

DIVINE DISPUTES: WHY AND HOW MICHIGAN COURTS SHOULD REVISIT CHURCH PROPERTY LAW

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I. INTRODUCTION

Church property law is a tricky area, because no court wants to decide between church factions for fear of violating the First Amendment.¹ Perhaps this difficulty is the reason the Michigan Supreme Court has not examined Michigan church property law since 1962.² In 1962, there was only one approach to church property questions found constitutionally acceptable, but in the past fifty-five years, one United States Supreme Court decision³ and a variety of state court decisions have allowed for other methods to decide these cases without violating the First Amendment. If the Michigan Supreme Court were to consider church property questions anew, the court would find that this state's approach to church property disputes stands on questionable constitutional ground, and no longer serves the interests of either the church or the state.

For example, in 2014, the Church of the Covenant (Covenant) in Macomb Township came to the Presbytery of Detroit, the regional governing body of the Presbyterian Church, USA (PC[USA]), seeking to close its doors.⁴ There was another layer, however, to the church's decision. Covenant's Pastor, Jason Huff, had opposed ordination or marriage of gays and lesbians in the denomination. Recently, the PC(USA) had authorized GLBTQ ordination, and the denomination was soon to authorize gay marriage.⁵ Rev. Huff was leaving the PC(USA) to become a minister in the Evangelical Presbyterian Church (EPC), a similar denomination that did not ordain noncelibate gays. Rev. Huff would be undertaking a new church development with the EPC—also in

1. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion [Establishment Clause], or prohibiting the free exercise thereof [Free Exercise Clause].”). Henceforth, this Note will use the terms “church,” and “churches” for brevity's sake, although the same legal analysis would apply to mosques, synagogues, temples, and other religious organizations.

2. The last Michigan Supreme Court case on point was *Immanuel Evangelical Lutheran Church v. Fromm*, 116 N.W.2d 766 (Mich. 1962).

3. *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969).

4. In 2013–14, this Note's author served on the Coordinating Cabinet of the Presbytery of Detroit, a local denominational leadership body. Knowledge about Rev. Huff's theological views, the denomination's deliberations, and the question of the outstanding loan come from the author's personal observations of Presbytery proceedings.

5. Niraj Warikoo, *Presbyterians in U.S. to Allow Gay Marriage Ceremonies*, DET. FREE PRESS (June 19, 2014), <http://www.usatoday.com/story/news/nation/2014/06/19/presbyterians-allow-gay-marriage-ceremonies/10922053/>.

Macomb Township.⁶ Further, Covenant had taken out a loan with the Presbytery for new construction several years earlier, a loan that the Presbytery now assumed, because Covenant was “closing.” Rev. Huff then “started” Crossway Church (EPC), taking “a large majority” of what had been Covenant with him, and announced to the community that “a lot of the ministries we are known for will continue through Crossway.”⁷ The Presbytery undertook the loan obligation, while the EPC gained a pre-existing church. Covenant, meanwhile, promoted the message that the church switched denominations because of finances, not because of antigay theology.

As the example illustrates, because Michigan relies on denominational policies to determine church property rights, churches have an incentive to find alternative means to exit. Furthermore, church property disputes are usually thinly veiled theological disputes, an improper area for civil courts to meddle.⁸ This Note will examine the alternative methods states use to settle church property disputes, and how the methods serve the First Amendment goals of allowing citizens to freely exercise religion and avoiding state establishment of religion.

II. BACKGROUND

Courts have difficulty resolving church property disputes without violating the First Amendment. Does it “establish religion” to award property to one section of the church and not another? From time to time, courts are called upon to do just that. If courts go against denominational decisions, does that not violate the Free Exercise clause? What about the local church’s Free Exercise right to exit a denomination?

Early American courts followed the English model of settling church disputes: when a church divided, courts would determine which of the factions taught “the true standard of faith,” that is, which congregation most closely followed the true teachings of the church.⁹ Such an analysis,

6. Nicole Tuttle, *Church of the Covenant closes in Macomb Township*, THE VOICE (May 15, 2014), http://www.voicenews.com/life/church-of-the-covenant-closes-in-macomb-township/article_dafebf40-c352-5f78-930e-e396a7dc818d.html.

7. *Id.*

8. All of the leading cases arose from theological disputes within churches. *E.g.*, *Watson v. Jones*, 80 U.S. 679, 727 (1872) (involving a theological dispute over biblical authorization of slavery); *Jones v. Wolf*, 443 U.S. 595 (1979) (involving a theological dispute over biblical authorization of the ordination of women; *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163 (2009) (involving, along with the vast majority of recent cases, theological disputes over GLBTQ ordination and marriage).

9. *Watson*, 80 U.S. at 727 (summarizing the English law: “it is the duty of the court in such cases to inquire and decide for itself, not only what was the nature and power of

in which civil courts decide “correct” theology, could not survive First Amendment examination. Over time, courts developed three methods of settling church property disputes that seek to avoid Establishment Clause problems: (1) the deferential approach; (2) the neutral principles of law approach; and (3) and the strict neutral principles approach.¹⁰

A. The Deferential Approach

In 1871, the United States Supreme Court, in *Watson v. Jones*, struck down the English “true church” approach.¹¹ The “true church” approach required civil courts to engage in theological discussion, and the Court declared, “the law knows no heresy, and is committed to support no dogma.”¹² Instead, the Court held that if the property had been donated in trust for a specific purpose, courts must honor that trust.¹³ If the property was not donated to be held in a trust, for example, in the case of an independent or congregational church, property rights traveled according to “the ordinary principles which govern voluntary organizations.”¹⁴ In this event, the majority of the members would keep the property. However, if a local church belonged to a “more important religious organization,” functioning “under its government and control,” and “bound by its orders and judgments,” then courts had to defer to the denomination in church property disputes.¹⁵

The Court reasoned that when a local church became part of a hierarchical denomination, the local church gave “implied consent” to denominational government.¹⁶ To invalidate a denomination’s decision would render that consent meaningless and would ultimately “lead to the total subversion of such religious bodies.”¹⁷ The Court decided *Watson* before the Constitution applied to the states; therefore, the opinion did not rest on Constitutional grounds.¹⁸ Yet the Court’s reasoning that it must give force to denominational tribunals or else create “the total

these church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard.”).

10. Matthew Namee, *Neutral Principle of Law and the Problems of Deference*, ORTHODOX HISTORY (June 7, 2011), <https://orthodoxhistory.org/2011/06/07/neutral-principles-of-law-and-the-problems-of-deference/>.

11. *Watson*, 80 U.S. at 727.

12. *Id.* at 728.

13. *Id.* at 723.

14. *Id.* at 725.

15. *Id.* at 726–27.

16. *Id.* at 729.

17. *Id.*

18. See Natalie L. Yaw, *Cross Fire: Judicial Intervention in Church Property Disputes After Rasmussen v. Bunyan*, 2006 MICH. ST. L. REV. 813, 821 (2006).

subversion of such religious bodies” because churches have a “right to establish tribunals for the decision of questions arising among themselves,” implies that churches have Free Exercise Clause rights to decide their own affairs.¹⁹

The church at issue in *Watson* was a Presbyterian church in Kentucky that had divided over the issue of slavery.²⁰ The Court concluded that the Presbyterian Church was a hierarchical church and awarded the property to the denomination.²¹ The Court in *Watson* deemed the “deferential approach” constitutionally valid.

Today, only a few states, including Michigan, still follow the deferential approach.²² However, the Michigan Supreme Court has not considered the issue since the 1962 case *Immanuel Evangelical Lutheran Church v. Fromm*.²³ Most recently, the Michigan Court of Appeals reaffirmed the deferential approach in *Lamont Community Church v. Lamont Christian Reformed Church*.²⁴ In order to apply the deferential approach, courts must determine whether a denomination is “congregational” or “hierarchical.”

Lamont Community involved a local church breaking away from the Christian Reformed church.²⁵ The Christian Reformed and Presbyterian denominations are both part of the Reformed tradition. They share a form of government that is very similar to the republican system of the United States; elected officials, both clergy and laypeople, govern the local church as well as higher governing bodies.²⁶ These denominations are

19. *Watson*, 80 U.S. at 729 (“It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding.”).

20. *Id.* at 713.

21. *Id.* at 734.

22. See State: Bench Exhibit 1, EPISCOPAL DIOCESE OF FORT WORTH, <http://www.fwepiscopal.org/downloads/BenchExhibit1.pdf> (last visited Feb. 24, 2017) (according to this resource from an Episcopalian diocese, thirty-four states are traditional neutral principles of law, six states have no cases, three use a strict approach, two use a deference approach, and the law of three states is unclear).

23. *Immanuel Evangelical Lutheran Church v. Fromm*, 116 N.W.2d 766 (Mich. 1962). There is a narrow class of cases in which Michigan would allow use of the neutral principles of law approach. See *Bennison v. Sharp*, 329 N.W.2d 466, 475 (Mich. Ct. App. 1982) (“Where, for example, it appears from the church constitution, canons or rules, or from some other source, that an express trust exists in favor of one or the other of the contending parties, application of neutral principles of law would be appropriate.”).

24. *Lamont Cmty. Church v. Lamont Christian Reformed Church*, 777 N.W.2d 15 (Mich. Ct. App. 2009).

25. *Id.* at 17–20.

26. *Id.* at 23–28; see also *Calvary Presbyterian Church v. Presbytery of Lake Huron of United Presbyterian Church*, 384 N.W.2d 92 (Mich. Ct. App. 1986).

not as clearly hierarchical as the Roman Catholic Church,²⁷ nor are they so clearly localized as Southern Baptist churches; this is one reason Reformed churches experience so many of these property disputes.²⁸ Although in a Presbyterian or Reformed church, local churches, not denominations, make most decisions involving property, Michigan courts have held both the Christian Reformed Church and the Presbyterian Church to be hierarchical churches, and courts have deferred to the denominations' decisions in property disputes.²⁹ In the cases that reach litigation under the deferential approach, denominations nearly always retain property.

The deferential method, as outlined in *Watson*, arguably supports the free exercise of religion by allowing church denominations to make their own determinations as to church property ownership.³⁰ However, a century after *Watson*, the Supreme Court heard several cases in which states were misapplying the deferential approach. In a 1968 case, *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the Court found that Georgia's method of resolving disputes using the departure-from-doctrine method was unconstitutional.³¹ The Georgia Supreme Court interpreted *Watson* to read that "there is an implied trust upon the local church properties for the benefit of the general church," but in the Georgia court's view, "such a trust is conditioned upon the general church's adherence to its tenets of

27. In the Roman Catholic Church, the bishop directly holds the title to a local church, making disputes between local churches and the denomination extremely uncommon. See Nick Strobel, *Methodism 101*, WESLEY CHURCH, <http://www.wesleybakersfield.org/methodism101/chapter8.pdf> (last accessed Feb. 24, 2017); Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307 (2016).

28. See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979); *Watson v. Jones*, 80 U.S. 679 (1872); *Lamont Cmty. Church*, 777 N.W.2d at 15; *Calvary Presbyterian*, 384 N.W.2d at 92.

29. See *Calvary Presbyterian*, 384 N.W.2d at 92; *Lamont Cmty. Church*, 777 N.W.2d at 15.

30. See Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1230–31 (2014); Justin M. Gardner, *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, 251 (2007); Brian Schmalzbach, *Confusion and Coercion in Church Property Litigation*, 96 VA. L. REV. 443, 457 (2010) (arguing for a federal church property statute as an overall solution).

31. *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449–50 (1969); see Gardner, *supra* note 30 (purporting to be using the deferential model Georgia's courts carved out an exception to deference to a denomination when a denomination had radically departed from its previously held doctrine).

faith and practice existing when the local church affiliated with it.”³² The Georgia court’s view violated the First Amendment because it required courts to interpret religious teachings.³³ In *Hull Presbyterian*, the Court also briefly mentioned that courts could settle church property disputes through “neutral principles of law,” which the Court would further analyze in a later case.³⁴ Then, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Court found that the Illinois Supreme Court had unconstitutionally inquired into religious controversies.³⁵ The Court expressed that, to properly apply the deferential approach, even denominational decisions that seemed entirely arbitrary could not be reviewed by civil courts.³⁶

B. The Neutral Principles of Law Approach

Against this background of difficulty in applying the deferential approach, in 1979, the United States Supreme Court, in *Jones v. Wolf*, affirmed other methods to determine church property questions without violating the First Amendment.³⁷ In *Wolf*, the Court stated: “the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes.”³⁸ Several jurisdictions had taken *Watson*’s authorization to use the “ordinary principles that govern voluntary organizations” in the case of congregational churches, and applied these “neutral principles of law” to hierarchical churches as well.³⁹ Courts would look at the deed to the property, the articles of incorporation of the church, the church bylaws, and any relevant denominational documents to determine who owned the property. A court would apply a jurisdiction’s law of property or trust, subjects “familiar to lawyers and judges.”⁴⁰ The *Wolf* Court specified other alternatives to the deferential approach, such as legislatures determining ownership of church property by statute.⁴¹

32. *Presbyterian Church in U.S. v. E. Heights Presbyterian Church*, 159 S.E.2d 690, 695 (Ga. 1968).

33. *Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. at 449–50.

34. *Id.* at 449. The later case is *Jones v. Wolf*, 443 U.S. 595 (1979).

35. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976).

36. *Id.* at 713–14.

37. *Wolf*, 443 U.S. at 595.

38. *Id.* at 602.

39. *Id.*

40. *Id.* at 611.

41. *Id.* Several states have taken advantage of the statutory option. For example, in Wisconsin, property held by a United Methodist congregation is held in trust for the United Methodist Church. WIS. STAT. ANN. § 187.15 (West 2018).

The *Wolf* Court noted that denominations could incorporate language in denominational statements stating that all local church property was held in trust for the denomination, and that is what several denominations proceeded to do.⁴² For example, the Protestant Episcopal Church adopted the “Dennis Canon” in 1979, which reads: “All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for this Church [i.e., the Episcopal Church] and the Diocese thereof.”⁴³ The Presbyterian Church adopted a property-trust clause in its Book of Order in 1983:

All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association . . . is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).⁴⁴

The United Methodist Church is in a unique position, since the denomination and its predecessors have had some form of a trust clause in the *Book of Discipline* since 1791.⁴⁵ Today, paragraph 2501 states: “All properties of United Methodist local churches and other United Methodist agencies and institutions are held, *in trust*, for the benefit of the entire denomination, and ownership and usage of church property is subject to the *Discipline*.”⁴⁶ Local Methodist churches are required to include a property-trust clause in the deed to the real property or other local church documents.⁴⁷

42. *Wolf*, 443 U.S. at 603. In the Evangelical Lutheran Church in America, the local church tends to include a schism clause in its constitution. For example, in the event of schism, one local church could keep its property so long as ninety percent of the congregation voted to leave. *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 328 P.3d 586, 590 (Mont. 2014).

43. *Falls Church v. Protestant Episcopal Church in U.S.*, 740 S.E.2d 530, 547 (Va. 2013).

44. *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 578 (Mo. Ct. App. 2012).

45. Alan K. Waltz, TRUST CLAUSE IN DEEDS, UNITED METHODIST CHURCH, <http://www.umc.org/what-we-believe/glossary-trust-clause-in-deeds> (last visited Feb. 24, 2017); PARAGRAPH 2501: REQUIREMENT OF THE TRUST CLAUSE FOR ALL PROPERTY, UNITED METHODIST CHURCH, <http://www.umc.org/what-we-believe/para-2501-requirement-of-the-trust-clause-for-all-property> (last visited Feb. 24, 2017).

46. See PARAGRAPH 2501: REQUIREMENT OF THE TRUST CLAUSE FOR ALL PROPERTY, *supra* note 45.

47. Waltz, *supra* note 45.

These and other property-trust clauses become evidence in civil courts that the local church holds property in trust. If the court determines that the property-trust clause, along with local church documents, demonstrates the existence of a trust, the church owes a fiduciary duty to the denomination, and must use the property according to the denomination's best interest.⁴⁸ If the court finds that there was a valid trust, in the event of schism, the local church must return the property to the denomination.

The outcome of the neutral principles of law approach depends upon a court's application of the property law of a given jurisdiction. For example, in *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, the Indiana Supreme Court had to determine whether the local church owned property or held it in trust.⁴⁹ Under Indiana law, a trust could be expressed if the parties agreed to it by clear written agreement; or a trust could be implied if the parties, especially the settlor, intended to create a trust, but the express trust failed in some respect.⁵⁰ In *Ohio Valley*, the court considered a note in the local church's bylaws recognizing the PC(USA) *Book of Order*, which included the property-trust clause, and the fact that [the local church] remained a member of the PC(USA) for nearly twenty-five years after insertion of the trust provisions."⁵¹ However, the local church never explicitly included any language that the property was held in trust in the title deed, articles of incorporation, or bylaws of the church.⁵² Nonetheless, the local church's participation in the denomination and recognition of the *Book of Order* was enough for the Indiana court to find the intent to create a "resulting trust" on the property.⁵³

Similarly, in the Virginia case *Falls Church v. Protestant Episcopal Church in the United States*, the state supreme court imposed a "constructive trust."⁵⁴ The court noted that constructive trusts are employed by courts to correct fraud or injustice, but the court did not identify any fraud or injustice in the congregation-church relationship. Instead, the church constructed a trust based on the parties' "relationship."⁵⁵ The court noted that the church had joined the denomination, had allowed the denomination a role in selecting its

48. See, e.g., *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012).

49. *Id.*

50. *Id.* at 1113–14.

51. *Id.* at 1113.

52. *Id.* at 1112–13.

53. *Id.* at 1109–14.

54. *Falls Church v. Protestant Episcopal Church in U.S.*, 740 S.E.2d 530, 539–42.

55. *Id.*

priests, and had participated in denominational meetings.⁵⁶ Based on these and other facts, the court found that the parties had created a “constructive trust.”⁵⁷ As *Falls Church* illustrates, depending on the trust law of the jurisdiction and the facts of the case, the neutral principles of law approach still often results in a denomination keeping local church property.

Despite the denomination usually keeping church property, sometimes the local church retains property under neutral principles. In *Masterson v. Diocese of Northwest Texas*, the Texas Supreme Court used the neutral principles of law approach, and found that church property was not held in trust for the denomination.⁵⁸ Under Texas law, a trust is revocable unless expressly declared irrevocable by its terms.⁵⁹ The court did not determine whether a trust existed, since the local church did not include property-trust language in its deed or articles of incorporation.⁶⁰ However, the court held that even if a trust existed, that trust was not expressly declared irrevocable and thus could be revoked at any time.⁶¹ Under this neutral principles approach, the local church had revoked the trust and could leave the denomination with its property intact.

The neutral principles of law approach is appealing, because it purports to keep courts out of theological controversies and allows them to analyze disputes using concepts from civil, secular law. For this reason, thirty-seven states now employ the neutral principles approach.⁶² However, as evinced by the cases above, the neutral principles approach results in a wide variety of decisions, with considerable variance in the way courts approach the law regarding creation of trust. For example, some courts take more care to identify the settlor and trustee in the purported trust, and whether the party acting as settlor ever owned the property to begin with.⁶³ Some courts will more readily impose an

56. *Id.* at 540–41.

57. *Id.* at 541–42.

58. *Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594 (Tex. 2013).

59. *Id.* at 613.

60. *Id.*

61. *Id.* An issue the court failed to address was the particular wording of the Texas statute related to revocation of a trust: “A *settlor* may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it [emphasis added].” Was the local church the settlor of the trust, the trustee, or both? See McConnell & Goodrich, *supra* note 27, at 346.

62. See State: Bench Exhibit 1, *supra* note 22.

63. See, e.g., *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575 (Mo. Ct. App. 2012); *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163 (S.C. 2009).

implied or constructive trust than others.⁶⁴ Some courts look closely at whether any trust has been revoked.⁶⁵ Some of these differences can find their roots in state trust law, but courts have considerable leeway in applying that law. For example, in *Falls Church*, the state's trust law did not allow for an implied trust, so historically Virginia courts did not recognize denominational trust clauses as binding upon the local church.⁶⁶ The court reversed longstanding Virginia church property law by imposing a constructive trust—a concept that had never before been applied to church property disputes.⁶⁷

C. The Strict Neutral Principles of Law Approach

Recently, several jurisdictions have adopted an alternative method of applying the neutral principles approach. Under the “strict” neutral principles of law approach, courts consider only the documents adopted by the local church without giving any legal force to the statements of denominations. The leading case is *All Saints Parish Waccamaw v. Protestant Episcopal Church*, in which the South Carolina Supreme Court, in 2009, held that none of the denomination's statements purporting to create a trust had “any legal effect on title to the All Saints congregation's property.”⁶⁸ The court reasoned that, as “an axiomatic principle of law . . . a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another.”⁶⁹ Since the Diocese did not hold title to the local church's property at the time of the Dennis Canon, no trust had been created.⁷⁰ The court analyzed the deeds to the property, dating from 1745 and 1903, and found that the congregation's corporate entity held title to the property.⁷¹ Additionally, all amendments to the articles of incorporation—removing any language that might have given the Episcopal denomination a claim to the property—complied with the South Carolina Non-Profit requirements.⁷² Because the court, examining only local church documents, found that no valid trust existed, the congregation was entitled to control of the property.

64. See, e.g., *Falls Church v. Protestant Episcopal Church in U.S.*, 740 S.E.2d 530 (Va. 2013); *Presbytery of Ohio Valley, Inc. v. OPL, Inc.*, 973 N.E.2d 1099 (Ind. 2012).

65. See, e.g., *Masterson v. Diocese of N.W. Tex.*, 422 S.W.3d 594 (Tex. 2013).

66. *Falls Church*, 740 S.E.2d at 537–39.

67. *Id.*

68. *All Saints Parish Waccamaw*, 685 S.E.2d at 174.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

In *Heartland Presbytery v. Gashland Presbyterian Church*, Missouri similarly adopted the strict neutral principles approach.⁷³ The Missouri Court of Appeals reasoned that a 1948 deed to a local church's property contained no language regarding a fiduciary duty or trust to the denomination.⁷⁴ According to the title deed, Gashland, the local church, owned the property "free and clear," and the PC(USA)'s Property-Trust clause did not yet exist in 1948, so the denomination could not have imposed any trust at that time.⁷⁵ The creation of an express or implied trust anytime after 1948 would "require a conveyance by Gashland" demonstrated by clear and convincing evidence, because Gashland owned the property.⁷⁶ The court found no such conveyance. The court recognized that the Supreme Court in *Wolf* had suggested that denominations could include trust language in their governing documents.⁷⁷ However, the court opined that this statement in *Wolf* was only "illustrative."⁷⁸ *Wolf*'s holding was simply that jurisdictions could apply ordinary principles of property and trust law to church disputes, and did not specify the particulars regarding creation of a trust.⁷⁹ The Missouri court also made note of the fact that Gashland had actually bought its property from the denomination, paying consideration to the Presbytery.⁸⁰ Even though the consideration was only one dollar, the court found it relevant to establish that the local church, not the denomination, owned the property.⁸¹

The strict approach does not always result in the local church retaining property. In *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, the Oregon Supreme Court adopted the strict neutral principles approach. Interpreting *Wolf*, the court reasoned that: "[T]he express trust provision in PCUSA's constitution cannot be dispositive, because . . . the denominational church may ensure that church property remains with the loyal faction by reciting an express trust, provided it is embodied in some legally cognizable form."⁸² The Oregon court reasoned that a "legally cognizable form" under *Wolf*

73. *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575 (Mo. Ct. App. 2012).

74. *Id.*

75. *Id.* at 585.

76. *Id.* at 585.

77. *Id.* at 588-89.

78. *Id.*

79. *Id.* at 589.

80. *Id.* at 593.

81. *Id.*

82. *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 291 P.3d 711, 712 (Or. 2012).

meant that the trust must be valid under Oregon trust law, which required that the settlor—the local church—affirm the intention to create a trust.⁸³ In *Hope*, the local church had affirmed such an intention with clear trust language in its amended articles of incorporation.⁸⁴

D. Free Exercise Clause Background

In order to apply the First Amendment to church property disputes, a review of law surrounding the Free Exercise Clause and Establishment Clause is in order. Most of the important Supreme Court decisions interpreting the Free Exercise Clause come from disputes in which *individuals* seek relief from a *law* inhibiting their ability to practice religion.⁸⁵ The Court's holding in *Employment Division v. Smith*, that neutral and generally applicable laws do not violate the Free Exercise Clause unless they lack a rational basis, is relevant to church property cases that involve application of property and trust law.⁸⁶ Overall, however, most Free Exercise disputes are quite different from church property cases, in which a *local church* seeks relief from *denomination decisions*.

There are several important decisions applying the Free Exercise Clause to church decisions. The Supreme Court's most recent interpretation of the Free Exercise Clause applied to a church is *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.⁸⁷ In *Hosanna-Tabor*, the Court held that it would violate the Free Exercise Clause to allow ministers to bring employment discrimination claims against churches.⁸⁸ One principle extracted from *Hosanna-Tabor's* Free Exercise analysis is "church autonomy," the idea that churches should be allowed to make their own decisions free from governmental interference.⁸⁹ Another important Court analysis of a church decision using the Free Exercise Clause was *Serbian Eastern Orthodox Diocese v. Milivojevich*.⁹⁰ This case pitted a local bishop against his denomination, with significant property consequences at stake.⁹¹ The Court significantly

83. *Id.*

84. *Id.* at 689–91.

85. *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

86. *Smith*, 494 U.S. at 882–85.

87. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

88. *Id.* at 702–07.

89. Lund, *supra* note 30, at 1185.

90. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

91. *Id.*

determined that it could not disturb a denomination's decision, even if that decision ran completely against the denomination's own law.⁹² Free Exercise analysis, applied to churches, generally allows churches to determine their own affairs with as little government interference as possible.

E. Establishment Clause Background

Establishment Clause case law has developed in the area of state funding to religious schools.⁹³ In *Lemon v. Kurtzman*, a case regarding whether a state could subsidize teacher salaries in religious schools, the Court applied a three-part analysis to Establishment Clause disputes.⁹⁴ A law must have a secular purpose, must have a primary effect "that neither advances nor prohibits religion," and must not involve inappropriate "government entanglement with religion."⁹⁵ The "*Lemon* test" has been applied in other Establishment Clause contexts.⁹⁶ The thrust of *Lemon* and the cases that followed is against both undue government promotion of religion and undue government entanglement in religious matters.

III. ANALYSIS

In order to analyze the constitutionality of the three approaches to church property disputes as they would be applied in Michigan, this Note will consider the text case of a fairly typical church: Starr Presbyterian Church of Royal Oak, Michigan. Starr Church was first organized in the 1850s as the First Reformed Presbyterian Church of Troy,⁹⁷ but the first Articles of Association were filed with the State of Michigan in 1920.⁹⁸ According to these Articles, the name of the church was "Troy United Presbyterian Church" and the purpose of the association was "diffusing moral and religious knowledge."⁹⁹ The church's Articles were amended twice more: in 1928, to rename the church "The First United

92. *Id.*

93. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1 (1947).

94. *Kurtzman*, 403 U.S. at 602.

95. *Id.*

96. See, e.g., *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Corp. of Presiding Bishops v. Amos*, 483 U.S. 327 (1987).

97. Interview with Margaret Beal, Church Historian, Starr Presbyterian Church (Mar. 15, 2016).

98. Articles of Ass'n, Troy United Presbyterian Church, (December 13, 1920) (in Starr Presbyterian Church archives).

99. *Id.*

Presbyterian Church of Royal Oak, Michigan,”¹⁰⁰ and in 1983, to rename the church Starr Presbyterian Church.”¹⁰¹ Neither of the amended Articles stated a different purpose for the association.

The church owns property at a busy intersection in a Detroit suburb with a rising real estate market. In the 1960s, the church donated its old wooden building to the local fire department to be burned down in a practice exercise¹⁰² and constructed a new building, securing a mortgage from the United Presbyterian Church, which later became part of the PC(USA).¹⁰³ In 1967, the church paid off its mortgage, and secured a quit-claim deed from the denomination.¹⁰⁴ The quit-claim deed states: “The purpose of this conveyance is to release the grantee of the trust” held on the property by the denomination.¹⁰⁵ The deed is signed by the Executive Vice-President and the Assistant Secretary and Treasurer of the Board of Missions of the denomination, and consideration of one dollar was paid.¹⁰⁶ The church’s bylaws were last amended in 2007, and in them, the church accepts the PC(USA) *Book of Order* for its governance, but does not specifically mention the PC(USA) Property-Trust Clause, which states that all local property is held in trust for the denomination.¹⁰⁷

A. The Deferential Approach: Analysis

1. Application of the Deferential Approach to a Michigan Church Dispute

Michigan is one of only two states still following the deferential approach.¹⁰⁸ Under Michigan’s current deferential approach, none of Starr’s local documents would have any impact on a court’s analysis, because Michigan courts have held the PC(USA) to be a hierarchical

100. Emendation to Articles of Ass’n, The First United Presbyterian Church of Royal Oak, Michigan (September 12, 1928) (in Starr Presbyterian Church archives).

101. Emendation to Articles of Ass’n, Starr Presbyterian Church, (June 19, 1983) (in Starr Presbyterian Church archives).

102. Quit-claim deed to First United Presbyterian Church of Royal Oak, Michigan, The Bd. of Missions of the United Presbyterian Church in USA, (March 3, 1967) (in Starr Presbyterian Church archives).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Bylaws, Starr Presbyterian Church (September 23, 2007) (in Starr Presbyterian Church archives).

108. *See* State: Bench Exhibit 1, *supra* note 22.

denomination.¹⁰⁹ If Starr chose to leave the PC(USA), any decision about the church property would be made by the ecclesiastical tribunals of the PC(USA) and enforced by Michigan courts.¹¹⁰ Most likely, the PC(USA) denomination would find that the local church held its property in trust, and the property would revert to the denomination.

2. *The Deferential Approach and Free Exercise*

Several commentators have defended the deferential approach on Free Exercise grounds; this approach purports to allow churches to determine their own property disputes, ensuring church autonomy.¹¹¹ On the other hand, the free exercise of religion by *denominations* prohibits the free exercise of religion by *local churches*. Although the deferential approach does not force a local church to adopt a denomination's theology, a denomination can exert considerable pressure on a local church to accept denominational theology or practice to stay in the denomination, at the risk of losing its property.¹¹² The deferential model further prevents a local church deemed "hierarchical" from freely choosing its denomination.¹¹³ An important free exercise right is the right to exit a religion.¹¹⁴ If the right of exit is important to individuals, is it not also important to local communities? Under the Free Exercise Clause, a local church should be free to exit its denomination without cost if ordinary principles of contract and property would allow it to do so.

Additionally, the deferential approach violates the Free Exercise Clause by enforcing court determinations of whether a church is "hierarchical" or "congregational" onto local churches, and, by extension, onto individual believers.¹¹⁵ A denomination might consider itself "hierarchical," while a congregation considers the denomination to be simply an association of churches to which it belongs.¹¹⁶ Since some churches do not bear their denominational affiliations on the church sign,

109. *Calvary Presbyterian Church v. Presbytery of Lake Huron of United Presbyterian Church in U.S.*, 384 N.W.2d 92 (Mich. Ct. App. 1986).

110. Louis J. Sirico, Jr., *The Constitutional Dimensions of Church Property Disputes*, 59 WASH. U. L. REV. 1, 9 (1981).

111. Lund, *supra* note 30, at 1231 (Professor Lund, applying a Free Exercise analysis, concluded that "churches should be able to privately order their affairs as they wish," and the deferential approach allows churches—here, interpreted as denominational tribunals—to do so); *see also* Schmalzbach, *supra* note 30, 457–58 (critiquing the neutral principles of law approach under a Free Exercise analysis).

112. Lund, *supra* note 30, at 1198.

113. *Id.* at 1231.

114. *Id.* at 1203.

115. *See* McConnell & Goodrich, *supra* note 27, at 328–30.

116. *Id.* at 322.

an individual believer in a Presbyterian Church may have no idea that, in the eyes of the courts, he is under the control of a denominational structure. The congregational or hierarchical nature of a church is a deeply held religious belief,¹¹⁷ and by imposing denominational determinations of beliefs about church structure, courts inhibit the free exercise of religion.

3. *The Deferential Approach and the Establishment Clause*

While a free exercise analysis of the deferential approach shows both benefits—from the perspective of the denomination—and drawbacks—from the perspective of the local church—under an Establishment Clause analysis, the deferential approach treads on even shakier ground than under Free Exercise Clause analysis. First, the deferential approach entangles courts in religion disputes by determining whether churches are “congregational” or “hierarchical.”¹¹⁸ Second, while the deferential approach seems to have a “secular purpose,” its effects promote some religious bodies over others.¹¹⁹

The deferential method entangles courts in religious affairs when courts must determine whether a denomination is “congregational” or “hierarchical.” Such decisions are not always clear-cut and often require courts to examine and interpret church documents and the beliefs of adherents.¹²⁰ It would be very interesting, for example, to see how a court determines whether a “non-denominational” megachurch is “hierarchical” or “congregational.” Kensington Church, one of the three largest churches in metropolitan Detroit has its main campus in Troy, but the ministry also includes a number of satellite congregations.¹²¹ Since these congregations are from a “nondenominational” tradition explicitly opposed to denominational structure, would a court consider them free and independent and use a “congregational” analysis? On the other hand, these churches function largely under the control of the parent church; for example, at Kensington Church, the parent church authorizes the

117. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971); McConnell & Goodrich, *supra* note 27, at 328.

118. McConnell & Goodrich, *supra* note 27, at 329–30.

119. *Id.* at 330–33 (making a cogent argument that the deferential approach and traditionally applied neutral principles approach place a “thumb on the scales” pushing churches toward more hierarchical structure).

120. See McConnell & Goodrich, *supra* note 27, at 329–30.

121. Niraj Warikoo, *Kensington to Open New Church in Shelby Township*, DET. FREE PRESS (Sept. 27, 2014, 12:06 AM) <http://www.freep.com/story/news/local/michigan/macomb/2014/09/27/kensington-open-new-church-shelby-township/16297569/>.

theme of the weekly sermon.¹²² In other megachurches, the parent church broadcasts the Sunday sermon directly onto a screen in the satellite congregation, allowing no local control of the message at all.¹²³ Under the neutral principles of law approach, courts would consider title deeds and agreements between the parent church and the satellites.¹²⁴ Conversely, under a deferential approach, courts would be forced to determine whether these churches are “non-denominational,” as they claim, or “hierarchical,” as they probably function.¹²⁵ These decisions improperly entangle courts in matters of theology and church politics.

Additionally, under the deferential approach, courts tend to rely on denominational statements, not the beliefs of local churches or their adherents, as to whether a church is “hierarchical.”¹²⁶ Unsurprisingly, in borderline cases such as the Presbyterian church, denominations claim to be hierarchical so that they can win the property dispute.¹²⁷ Because the deferential approach incentivizes churches to become more hierarchical, government affects religion by favoring the creation and furtherance of hierarchical churches.¹²⁸

Furthermore, the deferential approach has unconstitutional religious effects because the government favors some segments of the church over others.¹²⁹ Where, in *Hosanna-Tabor*, the Court saw fit to enforce *church decisions* over *secular law*, in these cases, courts enforce *some church*

122. *Watch: Series*, KENSINGTON CHURCH (May 1, 2018, 12:37 PM), <https://kensingtonchurch.org/series/>. The same sermon topic is used in campuses from Traverse City, Michigan to Orlando, Florida. By contrast, in the PC(USA), which Michigan law deems a hierarchical church, local pastors have full control over the Scripture selection and sermon topic.

123. *Multi-Site Church*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/Multi-site_church (last updated Feb. 11, 2017).

124. Schmalzbach, *supra* note 30, at 447–49.

125. *Id.* at 446–47.

126. *See, e.g., Lamont Cmty. Church v. Lamont Christian Reform School*, 777 N.W.2d 15, 24 (Mich. Ct. App. 2009) (“The question was whether CRCNA was hierarchical with respect to property. That decision had to be based on the language of the Church Order and other governing documents.”); *Calvary Presbyterian Church v. Presbytery of Lake Huron of United Presbyterian Church in U.S.*, 384 N.W.2d 92, 94 (Mich. Ct. App. 1986) (“The courts should not look behind the veil of the authority of the internal governmental structure of the Denomination.”); *see also McConnell & Goodrich, supra* note 27, at 330–33.

127. *See, e.g., Lamont Cmty. Church*, 777 N.W.2d 15; *Calvary Presbyterian*, 384 N.W.2d 92.

128. McConnell & Goodrich, *supra* note 27, at 330–33 (describing the deferential approach as placing a “thumb on the scales” toward hierarchical churches).

129. *Id.* at 343 (“Civil law does not takes sides, and should not be used to enforce internal church obligations.”).

decisions over other church decisions.¹³⁰ Such court decisions give power to one faction, generally the majority, in a religious denomination over another faction, generally the minority in a religious denomination; this results in an unconstitutional religious effect. These religious effects are particularly troubling when viewed alongside the Court's decisions in *Serbian Eastern Orthodox Diocese v. Milivojevich*¹³¹ and *Mary Elizabeth Blue Hull Memorial Presbyterian Church*,¹³² that the Court cannot reexamine whether a denomination has significantly departed from its own laws or doctrines. Under such decisions, a denomination could theoretically decide to worship a golden calf, and a local church would have no recourse to exit the denomination with its property. Justin Gardner of Ave Maria School of Law makes a strong argument that courts should not enforce denominational decisions or statements when a denomination has significantly departed from its own beliefs.¹³³ An analysis of whether a denomination has changed its beliefs so significantly that a local church should not be bound by that denomination's judgments, Gardner argues, is an essential check on a court's application of denominationally imposed law.¹³⁴ The Court declared such theological analysis by civil courts unconstitutional;¹³⁵ but without such a check on denominations, local churches could be bound by denominational law that those churches find abhorrent.

Thus the deferential approach has drawbacks from both a Free Exercise Clause standpoint and an Establishment Clause standpoint. For these reasons, most states are uncomfortable with the deferential model and have adopted other approaches.¹³⁶ Michigan should revisit this question, which the Michigan Supreme Court has not considered in over fifty years, and join the vast majority of states in abandoning the deferential model.

130. *Hosanna-Tabor v. Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

131. *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976).

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

133. See Gardner, *supra* note 30, at 263.

134. *Id.* at 263 (applying critique of *Mary Elizabeth Blue Hull Mem'l Presbyterian Church* not only to the deferential approach, but also to the neutral principles of law approach).

135. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 440.

136. See State: Bench Exhibit 1, *supra* note 22.

B. The Neutral Principles of Law Approach: Analysis

1. Application of the Neutral Principles Approach to a Michigan Church Dispute

The neutral principles of law approach purports to allow courts an alternative to deference using the law of contracts and torts, “familiar to lawyers and judges.”¹³⁷ In practice, however, the neutral principles of law approach has simply become another method by which courts enforce denominational policy.¹³⁸ To appreciate the practical difficulties in applying the neutral principles of law approach in Michigan, consider the Starr Presbyterian Church (Starr) test case. Not only do the church’s Articles of Association fail to subordinate the local church to a denomination, there is no mention of denominational affiliation aside from the word “Presbyterian,” which might refer to any of a number of denominations.¹³⁹ The title deed to the property not only declares the local church the owner of the property, but also releases the church from a trust agreement with the denomination.¹⁴⁰ Nonetheless, the *Book of Order* of the PC (USA) states that “[a]ll property held by or for a particular church . . . whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association . . . is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).”¹⁴¹

Would the Property-Trust Clause hold up in Michigan? Looking to Michigan trust law, the answer is: maybe. The only possible creation of a trust is in Starr’s 2007 bylaws,¹⁴² in which the church generally accepts the provisions of the PC(USA) *Book of Order*, without explicitly mentioning the Property-Trust Clause.¹⁴³ Michigan adopted the Uniform Trust Code in 2010, and creation of a trust is defined in M.C.L.A. section 700.7402.¹⁴⁴ The settlor must have the capacity and intention to create a trust.¹⁴⁵ If Starr holds its property in trust, the court must then determine

137. Jones v. Wolf, 443 U.S. 595, 611 (1979).

138. See McConnell & Goodrich, *supra* note 27, at 339 (“[the neutral principles approach, as usually applied] is simply the hierarchical deference approach by another name.”).

139. Articles of Ass’n, *supra* note 998; Emendation to Articles of Ass’n, *supra* note 100; Emendation to Articles, *supra* note 101.

140. Quit-claim Deed to First United Presbyterian Church of Royal Oak, Michigan, *supra* note 102.

141. PRESBYTERIAN CHURCH (U.S.A.), BOOK OF ORDER 2015–17, G-4.0203 (2015).

142. Bylaws, *supra* note 107.

143. *Id.*

144. MICH. COMP. LAWS ANN. § 700.7402 (West 2017).

145. *Id.*

whether Starr was settlor of the trust. Courts applying the neutral principles of law often fail to distinguish between the settlor and trustee in trust creation, skipping entirely an important part of any ordinary trust analysis.¹⁴⁶ Yet if a court truly applied the trust law of Michigan, the PC(USA) could not be called the settlor of the trust, because Starr, not the PC(USA), owned the property in 1983 according to the title deed.¹⁴⁷ The only time at which the denomination could have been said to have ownership interest in the property was in the 1960s, when Starr had a mortgage loan with the denomination.¹⁴⁸ However, the quit-claim deed expressly releases Starr of the trust created by that mortgage.¹⁴⁹ The neutral principles of law approach, if properly applied, would require more than acceptance on Starr's part of a trust put forward by the denomination; according to M.C.L.A. section 700.7402(b), Starr, as settlor, would have to indicate the intention to create a trust.¹⁵⁰ Under M.C.L.A. section 700.7401, there are several methods to create a trust, but the one that would apply here would be subsection (b), a settlor's declaration that the settlor holds property as a trustee.¹⁵¹ The 2007 bylaws could serve as Starr's declaration that it holds property as a trustee. The 2007 bylaws do not expressly use the word "trust" or declare that Starr holds its property as a trustee, but the bylaws do "subordinate" the local church to the governance of the *Book of Order*.¹⁵² Without considering the *Book of Order*, such a reference to the *Book of Order* in the bylaws is probably not enough to create a trust.¹⁵³ There is currently no Michigan case law on point as to what constitutes "intention" to create a trust. A court might hear evidence that Starr knew about the Property-Trust Clause and intended to adopt the Property-Trust Clause by reference to the *Book of Order*. Whether the 2007 bylaws are enough to show an intention to create a trust would be up to a court to determine without guidance from Michigan case law. Nonetheless, as Starr's bylaws do not mention the trust specifically, a court properly applying neutral principles of law would likely find that Starr did not hold the

146. McConnell & Goodrich, *supra* note 27, at 346; *see also* All Saints Parish Waccamaw v. Protestant Episcopal Church, 685 S.E.2d 163,174 (S.C. 2009) ("It is an axiomatic principle of law that a person or entity *must hold title to property* to declare that it is held in trust for the benefit of another.").

147. Quit-claim Deed to First United Presbyterian Church of Royal Oak, Michigan, *supra* note 102.

148. *Id.*

149. *Id.*

150. MICH. COMP. LAWS ANN. § 700.7402(b) (West 2017).

151. *Id.*

152. Bylaws, *supra* note 107.

153. MICH. COMP. LAWS ANN. § 700.7402 (West 2017).

property in an express trust.¹⁵⁴ The 2007 bylaws do not include the specific language required by other courts to clearly demonstrate intention to create a trust.¹⁵⁵ In *Falls Church*, for example, the Virginia court could not find an express trust, because the church had not clearly indicated its intention to create a trust.¹⁵⁶

A Michigan court might nonetheless find that the property was held in trust as a “constructive trust”¹⁵⁷ or a “resulting trust.”¹⁵⁸ According to M.C.L.A. section 700.7407, a trust need not be evidenced in writing, but an oral trust must be evidenced by clear and convincing evidence.¹⁵⁹ A court could possibly find clear and convincing evidence that Starr’s continued participation in the denomination constituted a trust relationship.¹⁶⁰ Ordinarily, however, courts only impose a trust where there is a policy reason for a constructive or resulting trust.¹⁶¹ Enforcing denominational control should not be a policy reason for imposing a trust, because that would violate the Establishment Clause. Courts should have no interest in enforcing the rules of religious denominations.

The neutral principles analysis gets even trickier, because if a court found that Starr’s property is held in trust, there is also a possibility that the trust could be revoked. Professor Lund maintains that the goal in church property cases should be to determine the intention of the parties before the dispute arose.¹⁶² What if Starr, before any dispute arose, rewrote its bylaws to indicate that the local church did not hold property as a trustee? An important change to Michigan’s trust law in 2010 was that any trust created after the adoption of the Uniform Trust Code would be considered revocable unless expressly declared otherwise.¹⁶³ If Starr created a trust in 2007, courts would have to consider whether that trust is irrevocable.

The foregoing analysis demonstrates that the neutral principles of law approach, when applied to denominational statements, is easier in theory than in practice. The law of contract and trust may be “familiar to lawyers and judges,”¹⁶⁴ but applying trust law to denominational

154. Bylaws, *supra* note 107.

155. *Id.*; see, e.g., *Falls Church v. Protestant Episcopal Church in U.S.*, 740 S.E.2d 530 (Va. 2013); *Presbytery of Ohio Valley, Inc v. OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012).

156. *Falls Church*, 740 S.E.2d at 539–41.

157. *Presbytery of Ohio Valley*, 973 N.E.2d at 1109–114.

158. *Falls Church*, 740 S.E.2d at 539–41.

159. MICH. COMP. LAWS ANN. § 700.7407 (West 2017).

160. *Presbytery of Ohio Valley*, 973 N.E.2d at 1109–114.

161. 76 AM. JUR. 2D *Trusts* § 130 (2015); see McConnell & Goodrich, *supra* note 27, at 354.

162. Lund, *supra* note 30, at 1229.

163. MICH. COMP. LAWS ANN. § 700.7602 (West 2017).

164. *Jones v. Wolf*, 443 U.S. 595, 611 (1979).

statements and religious practices requires these laws to stretch well beyond their original scope.¹⁶⁵

2. *Neutral Principles Approach and the Free Exercise Clause*

The neutral principles of law approach arguably inhibits the free exercise of denominations, because denominations that relied on *Watson v. Jones*'s deferential approach may suddenly find their right to enforce church decisions stripped away.¹⁶⁶ The neutral principles approach, however, simply requires denominations to reassert their authority using property and contracts language rather than theological language.¹⁶⁷ Under a neutral principles of law approach, churches still have "autonomy;" the autonomy comes in a different form, the autonomy to create trusts and contracts without governmental interference.¹⁶⁸ Quick denominational responses to *Jones v. Wolf* in the 1970s and 1980s, in the form of denominational trust-clause statements, which courts later upheld, demonstrate that denominations can still freely exercise religion under neutral principles approaches.¹⁶⁹ In addition, local churches arguably have more "autonomy" when states apply the neutral principles of law approach, in that they have the freedom to accept or reject a trust. Nonetheless, in practice, local churches are not free to exit denominations under the neutral principles approach as usually applied.¹⁷⁰ Because of the lack of freedom for churches to exit denominations with their property intact, there are drawbacks to the free exercise of religion by local churches under the neutral principles of law approach, just as there are under the deferential approach.

165. See McConnell & Goodrich, *supra* note 27, at 337–39, 351, 353. In *Falls Church*, the court reasoned that the local church had "violated its fiduciary duty" by breaking away from the denomination, so the court imposed a constructive trust; Profs. McConnell and Goodrich call this "a *Through the Looking Glass* version of trust law."

166. See Gardner, *supra* note 30, 240–43; Lund, *supra* note 30, 1230–31.

167. See McConnell & Goodrich, *supra* note 27, at 343 ("[T]he mere fact that some members of an organization might resist taking steps to comply with ordinary principles of property, trust, and contract law is not a sufficient ground for abandoning those principles.").

168. See Lund, *supra* note 30, at 1231 ("All agree that churches should be able to privately order their affairs as they wish.").

169. The Court decided *Wolf* in 1979. The Episcopal Church adopted the Denis Canon that same year. *Falls Church v. Protestant Episcopal Church in U.S.*, 740 S.E.2d 530, 539 (Va. 2013). The Presbyterian Church adopted a property-trust clause in its Book of Order in 1983. *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 578 (Mo. Ct. App. 2012).

170. See McConnell & Goodrich, *supra* note 27, at 332 (stating that under neutral principles as traditionally applied, "establishing a form of governance with a secure right of exit is not possible.").

3. *The Neutral Principles Approach and the Establishment Clause*

The neutral principles approach does not have the same Establishment Clause problems as the deferential approach. While the deferential approach applies denominational law, the neutral principles approach, as the approach's name implies, operates with the secular purpose to uphold property rights.¹⁷¹ However, because courts often give dispositional weight to denominational statements in a manner inconsistent with the usual understanding of trust law, the neutral principles approach ends up creating the same religious effect that the deferential approach does.¹⁷² A strong religious effect also results from courts' reliance on denominational statements under the neutral principles approach. Because denominations gain greater power over local churches, the balance of power shifts to denominations and hierarchical churches.¹⁷³ Additionally, the neutral principles approach does not provide the disentanglement from religion that is its stated goal.¹⁷⁴ In practice, courts tend to give dispositional weight to denominational statements that local church property is held in trust for the denomination, and do not fully consider whether those statements really create an irrevocable trust under state law.¹⁷⁵ Thus, once again, courts end up enforcing denominational law—albeit using the nomenclature of trusts. Courts often apply property law in a manner inconsistent with usual understandings of property rights, allowing denominations to retain property without a firm footing in legal principles of property and trusts.¹⁷⁶

C. *The Strict Neutral Principles Approach: Analysis*

1. *Application of the Strict Neutral Principles Approach to a Michigan Church Dispute*

The strict neutral principles approach is the first approach to truly focus on property rights rather than church decisions or statements.¹⁷⁷ Courts consider only the title history of the property.¹⁷⁸ The statements of

171. Schmalzbach, *supra* note 30, at 447–49.

172. McConnell & Goodrich, *supra* note 27, at 330–333.

173. *Id.* at 323–24.

174. *Id.* at 357.

175. *Id.* at 337–40.

176. *Id.* at 334.

177. *Id.* at 325–27.

178. *Id.* at 325.

denominations receive weight only to the extent that they are specifically adopted by the actual owner of property.¹⁷⁹

Under a strict neutral principles approach of Starr Church, much of the analysis remains the same as in the traditional neutral principles approach, but a court would not give dispositional weight to denominational statements. A court would seriously consider issues such as determining the settlor of the trust¹⁸⁰ and whether the trust is revoked.¹⁸¹ Under a strict neutral principles approach, Starr's property is not held in trust, because the 2007 Bylaws would be considered on their own, without reference to the PC(USA) *Book of Order*.¹⁸² Starr, as the owner of the title deed, and the only possible settlor, did not indicate an intention to create a trust.¹⁸³ A court using the strict neutral principles approach would also consider the 1967 quit-claim deed releasing Starr from the trust to the denomination.¹⁸⁴ Recall that the Missouri court, in *Heartland v. Gashland*, gave weight to a similar quit-claim deed when the church had taken out a mortgage with the denomination.¹⁸⁵

2. The Strict Neutral Principles Approach and the Free Exercise Clause

The strict neutral principles approach does not mean that denominations would be stripped of their power. Many denominations already require that clear trust language must be included in the title deeds of member churches or that the denomination hold the property outright.¹⁸⁶ Denominations that do not have such requirements will be required to impose them upon member churches in order to retain property in the event of a dispute.¹⁸⁷ Scholars argue that having to clarify property understandings in writing inhibits a denomination's free exercise of religion.¹⁸⁸ These scholars argue that denominations, relying

179. *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 685 S.E.2d 163, 174 (S.C. 2009).

180. *Id.*

181. *Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 613 (Tex. 2013).

182. *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 585–89 (Mon. Ct. App. 2012); *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 292 P. 3d 711, 722 (Or. 2012); *All Saints Parish Waccamaw*, 685 S.E.2d at 174.

183. *Quit-claim Deed to First United Presbyterian Church of Royal Oak, Michigan*, *supra* note 102; *see also* Bylaws, *supra* note 107.

184. *Quit-claim Deed to First United Presbyterian Church of Royal Oak, Michigan*, *supra* note 102.

185. *Heartland Presbytery*, 364 S.W.3d. at 593.

186. *See* Strobel, *supra* note 27, at 1–2.

187. *Id.* at 1.

188. *See* Lund, *supra* note 30, at 1230–31; Schmalzbach, *supra* note 30, at 460.

on the deferential approach or on property-trust clauses, would bear a large burden if the denominations had to ensure that each local congregation signed onto a trust agreement.¹⁸⁹ Such a burden is inherently neutral—any local Rotarian organization or McDonald's restaurant makes legal arrangements with a national body or corporation as to distribution of property. No one argues that such arrangements violate these institutions' freedom to contract or do business. Strict neutral principles therefore enforces neutral and generally applicable law—the law of property—by requiring that churches order themselves the way businesses and nonprofit corporations do.¹⁹⁰

If enforcement of neutral and generally applicable laws against individuals does not violate the Free Exercise Clause, it follows that enforcement of property law with respect to churches does not violate the Free Exercise Clause.¹⁹¹ Moreover, the strict neutral principles approach, unlike other approaches, allows for the free exercise right of exit.¹⁹² Local churches are free to exit insofar as their legal arrangements with denominations allow. For these reasons, the strict neutral principles approach best allows for free exercise of religion, in that denominations can still order themselves as they wish, and local churches have freedom to exit according to the rules to which they have previously agreed.

3. The Strict Neutral Principles Approach and the Establishment Clause

The strict neutral principles approach also avoids Establishment Clause problems. The strict neutral principles approach has a significant secular purpose—enforcing property rights.¹⁹³ While religious beliefs are deeply held in churches, property rights are deeply enshrined in the Constitution.¹⁹⁴ Additionally, the strict neutral principles approach has none of the religious effect problems of other approaches. The strict neutral principles approach treats all religious bodies equally, regardless of denominational structure or church law, by requiring that they hammer out property understandings prior to disputes.¹⁹⁵ Finally, the strict neutral principles approach avoids government entanglement in religion.¹⁹⁶ Courts look at title deeds instead of theological treatises.¹⁹⁷

189. See Lund, *supra* note 30, at 1230–31; Schmalzbach, *supra* note 30, at 460.

190. Employment Div. v. Smith, 494 U.S. 872, 882–85 (1990).

191. *Id.*

192. See McConnell & Goodrich, *supra* note 27, at 332–33.

193. *Id.* at 325.

194. U.S. CONST. amends. V, XIV.

195. McConnell & Goodrich, *supra* note 27, at 327.

196. *Id.* at 337–40.

The strict neutral principles of law approach best accords with both the Free Exercise Clause and the Establishment Clause of the First Amendment.¹⁹⁸

IV. CONCLUSION

In light of the vast transformations in church property law, Michigan courts should reexamine Michigan's deferential approach to church property disputes. The deferential approach, now adopted by only a small minority of states, no longer serves the church or the state. On the church side, the deferential approach results in uncertainty in denominations and local churches as to who really controls property, which leads, in some cases, to deception between local churches and denominations. By contrast, the strict neutral principles approach encourages local churches and denominations to determine where property rights stand before a dispute arises. More importantly, Michigan's deferential approach stands on shaky First Amendment ground. The deferential approach requires courts to inhibit a congregation's right to exit a denomination. Deference to church authorities also enforces denominational decisions, and encourages churches to become more hierarchical. The neutral principles approach, as usually applied, does little to alleviate these Free Exercise Clause and Establishment Clause concerns. Therefore, Michigan courts should adopt the strict neutral principles approach to resolving church disputes. As more of these cases arise, Michigan courts should get out of the business of analyzing church doctrines, and into the much easier business of enforcing legal property rights.

197. *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163, 174 (S.C. 2009).

198. *McConnell & Goodrich*, *supra* note 27, at 327.