to pass statutes that accommodate the polity of various churches. . . . This was a healthy development that augurs well for the federal system. To be sure, it places greater responsibility on the states and allows novel experimental approaches that are more atune [sic] to each state's unique history and conditions.[55]

Here, this Part explains why this lack of consistency among states constitutes a failure, rather than a success, of the state-based neutral principles approach. This Part shows that the inconsistency-laden current neutral principles approach threatens the free exercise rights of hierarchical churches by coercing them into, on the one hand, adopting alien forms of property management that are doctrinally disfavored by those churches ("property management"), or on the other hand, relinquishing hierarchical control over local congregations ("hierarchical control"). If a state forces a hierarchical church to abandon its system of property management or compels it to forsake its hierarchical control, there are grave

[54] John E. Fennelly, Property Disputes and Religious Schisms: Who Is the Church? 9 St. Thomas L. Rev. 319, 353 (1997) ("Neutral principles has led to the willy-nilly application of real property, equitable estoppel, trust, and other doctrines without any real doctrinal analysis. The predictable result is confusion and uncertainty."); Greenawalt, supra note 8, at 1895 ("Knowing that a court will use a neutral principles approach alone may not provide competing claimants with much of a guide as to how a case will be decided."); Giovan Harbour Venable, Courts Examine Congregationalism, 41 Stan. L. Rev. 719, 745 (1989) ("It has been suggested that the concept of neutral principles is too manipulable to be used with any consistency when resolving church property disputes.").

[55] Fennelly, supra note 54, at 335.

free exercise implications; the choice between one or the other is no better. When states put this choice to a hierarchical church, it violates the free exercise clause as incorporated against the states.[56]

The problem that the neutral principles approach creates—a forced choice for hierarchical churches between property management and hierarchical control—is compounded by the fact that the previous *Watson* regime protected those churches' choices of property and polity and encouraged reliance on that protection. The neutral principles regime obliterated such protection.[57] This problem is unique to national hierarchical churches and has been given far too little attention in the scholarly literature on church property disputes.[58]

It is undoubtedly true that the current federal system of church property adjudication presents a hardship for national hierarchical denominations. This fact, however, may not be sufficient by itself to merit a significant change at the federal level. What is sufficient to warrant such a change is that the hardship puts pressure on these denominations to change fundamental aspects of their identity. It is beyond doubt that a state could not explicitly require a Baptist church to become more Catholic, or a Catholic church to become more Baptist.[59] Yet the flawed neutral principles approach practiced by several states in effect requires denominations which are only intermediately hierarchical to become more like the one or the other because these denominations must sacrifice either their hierarchical system of national governance or their method of decentralized property ownership. Mere amendment of a church's constitution, canons, or bylaws will not solve the coercion problem.

---

[56] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[57] See supra text accompanying note 12.

[58] See supra note 54.

[59] What Professor Howe wrote regarding state law is equally true of the current federal system:

> It would hardly be a satisfactory arrangement for a Congregational church if the state in which it carries on its mission should promulgate a law saying that all real estate owned by any church within the state must be held in the name of the bishop of that church. Nor would it be entirely fair to the Roman Catholic church for a state to promulgate a law saying that the minister of each church in the state is only to be employed or dismissed by a majority of the congregation of the parish to which he ministers.

Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History 33–34 (1965).

This is because, as cases in Part II refusing to find a trust for the denomination make clear, no matter what changes these churches make, some states will refuse to recognize any trust-based ownership interest in parish property without an explicit trust agreed to by the individual parish. As soon as even a single state refuses to respect amendments to church constitutions and canons,[60] then denominations with parishes in all such states must change either their system of governance or their system of property ownership. Because both of those aspects of church identity are doctrinally significant, this coercion amounts to a burden on these denominations' free exercise of religion. Although the church property literature has occasionally noted the inconsistency problem,[61] no author has yet recognized the crucial constitutional implications of that problem.

A preliminary counterargument to this claim of coercion is that national churches can now create explicit trust agreements with each individual parish, rather than relying on a single trust provision in a denominational constitution. If plausible, that approach would allow national churches to maintain their desired hierarchical governance structure while continuing to use a trust-based system of property ownership. Admittedly, churches like the PECUSA and UPCUSA could try to create explicit trusts in brand-new missions and parishes by conditioning admission to the denomination on acceptance of the trust, although all the parties may want to avoid this maneuver for the same reasons that prospective spouses avoid prenuptial agreements.[62]

Even if new explicit trust agreements would be a plausible solution for new parishes, however, that tactic utterly fails for established parishes, a group that includes the overwhelming majority of all parishes and, notably, every single one of the parishes involved in the cases described in Part II. Whereas prospective parishes pre-

[60] The cases described in footnotes 41 and 52–53 above indicate that as many as eight states have already refused to respect amendments to church constitutions and canons for the purpose of establishing church property trusts; more states that have not yet weighed in on the issue may fail to respect such amendments in the future.

[61] See supra note 54.

[62] See Greenawalt, supra note 12, at 279 ("[F]or reasons similar to those that disincline engaged couples from facing how they will distribute property if they get divorced, church members may resist detailing the consequences of a split in their spiritual community.").

sumably wish to be affiliated with their chosen denomination, the only existing parishes in which the national church would feel a pressing need to establish an explicit trust are those parishes that are already considering leaving the denomination. If the national church forced those parishes to choose between an explicit trust and expulsion from the denomination, the parishes would almost certainly choose the latter.[63] Such an option would be as bad for free exercise purposes as the two choices described above, because it would prevent the national church from exercising both trust-based property ownership and hierarchical control over parishes. Therefore, the mere possibility that national churches could try to establish new explicit trusts in parish property does not ameliorate the free exercise problem.

Once explicit trust arrangements with each individual parish are rejected as infeasible, one of two remaining ways for the hierarchical denominations burdened by the neutral principles regime to respond is to become less hierarchical. In other words, these churches could abandon their attempts to exert control over the property of parishes that no longer wish to be associated with the denomination—in effect, abandoning attempts to control the parishes themselves. By relinquishing that aspect of control, these hierarchical denominations would then become more like congregational denominations, where individual parishes have autonomy. Congregational churches do not generally have to deal with the problem of a national church organization trying to assert control over parish property when that parish tries to disaffiliate from the national organization.[64]

Coercion of such a choice, however, would be a threat to these denominations' free exercise of religion. As the Supreme Court

[63] Id. ("If the general church thinks that property should be held for it, but some disaffected local churches disagree, the general church may wish not to exacerbate existing tensions by forcing a definitive decision."). The defections following the UPCUSA's consideration of a more explicit trust approach vividly illustrates this point. See, e.g., York v. First Presbyterian Church of Anna, 474 N.E.2d 716, 718 (Ill. App. Ct. 1984) (addressing a church action in October, 1980 that "in essence" amounted to "an absolute withdrawal from UPCUSA" in response to a change by the UPCUSA in July, 1980); Presbytery of Elijah Parish Lovejoy v. Jaeggi, 682 S.W.2d 465, 466 (Mo. 1984) (addressing a situation in which a church voted to terminate its association with UPCUSA on July 21, 1980).

[64] See Greenawalt, supra note 8, at 1866–70.

explained in *Kedroff v. Saint Nicholas Cathedral*, it is the object of church property and polity jurisprudence to "radiate[] . . . 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."[65] Institutions such as the Episcopal Church and the UPCUSA have not chosen a supercongregational structure out of convenience—their doctrine and tradition demand certain forms of church government.[66] Granting parishes such significant autonomy is inconsistent with the hierarchical model of polity adopted by denominations such as the PECUSA and UPCUSA, and if denominations in several states are forced to grant such autonomy as the price of retaining a trust-based system of church property management, their free exercise of religion is threatened.

Besides abandoning hierarchical control, the only other remaining way for national hierarchical churches to deal with the current regime is to continue to exercise hierarchical control but to abandon the system in which parishes are allowed to hold title to property in their own name. The Roman Catholic Church in America has confronted only a fraction of the church property litigation that the Protestant churches have faced, because Catholic practice is largely for the bishops to hold title to parish property. This practice is in fact rooted in the doctrine of that church—hierarchical authority in the Catholic tradition demands a greater amount of control over property than in mainline American Protestant churches.[67] As a result, Catholic parishes generally have no claim to the property under any of the Supreme Court's approaches.[68]

---

[65] 344 U.S. 94, 116 (1952).

[66] Richard W. Duesenberg, Jurisdiction of Civil Courts over Religious Issues, 20 Ohio St. L.J. 508, 527 n.63 (1959); Michael William Galligan, Note, Judicial Resolution of Intrachurch Disputes, 83 Colum. L. Rev. 2007, 2030 (1983) ("Churches and religious organizations maintain beliefs and doctrines about their structure as well as the transcendent. Often the internal organization of a church reflects such beliefs.") (footnote omitted).

[67] See generally Patrick J. Dignan, A History of the Legal Incorporation of Catholic Church Property in the United States (1784–1932) (1933).

[68] See, e.g., Maffei v. Roman Catholic Archbishop of Boston, 867 N.E.2d 300, 312 (Mass. 2007) (finding that the parishioners had no property right in church property that would allow them to prevent the archbishop from closing the parish); Berthiaume v. McCormack, 891 A.2d 539, 549 (N.H. 2006) (same).

This tactic, however, is equally problematic from a free exercise standpoint. Just as the Catholic Church's system of property organization is rooted in church doctrine, so are the property systems of the national Protestant churches. In fact, much of the Protestant doctrine of church organization likely formed in reaction to the perceived excessive hierarchical authority of the Catholic Church. It would be ironic indeed if the federal structure of American law coerced the Protestant leaders into acting more like Catholic hierarchs. Moreover, such a move would certainly violate the "spirit of freedom for religious organizations" that *Kedroff* cited as a primary motivation for the Supreme Court's jurisprudence involving church polity and governance. When several states force national churches to change the way that they manage the property of their parishes as the price of maintaining their traditional hierarchical control, denominational free exercise is threatened.

Therefore, the inconsistent application of neutral principles—in which some states refuse to respect the force of trust provisions in denominational constitutions—coerces these denominations to abandon either their systems of property management or hierarchical control. Unlike other national actors burdened by federalism, hierarchical churches have religious reasons for particular types of property management and hierarchical control—religious reasons that are recognized as the core of free exercise protection for religious institutions.[69] Therefore, this forced choice between two options that both impinge upon the constitutional right to free exercise of religion is itself unconstitutional.

IV. TOWARD A FEDERAL STATUTORY SOLUTION

This Part argues that the best way to correct the problems with the neutral principles approach, at least as it has been applied on a state-by-state basis, is to craft a federal statute. First, this Part argues that the Religious Freedom Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") will not be sufficient to solve the problems described above. Then, this Part shows that other approaches that have been proposed to solve the problems with the current neutral principles model are insufficient. Finally, this Part proposes a different fed-

[69] See supra text accompanying note 65.

eral statute that would solve the identified problems with the neutral principles approach.

A. Existing Federal and State Statutes Are Insufficient

At first glance, it seems plausible that RFRA[70] or RLUIPA,[71] or perhaps state versions thereof, would afford some protection to national hierarchical denominations buffeted by the inconsistencies of a federal system. After all, losing significant amounts of church property to breakaway parishes is, at least colorably, a "substantial burden" which can only survive under RFRA and RLUIPA if there is a narrowly tailored compelling state interest. None of these laws, however, would effectively solve the problem of inconsistency.

The most obvious reason that the federal RFRA would not help is that it no longer applies to the states. In *City of Boerne v. Flores*, the Supreme Court held that Congress did not have the authority under Section 5 of the Fourteenth Amendment to require states to prove that laws substantially burdening one's exercise of religion were narrowly tailored to a compelling governmental interest.[72] Although the federal RFRA still applies to federal law, the vast majority of church property disputes take place in state courts applying state law.[73] Though state RFRAs might then apply, not every state has its own RFRA. Assuming, arguendo, that application of a state RFRA would result in outcomes uniformly favorable to national hierarchical churches, the inconsistency problem would nevertheless remain.

Even if federal and state RFRAs would not resolve the issues presented by the neutral principles regime, there is a colorable argument that RLUIPA would. After all, RLUIPA has been upheld as applied to the states and, even more promisingly, it is focused on

[70] 42 U.S.C. § 2000bb (2006).

[71] Id. § 2000cc.

[72] 521 U.S. 507, 533–34 (1997).

[73] See, e.g., supra Part II (citing state court cases from California, South Carolina, Colorado, New York, and Ohio); supra note 41 (citing state court cases from Kentucky, Virginia, Connecticut, Massachusetts, New York, North Carolina, and Pennsylvania); supra notes 52–51(citing state court cases from Pennsylvania, Tennessee, Arkansas, Kentucky, and Louisiana).

religious land use.[74] Unfortunately, RLUIPA probably only applies when a governmental actor is a party—this is not the case in a typical church property dispute. RLUIPA probably has this limited application by analogy to the federal RFRA, which federal courts interpreted to apply only in that circumstance.[75] RLUIPA has almost the same language as RFRA, although it only applies to religious land use and institutionalized persons,[76] so courts would probably not apply RLUIPA to a church property dispute in which no governmental actor were a party.

Finally, even supposing that RLUIPA could apply to a church property dispute in which a governmental actor were not a party, it probably would not have any effect on the law that would otherwise apply. After all, RLUIPA, just like its predecessor RFRA, was meant to reinstate the strict scrutiny regime that had governed free exercise claims prior to *Employment Division v. Smith*.[77] Even under the old regime, however, courts did not apply strict scrutiny to church property disputes—rather, they applied the *Watson* deference approach or neutral principles. There is no reason to conclude that RLUIPA would apply to church property disputes now when the regime it was designed to replicate did not then.[78] Therefore, RLUIPA would be useless in church property litigation even if there were no other reason that it did not apply. Some other approach is needed to resolve the inconsistency problem with the neutral principles regime.

---

[74] See Cutter v. Wilkinson, 544 U.S. 709 (2005). Note, however, that *Cutter* dealt with a facial challenge to the "institutionalized-persons" portion of RLUIPA. Id. at 713. It is possible, even if unlikely, that a separate challenge to the religious land use portion of the statute would succeed. See id. at 715 n.3.

[75] 42 U.S.C. § 2000bb-1(a) ("*Government* shall not substantially burden a person's exercise of religion.") (emphasis added); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006) ("RFRA is applicable only to suits to which the government is a party."); Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1121 (9th Cir. 2000) ("It seems unlikely that the government action Congress envisioned in adopting RFRA included the protection of intellectual property rights against unauthorized appropriation.").

[76] Compare RLUIPA, 42 U.S.C. § 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person."), with RFRA, 42 U.S.C. § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion.").

[77] 494 U.S. 872 (1990).

[78] In re Roman Catholic Archbishop of Portland in Or., 335 B.R. 842, 860 n.20 (Bankr. D. Or. 2005) (citations omitted).

B. Other Proposed Revisions to Neutral Principles Are Insufficient

1. Church Constitution-Centered Approach

One commentator has also noted that the Supreme Court's current framework for church property jurisprudence creates a great hardship for national denominations. Ashley Alderman, whose note's title aptly referenced "*the Need for Consistent Application of the Law*," found that "state court decisions have become more and more disparate, as national churches face increasing threats of division."[79] Because she determined that much of the inconsistency in the *Jones v. Wolf* approach derived from the choice between deference and neutral principles that it permitted, Alderman suggested the following solution:

> Eliminating the deference approach and limiting a state court's analysis to the general church constitution under the neutral principles approach enables more predictable results to be reached. Once a state court examines the general church constitution, the state court must either abide by the constitution if property provisions are written in purely secular terms or refer to the deeds and state statutes of the local church, evaluating the situation under a neutral principles approach.[80]

This approach, which she calls the "church constitution-centered approach,"[81] is supposed to constitute "[a] single standard [that] offers the chance of more predictable results for individual denominations."[82]

While Alderman's proposal would be a step in the right direction, it would not be sufficient to resolve the inconsistency problems that *Jones v. Wolf* created. Eliminating the deference approach would alleviate some, but not all, of the problem because many states have already abandoned it because of establishment clause concerns.[83] Of those that have retained the deference ap-

[79] 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, 1028 (2005).

[80] Id. at 1029.

[81] Id. at 1030.

[82] Id. at 1053.

[83] E.g., Fluker Cmty. Church v. Hitchens, 419 So.2d 445, 447 (La. 1982) (refusing to apply the deference approach on the ground that neutral principles was required un-

proach, many would reach the same results under the neutral principles method anyway.[84] Second, this approach still requires the application of state law to determine whether the church constitution creates a trust. Although a "nationally recognized starting point" of the analysis would homogenize some outlying state approaches, it would not solve the problem of state law leading to different results on very similar facts, as was the case in *Diocese of Los Angeles v. Barker* and *Bishop and Diocese of Colorada v. Mote*.[85]

Recall, on the one hand, that the *Mote* court determined that there was a trust for the Diocese under relatively lenient Colorado trust law.[86] On the other hand, in *Barker*, the California Court of Appeals held that three parishes held title to the parish property whereas a fourth did not.[87] The three successful parishes retained

der both the state and federal constitution); see also Greenawalt, supra note 8, at 1904 ("The rigid deference component of the polity approach should be declared unconstitutional as insensitive to the diversity of American religions.").

[84] E.g., Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 816–19 (Iowa 1983) (finding that the United Presbyterian Church would have been entitled to control of a breakaway parish's property under either the deference approach or the neutral principles approach); see also Hassler, supra note 26, at 457–63 (listing several state decisions that found identical results under both deference and neutral principles approaches).

[85] Alderman, supra note 79, at 1060. Another law student has recognized that "it is the freedom of the states to choose for themselves which method to employ when resolving church property disputes . . . that has resulted in uncertainty in determining the likely outcome of a church property dispute[,]" but then argues that an idiosyncratic Virginia statute is a good model for resolution of such disputes. Meghaan 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, 331–32 (2008). See generally Va. Code Ann. § 57-9(A) (West 2009) ("If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation 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."). There are overt constitutional problems with the Virginia statute. Fiona McCarthy, Note, Church Property and Institutional Free Exercise: The Constitutionality of Virginia Code Section 57-9, 95 Va. L. Rev. 1841, 1841. In addition, this approach suffers from the same state-law uncertainty flaw as Alderman's church constitution-centered approach.

[86] See supra Section II.A.

[87] Diocese of L.A. v. Barker, 171 Cal. Rptr. 541, 555–56 (Cal. Ct. App. 1981). The Supreme Court of California came to a different result twenty-eight years later in *In re Episcopal Church Cases*, 198 P.3d 66, 70–72 (Cal. 2009). It did not, however, overrule the *Barker* court, instead holding that *Barker* was distinguishable "largely due to the passage of time." Id. at 83.

title even though the Diocese asserted a trust in the property because the parishes all included in their articles of incorporation a statement that "the constitution, canons, and discipline of PECUSA and the Diocese shall always form part of the articles of incorporation and prevail against anything repugnant."[88] The Diocese did adopt a canon in 1958, after all three of those parishes were incorporated, providing that parish property would be conveyed to the Diocese on dissolution of a parish; the Diocese later contended that secession constituted an act of dissolution.[89]

Unfortunately for the Diocese, California common and statutory law were unreceptive to its arguments. The court determined that the "declarations of affiliation and loyalty" in the parish articles of incorporation were mere nonbinding "expressions of present intention."[90] In addition, because the 1958 canon was adopted *after* the three parishes were incorporated, those declarations did not create the sort of express trust the Diocese would need to form a property interest. The court reinforced its common law trust analysis with citation of California statutes that provided a very high evidentiary standard for that sort of trust.[91] Moreover, the court found that while California did have a statutory scheme which provided that revocation of a subordinate body's charter results in the distribution of that body's assets to the national organization, the three parishes' articles of incorporation existed prior to or were silent with respect to those statutes.[92] Though the fourth parish did reference those statutes and therefore the Diocese was found to have an express trust in the property, California common and statutory law eliminated any trust interest in the property of the other three parishes.

Although the California and Colorado parishes were functionally identical, the two states adjudicated the matters quite differently. In fact, a Colorado court likely would have found a trust in the California parishes, whereas a California court probably would have refused to find one in the Colorado church. Finally, Alder-

[88] Id. at 554.
[89] Id. at 555.
[90] Id. at 554.
[91] Id. at 553 (citing Cal. Evid. Code § 662 (West 1995); Cal. Civ. Code. § 1105 (West 2007)).
[92] Id. at 554–55 (citing Cal. Corp. Code §§ 9203, 9802 (repealed 1980)).

man's approach allows state statutory law to continue to resolve many of these disputes. As long as states continue to apply their own idiosyncratic statutes, cases in these and other states will be unpredictable and even contradictory.[93] The interpretive independence that state courts retain under this approach, while it does "limit[] any federalism concerns," is an insuperable obstacle to national denominations' freedom to maintain their desired degree of hierarchy.[94] Therefore, another model is necessary to create the consistent results that are impossible under the current neutral principles regime.

2. The Strict Neutral Principles Approach

Another alternative to neutral principles as currently practiced is the so-called "strict" neutral principles approach. Strict neutral principles would require courts to use "the *same* legal principles that are used to resolve equivalent non-religious disputes instead of applying a special set of legal doctrines."[95] This approach is nearly the opposite of Alderman's church constitution-centered approach because it rejects "implied trusts" based on church constitutions.[96] Because trust provisions in church constitutions have largely created whatever success hierarchical denominations have had in state courts so far, strict neutral principles would likely be less favorable to those denominations and more favorable to local parishes than is the current neutral principles regime.

In terms of consistency, however, the strict neutral principles approach would lead to results that are no better than under the current approach. In fact, strict neutral principles would not even lead to consistent results within the same state. In *Barker*, a California decision that even proponents of strict neutral principles call

[93] Compare id. (relying in large part on a California corporations statute to find no trust for the diocese in the property of three parishes), with In re Church of St. James the Less, 888 A.2d 795, 801 (Pa. 2005) (relying in large part on a Pennsylvania statute that required local parishes of national denominations to hold their parish property "in accordance with the rules of the national church with which they are associated" to find a trust for the Episcopal diocese) (quoting 10 Pa. Stat. Ann. § 81 (West 1999)).

[94] Alderman, supra note 79, at 1060.

[95] Patty Gerstenblith, Civil Court Resolution of Property Disputes Among Religious Organizations, 39 Am. U. L. Rev. 513, 516 (1990) (emphasis added).

[96] Hassler, supra note 26, at 446.

"[a] clear example of the strict-neutral-principles approach,"[97] local parishes were allowed to keep three churches, while the Diocese was entitled to one. Ultimately, the different results for the different parishes were caused not by a substantively different relationship between parish and diocese, but rather by a new California statute that took effect before the fourth church was incorporated.[98] Any neutral principles method that allows such state statutes to be outcome determinative will inevitably be cursed with inconsistent results. That inconsistency will, in turn, exert pressure on hierarchical denominations to abandon their freely chosen form of organization.

The strict neutral principles approach purports to advance the value of "equality between religious factions"[99] beyond the force it is given under the current neutral principles regime. Although it may serve that function, it would nevertheless impose the same or greater pressures on denominational choice of governance than the current neutral principles regime already does. As described above, even the paradigmatic case applying strict neutral principles creates inconsistent results within one state. In addition, if courts refused to look to church constitutions for evidence of implied trusts in parish property, there is essentially no possibility of retaining the intermediate forms of hierarchical governance that are at least options in some states under current neutral principles doctrine.

Admittedly, there are other important values at stake in church property adjudication besides the freedom of denominations to choose their own desired form of governance, such as equality between religious factions.[100] Unfortunately, denominational autonomy and some of these other values will inevitably conflict under any given approach to church property disputes.[101] It is more impor-

[97] Id. at 421.

[98] Id. at 421–23 & n.132.

[99] Gerstenblith, supra note 95, at 516.

[100] See Greenawalt, supra note 8, at 1865 (listing criteria "derived from the values of religious freedom, equality, nonestablishment, and fulfilling the intent of relevant persons").

[101] Id. ("One needs only to state these criteria to recognize that no set of standards can accomplish all these objectives."); Hassler, supra note 26, at 447 ("Adopting an approach that emphasizes uniformity of result . . . may allow both general and local parties to more accurately predict the results of disaffiliation and any accompanying

tant to preserve denominational autonomy, however, because parishes have other means to protect their equality. In particular, because parishes already have representation in the denominational bodies that choose whether to adopt constitutional trust provisions in the first place, it is not necessary for courts to ignore a hierarchical trust in order to ensure equality.

C. A New Federal Statute

Since the other potential solutions to the problems with the neutral principles regime do not resolve or even address those problems, this Note proposes that Congress enact a different federal statute that will have three main functions. First, it will preempt state statutory and common law as it applies to church property disputes. Second, it will replace state law with the following rule of decision: a supercongregational church that does not already hold title to local church property shall be entitled to beneficial ownership of that property if it can demonstrate the existence of a trust for the supercongregational church. Finally, a supercongregational church can establish the existence of such a trust through statements in the deed to the property, provisions in the local church charter or articles of incorporation, or provisions in the supercongregational church's constitution or canons.

In structure, this statute would be a recognizable form of the neutral principles approach. In fact, analysis under the federal statute would closely resemble the analysis that the Supreme Court of California used in *In re Episcopal Church Cases*. It would eliminate state-by-state variations in the neutral principles method, however, by preempting state statutory and common law. In this respect, it would resolve the inconsistency that Alderman's approach failed to settle. A quick review of the case law confirms that church property disputes would be vastly more predictable under this federal statute; on the one hand, all the cases dealing with Episcopal and Presbyterian churches described in Part II would find a trust in favor of the supercongregational church because those denominations have adopted in their constitutions statements providing for a

litigation; however, such consistency comes at the price of substantial unfairness to the parties, especially to local congregations which . . . may be precluded from having their arguments heard.").

trust in local church property. Denominations that do not explicitly claim a trust in local church property in their constitutions, on the other hand, would not be entitled to control over that property in the event of a schism.[102]

By virtually eliminating the inconsistency problem with neutral principles as currently applied in the states, this proposed federal statute would cure the problem of supercongregational churches being coerced into adopting forms of governance that are not traditionally and doctrinally their own. Even if pressuring a denomination to abandon either its system of property ownership or its method of hierarchical control does not create the requisite sort of coercion, Part II demonstrated that there is undeniable confusion as to how different states will treat identical constitutional trust provisions. A standardized nationwide solution in the form of a federal church property statute is therefore still desirable as a means of clearing up that confusion because it would reduce litigation costs for all of the churches involved and allow them to focus on their organizational missions.

More importantly, national denominations are only in this confused situation because they reasonably relied on a church property regime that changed dramatically in 1979. Had the national churches known that someday they would have needed explicit trust agreements with each parish individually in order to maintain both their desired system of property ownership and proper degree of hierarchical control, they would have made the appropriate legal arrangements when the parishes were organized. The church property regime in effect when most parishes were organized, however, would have rendered such arrangements superfluous and would have exacted monetary and social costs well in excess of any benefit.[103] Therefore, the federal church property statute is an appropriate form of transitional relief for those denominations that were

[102] For an example of such a denomination, see the Provisional Constitution of the Province of the Anglican Church in North America, art. XII (Dec. 3, 2008), http://www.canaconvocation.org/index.php?option=com_content&task=view&id=267&Itemid=54 ("All church property, both real and personal, owned by each member congregation now and in the future is and shall be solely and exclusively owned by each member congregation and shall not be subject to any trust interest or any other claim of ownership arising out of the canon law of this Province.").

[103] See supra text accompanying note 12.

prejudiced by *Jones v. Wolf* and need more protection to vindicate their reasonable expectations.

In addition, such a statute would likely have the effect of encouraging parishes to seek resolution of disputes within a denomination's existing adjudicatory and legislative bodies. Promotion of this sort of solution—which we might call "exhaustion of ecclesiastical remedy"—would have the same benefits that exhaustion of administrative remedies has in other contexts, the most important of which is conservation of judicial resources. It might also reduce some of the divisiveness that civil litigation over church property creates. Therefore, a federal statute such as the one this Note proposes would not only resolve one of the most pressing problems with the neutral principles approach but also create ancillary benefits for the judicial system.

A skeptic might say that the federal church property statute is useful primarily as a means to a different end—securing courtroom victories for liberal national churches over their more conservative breakaway parishes. As a preliminary matter, the proposed statute provides a viable alternative to recent scholarship that has recommended changes that would—in practice if not in theory—overwhelmingly favor local parishes over their national denominations due to the latter's past reasonable reliance on the deference approach.[104] More importantly, this skeptical view fails to take into account that the statute vindicates the reasonable expectations of the denominations, like the PECUSA and UPCUSA, that relied on the sole church property regime that the Supreme Court had allowed before *Jones v. Wolf*.[105] If reliance on reasonable expectations matters, the national churches should win.

The skeptical objection also ignores the statute's significant amelioration of free exercise burdens on supercongregational denominations, which were described in Part III. For that reason, the federal church property statute would be a proper response to *Employment Division v. Smith*, in which the Supreme Court made it clear that those seeking religious accommodations such as the

[104] See, e.g., Gerstenblith, supra note 95; Hassler, supra note 26; McElroy, supra note 85.

[105] See supra text accompanying note 12.

one at issue in this case must generally go through the legislature.[106] In addition, it implicitly assumes that the national churches are less in need of this sort of legislative accommodation than are parishes. This assumption too ignores the ability of parishes to protect their own interests through representation in supercongregational legislative bodies. Finally, even if for no other reason, the federal church property statute is an interesting and provocative way to test the limits of Congress' ability to pass legislation granting religious accommodations. The next Part explores those limits.

V. CONSTITUTIONAL ANALYSIS OF THE FEDERAL CHURCH PROPERTY STATUTE

This last Part examines whether this proposed federal statute would be constitutional. The first issue is whether Congress has a jurisdictional hook to pass such legislation. This Part argues that if Congress has the authority to enact RLUIPA, it also may pass this statute. Next, this Part argues that this statute would not violate the establishment clause. Using the test for legislative accommodations in *Cutter v. Wilkinson*,[107] the first issue is whether the legislation ameliorates a substantial (government-created) burden. The discussion of the free exercise problem with federalism-based neutral principles in Part III should satisfy that requirement. The second issue is whether the legislation considers the burden on nonbeneficiaries of the accommodation. This is the most interesting establishment clause question, because it is unusual for an accommodation to take the form of a revision to private law that governs disputes between two nongovernmental actors. The third issue is whether the accommodation is neutrally administered. This Part argues that this statute can satisfy that requirement. The final major constitutional question is whether the statute would actually violate the free exercise rights of parishes in its attempt to vindicate the free exercise rights of national churches. This Part argues that just as the deference approach to church property disputes

[106] See Greenawalt, supra note 12, at 288 ("The dominant recent trend in free exercise law has been to withdraw special constitutional protection for religious claimants . . . *unless* a legislature grants them an exemption.").

[107] 544 U.S. 709 (2005).

does not violate the free exercise clause, neither would the federal church property statute.

A. Congressional Jurisdiction

After Congress' first attempt at a religious liberty statute was struck down by the Supreme Court in *City of Boerne v. Flores*, it became clear that any future attempts would have to be firmly grounded in its constitutional regulatory powers. Congress addressed this concern by including jurisdictional limitations in RLUIPA. In particular, RLUIPA only applies to land use regulations when

> the substantial burden is imposed in a program or activity that receives Federal financial assistance, . . . the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, . . . or the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[108]

These requirements rest Congress' authority to regulate in RLUIPA on its various constitutional powers, namely the spending clause, commerce clause, and Section 5 of the Fourteenth Amendment, respectively.[109]

The federal statute this Note proposes as a solution to the inconsistency problems with the neutral principles approach to church property disputes would likewise require a basis in Congress' constitutional regulatory powers. Because church property is not generally a target of federal financial aid, Congress could not rest its authority on the spending clause. Therefore, Congress would have to rely on either the commerce clause or on Section 5 of the Fourteenth Amendment for the requisite constitutional authority.

---

[108] RLUIPA, 42 U.S.C. §§ 2000cc(a)(2)(A)–(C) (2006).

[109] See U.S. Const. art. I, § 8, cl. 1, 3; id. amend. XIV, § 5; see also Shawn Jensvold, The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?, 16 BYU J. Pub. L. 1, 7 (2001).

1. Interstate Commerce Clause

Although the commerce clause seemed to be a plenary grant of regulatory power for over half a century prior to the 1990s, the Supreme Court appeared to place a boundary on that regulatory power in *United States v. Lopez*.[110] In that case, the Court refused to aggregate the effects of gun possession in local school zones in order to find a substantial effect on interstate commerce, holding that mere gun possession is not economic activity.[111] Subsequent case law applying *Lopez* to RLUIPA, however, has continued to construe Congress' interstate commerce powers broadly. In *Freedom Baptist Church of Delaware County v. Township of Middletown*, a district judge distinguished *Lopez* on the ground that "the noneconomic, criminal nature of the conduct at issue was central" to the outcome.[112] That judge then gave deference to Congress' RLUIPA fact finding which indicated that church zoning had a substantial effect on interstate commerce. Because of the economic, noncriminal nature of property zoning,[113] the judge was willing to grant the deference that the Supreme Court refused to grant in *Lopez*.

Unlike the Gun-Free School Zones Act struck down in *Lopez*, but like RLUIPA which was approved in *Freedom Baptist Church*, the federal church property statute proposed above regulates economic activity. The ownership, purchase, and sale—not mere possession—of church property are all economic activities. Indeed, ownership of and transactions involving property are in fact quintessentially economic activities. Therefore, even under the less deferential rule in *Lopez*, the effects of church property ownership could be aggregated in order to find a substantial effect on interstate commerce. In fact, Congress grounded—and at least one court has recognized—RLUIPA jurisdiction over religious zoning

[110] 514 U.S. 549, 566–68 (1995).

[111] Id. at 567. See generally Wickard v. Filburn, 317 U.S. 111, 124–29 (1942) (establishing that even if an isolated instance of an activity would not have a substantial effect on interstate commerce, if the aggregation of all such activities would have such an effect, then Congress has the authority under the interstate commerce clause to regulate even isolated instances).

[112] 204 F. Supp. 2d 857, 866–67 (E.D. Pa. 2002) (quoting United States v. Morrison, 529 U.S. 598, 610 (2000)).

[113] Id. at 866–68.

decisions on just that substantial effect.[114] If Congress can regulate local zoning decisions on the grounds that they affect economic activity such as "the rental of property and use and development of land,"[115] then there is a strong case that Congress can prescribe how national churches can show that they have beneficial ownership of parish property for the same reasons. Therefore, if Congress published its economic effect fact findings for the church property statute, judges would most likely give those findings deference and consequently find the statute to be within Congress' power to regulate commerce between the states.

2. Section 5 of the Fourteenth Amendment

Even if the proposed church property statute exceeds Congress' interstate commerce authority, it may still fall within Congress' enforcement power under Section 5 of the Fourteenth Amendment. That provision authorizes only "remedial" legislation to enforce substantive components of the Fourteenth Amendment. When Congress uses Section 5 as a pretext for defining or changing substantive rights, it oversteps the narrow grant of remedial power.[116] The church property statute qualifies as remedial, however, because it merely codifies a rule—the neutral principles approach—that the Supreme Court itself has endorsed. Similarly, RLUIPA was a proper exercise of Section 5 remedial power because it did no more than codify *Church of the Lukumi Babalu Aye v. City of Hialeah*.[117]

[114] See id. at 867–68 (holding that RLUIPA was a permissible exercise of Congress' commerce clause authority). But see Lara A. Berwanger, Note, White Knight?: Can the Commerce Clause Save the Religious Land Use and Institutionalized Persons Act?, 72 Fordham L. Rev. 2355, 2389 (2004) (arguing that RLUIPA exceeds Congress'commerce clause jurisdiction); Ada-Marie Walsh, Note, Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary, 10 Wm. & Mary Bill Rts. J. 189, 211 (2001) (same).

[115] *Freedom Baptist Church*, 204 F. Supp. 2d at 866.

[116] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[117] 508 U.S. 520, 531 (1993); see Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder County, 612 F. Supp. 2d 1163, 1183, 1189 (D. Colo. 2009) (holding RLUIPA a constitutional exercise of Congress' remedial Fourteenth Amendment power); Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 119–20 (D. Conn. 2003) (same); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1221 (C.D. Cal. 2002) (same); *Freedom Baptist Church*, 204 F. Supp. 2d at 868–69 (same); Shawn Jensvold, supra note 109, at 35 (arguing same);

Some may argue that the current rule for church property disputes is that *either* the deference *or* neutral principles approach is acceptable, so the federal church property statute substantively revises this rule by eliminating the deference approach. Academic criticism and judicial neglect of the deference approach, however, suggest that it has already been abandoned in practice. If *Watson* is already dead letter, the proposed statute would not substantively revise the de facto test now applicable to church property disputes.

Although the Supreme Court reaffirmed *Watson* in *Jones v. Wolf*, three strands establishment clause criticism have since arisen to undermine the *Watson* rule. The first, derived from Justice Rehnquist's dissent in *Jones*, is that the deference approach treats ecclesiastical decisions differently from those of secular groups.[118] The second critique decries the differential treatment that results from deferring to the governing bodies of hierarchical denominations but not congregational ones.[119] Lastly, scholars note that *Watson* requires courts to distinguish between denominations as a threshold matter, thus raising the specter of potentially meddle-

Frank T. Santoro, Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act, 24 Whittier L. Rev. 493, 538 (2002) (same). But see Elsinore Christian Ctr. v. City of Lake Elsinore, 270 F. Supp. 2d 1163, 1182 (C.D. Cal. 2003) (holding that Section 2(a) of RLUIPA "exceeds Congress's power under Section 5 of the Fourteenth Amendment"); Caroline R. Adams, Note, The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?, 70 Fordham L. Rev. 2361, 2407–08 (2002) (arguing same); Joshua R. Geller, Note, The Religious Land Use and Institutionalized Persons Act of 2000: An Unconstitutional Exercise of Congress's Power Under Section Five of the Fourteenth Amendment, 6 N.Y.U. J. Legis. & Pub. Pol'y 561, 587 (2003) (same).

[118] See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting) ("To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would . . . itself create far more serious problems under the Establishment Clause."); see also Greenawalt, supra note 8, at 1872; Louis J. Sirico, Jr., Church Property Disputes: Churches as Secular and Alien Institutions, 55 Fordham L. Rev. 335, 351 (1986); Galligan, supra note 66, at 2022.

[119] See, e.g., Arlin M. Adams & William R. Hanlon, *Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment, 128 U. Pa. L. Rev. 1291, 1297 (1980); Greenawalt, supra note 8, at 1866–70; Galligan, supra note 66, at 2021.

some characterizations that impermissibly inquire into church doctrine.[120]

Commentators are not the only ones to view the deference approach with a skeptical eye; several state judges also appear to doubt its viability. Only nine states have adopted and retained the *Watson* approach, whereas almost thirty states have embraced the neutral principles approach.[121] California is emblematic of states that have increasingly decided that the neutral principles approach, rather than the deference approach, should apply in cases like these when courts are not required to decide questions of church doctrine.[122] At least one state court otherwise willing to apply *Watson* implicitly acknowledged that it may no longer be good law by including neutral principles analysis supporting the same result.[123] Such parallel analysis is only necessary if judges suspect that the deference approach will not always be permissible.

Considering its flaws and relative desuetude, it is likely that the deference approach would be declared unconstitutional. This would rebut the contention that the federal church property statute substantively revises federal church property jurisprudence because neutral principles would be the only constitutional option, and Section 5 of the Fourteenth Amendment therefore would be as appropriate a jurisdictional basis as the interstate commerce clause.

B. Establishment Clause

In the context of a facial challenge to RLUIPA's institutionalized persons provision, the Supreme Court reaffirmed that when an exercise of governmental power burdens the free exercise of religion, the establishment clause allows legislative accommodations

[120] See, e.g., Greenawalt, supra note 8, at 1879 ("The two-category approach to church government is crude, but the more courts attempt to refine distinctions, asking whether hierarchical bodies have authority over particular subjects in particular circumstances, the more their classifications in individual cases may turn on disputable ecclesiastical matters."); Sirico, supra note 118, at 349. Note that the denominations' freedom to specify what approach should apply to them under the federal church property statute insulates the statute from these particular establishment clause concerns. See supra text accompanying note 102.

[121] See supra text accompanying note 26.

[122] See In re Episcopal Church Cases, 198 P.3d 66, 78–79 (Cal. 2009).

[123] See Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 819 (Iowa 1983).

to alleviate that burden.[124] Part III of this Note argued that the federal system of church property adjudication burdens the free exercise of religion by national hierarchical churches, and Part IV proposed a legislative response to that burden. This Section evaluates that response under the establishment clause for legislative accommodations in *Cutter v. Wilkinson*. To withstand establishment clause scrutiny, the proposed accommodation (1) must alleviate an exceptional government-imposed burden on private religious exercise, (2) must not impose inappropriate burdens on nonbeneficiaries, and (3) must be administered neutrally among different faiths.[125]

1. Alleviate Substantial Government-Created Burden

In *Cutter*, the Supreme Court found that RLUIPA's institutionalized-persons provision was an accommodation that reduced a substantial, government-created burden on the free exercise of religion.[126] Because the government institutions covered by section 3 of RLUIPA include "mental hospitals, prisons, and the like," they are "severely disabling to private religious exercise."[127] In particular, because the "exercise of religion" includes not only mental acts but also assembly and sacramental acts of worship, "institutionalized persons . . . are therefore dependent on the government's permission and accommodation for exercise of their religion."[128]

Although the burden imposed on national supercongregational denominations is very different from those suffered by institutionalized persons, it is substantial nonetheless. Part III argued that the federal system of church property adjudication coerces these denominations into becoming either more or less hierarchical than their doctrines demand. This is not only a burden on a denomination's free exercise of religion, it is perhaps the quintessential burden. Because churches are corporate entities, their chosen form of

[124] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005); see also Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) (noting that Religion Clauses "do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice").

[125] *Cutter*, 544 U.S. at 720 (citations omitted).

[126] Id.

[127] Id. at 720–21.

[128] Id.

organization is one of the most important ways in which they can exercise religion.[129] Any restriction or coercion regarding that form of organization therefore constitutes a substantial burden. Moreover, the burden is government-created. State governments, through courts construing common and statutory law, have created the conditions that inevitably force hierarchical churches to abandon their systems of property management or hierarchical control. Although *Cutter* is relatively new and there has been little discussion of the "government-created" requirement, adjudication of church property disputes is the sort of state action that can be addressed by legislative accommodations.

2. Considers Burden on Nonbeneficiaries

The next requirement that the establishment clause imposes on a legislative accommodation is that it "must be measured so that it does not override other significant interests" of parties who do not benefit from the accommodation.[130] In *Cutter*, the Court found that RLUIPA's institutionalized-persons provision did not account for nonbeneficiaries' interests. Unlike the Sabbath law at issue in *Estate of Thornton v. Caldor*, which "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath,"[131] RLUIPA was meant to be applied with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures . . . ."[132] In other words, courts hearing RLUIPA challenges were meant to take into account the interests of those who would be forced to administer and pay for the fruits of successful claims—that is, prison administrators and the public.

The proposed statutory accommodation for hierarchical churches is unusual because both the beneficiaries and nonbeneficiaries are private parties whose actions will not affect public officers or funds. Accordingly, it is difficult to evaluate under the *Cutter* framework. Still, the proposed federal statute would indirectly account for the burden on seceding local churches, who are the

[129] See supra text accompanying note 56.
[130] *Cutter*, 544 U.S. at 722.
[131] 472 U.S. 703, 709 (1985).
[132] *Cutter*, 544 U.S. at 723 (citation omitted).

principal nonbeneficiaries in this case. First, the statute gives local churches better notice about how their disputes will be resolved; this aids those churches by reducing the need for costly litigation. Second, the statute still allows local churches to contract with their parent denominations to waive any rights that the denominations have under the statute. Third, the federal statute would not harm local churches in a way that was not already possible under state law—the federal statute merely unifies a rule of decision that was permissible under the neutral principles framework. Finally, relative to the public safety and financial burdens that RLUIPA could have created, any burden imposed by this federal statute would be fairly small and outweighed by elimination of the threat to national denominations' free exercise.

3. Neutrally Administered

The third and final element of the *Cutter* test for legislative accommodations is that legislation must not "differentiate among bona fide faiths."[133] The *Cutter* Court seemed to have no difficulty evaluating RLUIPA in this regard. Unlike the very narrow accommodation invalidated in *Board of Education of Kiryas Joel Village School District v. Grumet*, "that carved out a separate school district to serve exclusively a community of highly religious Jews," RLUIPA applies equally to all faiths and singles out none for special treatment.[134]

While RLUIPA clearly can be administered neutrally, it is a slightly more difficult question whether the proposed federal statute would admit of neutral administration under the *Cutter* test. The answer probably rests on whether a parent church and its local parishes count as different "faiths." If not, the statute applies to all hierarchical denominations equally, just like RLUIPA. If, however, the denomination and the parish constitute different faiths by virtue of the parish splitting away, there is a serious problem under *Cutter*. In that case, the statute would seem to grant a benefit to one faith—supercongregational denominations—that it withholds from another—breakaway parishes. Ultimately, the meaning of the term "faith" does not lend itself well to the second understanding.

[133] See id. at 723.
[134] Id. at 723–24 (citing *Kiryas Joel*, 512 U.S. at 690).

In ordinary usage, "faith" encompasses a parental denomination and its affiliated local parishes. Therefore, the proposed federal statute could be neutrally administered and would likely constitute a permissible legislative accommodation under the establishment clause.

C. Free Exercise Clause

Although the proposed federal church property statute is meant to alleviate the free exercise burden on national denominations, there is a colorable argument that it violates the free exercise rights of parishes by making it too easy for national denominations to take ownership of parish property. A court would evaluate that claim with strict scrutiny only if it is not neutral and of general applicability.[135] Otherwise, a forgiving rational basis analysis will apply.

The term "neutral" in free exercise challenges primarily screens for legislative intent to discriminate against religion. Impermissible intent can be gleaned from the text of a law,[136] the circumstances under which it was adopted,[137] and perhaps its legislative history,[138] and these sources are all meant to determine whether "the object of a law [was] to infringe upon or restrict practices because of their religious motivation."[139] If Congress were to adopt the proposed statute, its object would not be to infringe upon the religious practices of parishes—at least not if it followed the reasoning of this Note. Rather, Part III indicated that a sufficient reason to adopt the church property statute would be to relieve the free exercise burden that the federal system of church property adjudication has placed upon supercongregational denominations. This intent—to lift a burden rather than to create one—would make the statute neutral for free exercise purposes.

The proposed church property statute is also generally applicable. While the neutrality requirement is designed to ferret out laws with no permissible purpose, there are laws with legitimate motiva-

[135] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993).
[136] Id. at 533.
[137] Id. at 534.
[138] Id. at 540.
[139] Id. at 533.

tions that nevertheless violate the free exercise clause because they are underinclusive in scope and thus are not generally applicable. For example, the ordinances in *Lukumi* purportedly advanced food safety and prevention of animal cruelty but "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does."[140] Although the federal church property statute does deal with religious institutions exclusively, Part III explained that the coercion problem with neutral principles is unique to religious institutions. Therefore, the statute is not underinclusive—it is generally applicable in the way that *Lukumi* demands—because it relieves the free exercise burdens of *all* the institutions that are burdened by the American federal church property regime. Because the proposed statute is neutral and of general applicability, it would not be subject to strict scrutiny and would almost certainly survive under rational basis review.

Besides the fact that the federal church property statute comports with the free exercise test set forth in *Lukumi*, it also should survive free exercise review by analogy to the deference approach. Although this Note argued earlier that the deference approach violates the establishment clause, there has been little or no suggestion even after *Jones v. Wolf* that it violates the free exercise clause. In fact, when the Supreme Court last considered the constitutionality of the *Watson* approach in 1979, there was an even more rigorous free exercise test in place, which the deference approach apparently passed with ease.[141] If any method of church property adjudication were to violate the free exercise clause by virtue of making it too easy for parishes to lose ownership, however, it would be that approach. The federal statute this Note proposes is less offensive in that regard because denominational governing bodies at least generally include representation from parishes, so parishes have greater ability to protect their property rights. Because the proposed statute is even less of a threat to the free exer-

[140] Id. at 543.

[141] Compare Sherbert v. Verner, 374 U.S. 398, 403 (1963) (holding that all laws that burden the free exercise of religion, not just those that fail to be neutral and generally applicable, are subject to strict scrutiny review), with Employment Div. v. Smith, 494 U.S. 872, 882–85 (1990) (holding that neutral and generally applicable laws, even if they create free exercise burdens, are generally subject only to rational basis review).

cise of parishes than is the deference approach, the statute should survive free exercise review.

CONCLUSION

As one might expect, the Supreme Court's decision in *Jones v. Wolf* to allow states to adjudicate church property disputes largely through the pre-existing mechanisms of state law has introduced into that realm all of the diversity and contradiction in the laws of different states. Though the Court calls this approach "neutral principles," in practice, it threatens to exert a decidedly coercive force on the forms of governance and hierarchy that supercongregational churches use. A federal statute that retained the neutral principles rules of law without the problematic federalism of neutral principles as currently practiced could create a truly neutral system of church property adjudication. Such a statute would also survive the constitutional challenges that have dogged other federal attempts at legislating religious freedom.