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other Code states since it involves interpretation of a uniform law.[37] Courts in these states, however, may choose to limit the effects of the holding by strictly limiting the case to its own facts. Indeed, the court stated that the logic of the holding may apply only in a few instances.[38] Unfortunately, since most forged indorsements are not restrictive in nature, the courts inclined to uphold as a matter of policy a direct cause of action by a drawer against a depositary bank are in most cases left without an acceptable theory of justification in the Code.

NEIL E. SPRAGUE

CONSTITUTIONAL GUIDELINES FOR CIVIL COURT RESOLUTION OF PROPERTY DISPUTES ARISING FROM RELIGIOUS SCHISM

Jones v. Wolf[1]

The Vineville Presbyterian Church (VPC) of Macon, Georgia, was organized and affiliated with the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS) in 1904. The congregation purchased property in Macon upon which it built a meeting house. In 1973 the congregation voted, 164-94, to leave the PCUS. After notifying the PCUS of this decision, the majority affiliated with the Presbyterian Church in America, a separate denomination. The PCUS promptly excommunicated the members of the majority faction and declared the minority "the true congregation of the [VPC]."[2] The PCUS further decreed that the majority had "forfeited . . . all rights to the property of the congregation."[3] The majority ignored this finding and retained possession of the meeting house property. The minority sought declaratory and injunctive relief in federal court to establish its exclusive right to the property on the basis of the PCUS decree. The complaint was dismissed for lack of jurisdiction.[4]

37. *See* Foxco Indus., Ltd. v. Fabric World, Inc., 595 F.2d 976, 982 (5th Cir. 1979).
38. 46 N.Y.2d at 466, 386 N.E.2d at 1322, 414 N.Y.S.2d at 301.
1. 99 S. Ct. 3020 (1979).
2. Lucas v. Hope, 515 F.2d 234, 235 (5th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).
3. *Id.*
4. *Id.*

Shortly thereafter the minority sought relief in a Georgia court on the basis of the PCUS decree. Under Georgia law, however, disputes over church property are not resolved simply by enforcing the decision of the authorized tribunal within the church hierarchy. Instead, a claimant must show that there is an express provision in the deed to the property, the corporate charter of the congregation, or the constitution of the general church which provides that upon schism, the property is to be held in trust for the claimant or the entity under which the claimant derives his purported interest.[5] If such provision is not present, the property is awarded on the basis of legal title, regardless of the nature of the affiliation with the hierarchy.[6] The Georgia court found no provision for such an interest in the PCUS, which was not a party to the suit.[7] The court awarded the property, which had been conveyed to the "Trustees of Vineville Presbyterian Church,"[8] to the majority faction of the VPC, without explanation of why that faction rather than the minority held title. The Supreme Court of Georgia affirmed[9] and the Supreme Court of the United States granted certiorari.[10]

In a five to four decision the Supreme Court refused to require that state courts enforce the determination of the appropriate ecclesiastical tribunal in all disputes over control of church property.[11] The Court held that the states may use any method of resolving church property disputes which meets the requirements of a new, two-part constitutional test. In particular, the Court stated that a method used in resolving church property disputes, generally referred to as the "neutral principles" approach,[12] satisfied this new two-part test. It noted that in applying the neutral principles approach, the Georgia court appeared to adopt a presumption, ordinarily applied when a non-profit corporation is at odds internally,[13] that a majority of its members represent the corporation.[14] Because adop-

5. Jones v. Wolf, ____Ga.____, 260 S.E.2d 84, 84-85 (1979), *cert. denied,* 48 U.S.L.W. 3525 (U.S. Feb. 19, 1980); Jones v. Wolf, 241 Ga. 208, 210, 243 S.E.2d 860, 863 (1978), *vacated,* 99 S. Ct. 3020 (1979); Carnes v. Smith, 236 Ga. 30, 37, 222 S.E.2d 322, 327, *cert. denied,* 429 U.S. 868 (1976); Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 260, 167 S.E.2d 658, 659 (1969), *cert. denied,* 396 U.S. 1041 (1970).

6. *See* cases cited note 5 *supra.*

7. 241 Ga. 208, 212, 243 S.E.2d 860, 864 (1978), *vacated,* 99 S. Ct. 3020 (1979).

8. 99 S. Ct. at 3022.

9. 241 Ga. 208, 243 S.E.2d 860 (1978), *vacated,* 99 S. Ct. 3020 (1979).

10. 99 S. Ct. 247 (1978).

11. 99 S. Ct. at 3026.

12. *Id.* at 3025, 3027. For a general discussion of the neutral principles approach, see text accompanying notes 68-70 *infra.*

13. *See* H. OLECK, NON-PROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS § 337 (3d ed. 1974). *See also* Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872) (congregational church); Watson v. Jones, 80 U.S. (13 Wall.) 679, 725 (1872) (dicta) (congregational church).

14. 99 S. Ct. at 3027. The Court noted that the majoritarian presumption would not violate its newly pronounced constitutional test for resolution of church property disputes. *Id.*

tion of the majoritarian presumption is an issue of state law,[15] and it could not be determined whether the Georgia court had adopted such a presumption, the judgment was vacated and the case remanded for determination of the law of Georgia.

Historically,[16] federal courts[17] and a majority of state courts[18] have resolved church property disputes by following the approach taken in the seminal case of *Watson v. Jones.*[19] In *Watson,* the United States Supreme Court held that a civil court should defer its decision to the resolution of the dispute reached by an authoritative tribunal within the church.[20] Later, after the incorporation of the first amendment religion clauses against the states,[21] the Supreme Court did not require the states to follow the deference approach,[22] although several commentators[23] have inter-

15. *Id.* at 3029.

16. The non-constitutional development of civil court resolution of church property disputes is discussed in Kauper, *Church Autonomy and the First Amendment: The* Presbyterian Church *Case,* 1969 SUP. CT. REV. 347, and Note, *Judicial Intervention in Disputes Over the Use of Church Property,* 75 HARV. L. REV. 1142 (1962). Missouri's approach to the resolution of church property disputes is discussed in Hughes, *The Role of Courts in Church Property Disputes,* 38 MO. L. REV. 624 (1973). Only one Missouri case dealing with a church property dispute has been reported since 1973. *See* Fast v. Smyth, 527 S.W.2d 673 (Mo. App., K.C. 1975).

17. *See* Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872); Brundage v. Deardorf, 55 F. 839 (N.D. Ohio 1893), *aff'd,* 92 F. 214 (6th Cir. 1899). These cases were decided before the "federal common law" was abandoned in Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

18. *See* cases collected at 66 AM. JUR. 2d *Religious Societies* §§ 46, 51 (1973); Annot., 52 A.L.R.3d 324 (1973).

19. 80 U.S. (13 Wall.) 679 (1872).

20. Although informed by first amendment considerations, *Watson* was decided under federal common law and thus was never binding upon the states. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710-11 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 447 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

21. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause); Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause).

22. *See* cases cited note 20 *supra. See also* Maryland & Virginia Eldership v. Church of God, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

23. *See, e.g.,* E. BARRETT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1497 (5th ed. 1977); McKeag, *Problem of Resolving Church Property Disputes in Hierarchical Churches,* 48 PA. B.A.Q. 281, 295 (1977); Note, *Constitutional Law—Limits on Judicial Review of Hierarchical Church Decisions,* 45 FORDHAM L. REV. 992, 999-1000 (1977); Note, *"And of your law, look ye to it"—The State's Role in Ecclesiastical Property Disputes*—Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich, 1977 UTAH L. REV. 138, 148. *Contra,* Note, Serbian Eastern Orthodox Diocese v. Milivojevich: *The Continuing Crusade for Separation of Church and State,* 18 WM. & MARY L. REV. 655, 675 (1977); Note, *Constitutional Law—First Amendment—The Role of Civil Courts in Church Disputes,* 1977 WIS. L. REV. 904. The dissent in *Jones* which represents four of the seven Justices that concurred in *Serbian* takes the view that *Serbian* does require deference. 99 S. Ct. at 3033-34 ("[t]his court has held that the civil courts must give effect to the duly made decisions of the highest body within the hierarchy that has considered the dispute").

preted a later case, *Serbian Eastern Orthodox Diocese v. Milivojevich*,[24] as requiring deference. The Court did hold, however, that the Constitution "severely" restricts the role that civil courts may play in resolving church property disputes.[25] As the misunderstandings over *Serbian* suggest, the exact nature of these restrictions was not clear. The holding in *Jones* is significant because it is the first time the Court has clearly set out the limitations placed upon the states in handling church property disputes.

The first part of the test announced in *Jones* requires that if a civil court makes the resolution of a church property dispute turn on a controverted matter of religious doctrine or practice, then the court must resort for decision of that issue to the decision reached by the church's authoritative tribunals.[26] The difference between this requirement and the rule in *Watson* is that *Watson* required deference to the ultimate resolution of the dispute, while *Jones* only requires deference for certain issues reached in the course of arriving at the ultimate resolution of the dispute.

Under the *Jones* test, one challenging a civil court's action must show that the civil court resolved a "religious" controversy. The Court has not precisely defined religious controversy, but in past decisions has provided considerable guidance in identifying religious matters. In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[27] the Court held that a civil court's resolution of issues concerning church doctrine, such as whether the PCUS had adhered to its original theology, is impermissible.[28] In *Serbian*, the Court held that the constitutional restriction on civil court resolution of religious disputes also applied to matters of internal discipline, organization, and procedure.[29] Matters such as the allocation of power within the church,[30] the credentials of the clergy,[31] and the status of members in fellowship[32] are clearly included in the *Serbian* prohibition.

The holding in *Serbian* went further than prior Supreme Court holdings in placing restrictions on civil court resolution of church property disputes. Under *Watson*, civil courts could refuse to enforce the church's decision in cases of fraud, collusion, or where the tribunal had so deviated

24. 426 U.S. 696 (1976).
25. *See* Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 449 (1969).
26. 99 S. Ct. at 3025.
27. 393 U.S. 440 (1969).
28. *Id.* at 449-50. The offensive findings concerning church doctrine made by the civil court in *Presbyterian* were that the church was "making pronouncements and recommendations concerning civil, economic, social and political matters" and "that the general church has . . . made pronouncements in matters involving international issues such as the Vietnam conflict." *Id.* at 442 n.1.
29. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976).
30. *Id.* at 708, 722-23.
31. *Id.* at 709.
32. *Id.* at 713-14.

from church regulations as to have acted arbitrarily.[33] In *Serbian,* the Eastern Orthodox Church had stripped Milivojevich, a subordinate figure in the church, of his bishopric. Milivojevich filed suit in state court to enjoin those ordained in his place from interfering with the assets of the diocese. As his right to control the disputed property was derived solely from his clerical status, he also sought a declaration that he was "the true . . . Bishop."[34] The state court did not purport to invest Milivojevich with the powers of the bishopric but did invalidate his defrockment because of arbitrariness by the hierarchy in failing to comply with its own "penal code."[35] The Supreme Court invalidated the *Watson* arbitrariness exception, and held that the church tribunal is the exclusive judge of its own need to follow established procedure.[36] The Court also indicated that this holding would apply whether or not the church procedure in question had theological origins.[37] Considering the holdings in *Presbyterian* and *Serbian,* it appears that the phrase "religious controversy" has been defined sufficiently broad by the Court to encompass the determination of the propriety of almost any position or organizational action taken by a church.

The Supreme Court has allowed civil courts to exercise independent judgment on one religious matter: the location of the authoritative tribunal within the church.[38] This issue may arise in one of two instances. First, there may be two tribunals claiming to speak for the general church. Second, a subordinate unit within the church may claim an autonomy the hierarchy denies. The scope of the civil court's independent judgment in these situations, however, is again severely circumscribed.[39] The *Jones* Court intimated that the independent judgment of a civil court "would appear to" be limited to cases where the locus of authority within the church is not *"ambiguous."*[40] This restriction was applied to the case of a purportedly autonomous subordinate in *Serbian.* The Eastern Orthodox Church in *Serbian* had divided the diocese into three smaller dioceses. Milivojevich, as putative spokesman for the diocese, claimed that the reorganization was "in clear and palpable excess of [the hierarchy's] jurisdiction" because earlier agreements between the hierarchy and the diocese "manifested a clear intention [that the diocese] retain independence and

33. *See* Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); Brundage v. Deardorf, 55 F. 839 (N.D. Ohio 1893), *aff'd,* 92 F. 214 (6th Cir. 1899).

34. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708 (1976).

35. *Id.*

36. *Id.* at 714-15.

37. *Id.* at 712. ("it is the essence of religious faith that ecclesiastical decisions are to be accepted as matters of faith, whether or not . . . measurable by objective criteria").

38. 99 S. Ct. at 3026.

39. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09 (1976); Maryland & Virginia Eldership v. Church of God, Inc., 396 U.S. 367, 368-70 (1970) (Brennan, J., concurring).

40. 99 S. Ct. at 3026 (emphasis added).

autonomy in its administrative affairs."[41] The Eastern Orthodox Church, which had jurisdiction to determine internal allocations of power,[42] interpreted these agreements to give autonomy only in the day-to-day administration of church property. The Supreme Court prohibited any independent civil court determination of the question because the provisions setting out the internal structure of the church "were *not so express* that the civil court could enforce them without engaging in a searching and therefore impermissible inquiry into church polity."[43] Therefore, an autonomous subordinate's claim must yield to the claim of the general church if the locus of authority is ambiguous. In a case where two tribunals claim to speak for the church, a court following the *Watson* deference approach would appear to be required by *Jones* either to assume that the first party in court represents the church, or abandon deference for a "neutral principles"-type analysis.

Finally, the Court has made it clear that a civil court need not defer to the church tribunal's ultimate award merely because of the presence of one ecclesiastical issue among the several issues to be decided by the court in the course of its ultimate award of the property. In *Serbian*, the civil court was required to accept the decisions of the highest ecclesiastical tribunals within the church *"in their application to the religious issues* of doctrine or polity before [the civil court]."[44] *Jones* contains a similar statement.[45] This language indicates that the deference required by the Constitution is limited to religious controversies before the court. At some point, however, a state's approach to the ultimate resolution of the controversy may become so riddled with religious considerations that a civil court must defer to the church tribunal's ultimate resolution.[46]

While the prohibition against civil court resolution of religious controversies is a longstanding tradition in constitutional law, the second part of the test applied in *Jones* is new to constitutional analysis and therefore has not been fully developed. This part of the test requires that a state's approach to resolving church property disputes be sufficiently flexible so that "a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members."[47] The origin of this test is the first amendment, which protects religious organizations from state interference with the form of church government they choose.[48]

This interference might occur if a state refused to recognize the de-

41. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 720-21 (1976).
42. *Id.* at 721.
43. *Id.* at 723 (emphasis added).
44. *Id.* at 709 (emphasis added).
45. 99 S. Ct. at 3026.
46. *Id.* at 3028.
47. *Id.* at 3026.
48. *See* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

cisions of the church government in church property disputes.[49] Such a result first came before the Supreme Court in *Maryland & Virginia Eldership v. Church of God, Inc.*[50] In *Maryland & Virginia Eldership,* the Court upheld Maryland's approach to the resolution of church property disputes. It dismissed an appeal on the sole ground that "the Maryland court's resolution . . . involved no inquiry into religious doctrine."[51] Georgia's approach is based on, and is identical to the Maryland approach.[52] Unlike the Maryland court in *Maryland & Virginia Eldership,*[53] however, the Georgia court in *Jones* actually contravened the desires of the church and its members concerning the resolution of the property dispute. Under the PCUS constitution, property is owned by the congregation[54] and managed by the ruling elders of the congregation,[55] but the presbytery and superior tribunals are empowered to review *all* decisions of the leading elders and to excommunicate whomever they choose.[56] The ultimate result of the Presbyterian scheme should have been that the general church had the

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49. In *Kedroff,* the New York legislature had awarded by statute the control of the New York property of the Russian Orthodox Church to an American group seeking to terminate its relationship with the Mother Church in Russia. Thus, the legislature prohibited the people of New York from recognizing the Russian Church as authoritative. The New York Court of Appeals upheld the statute. St. Nicholas Cathedral v. Kedroff, 302 N.Y. 1, 96 N.E.2d 56 (1950). The Supreme Court invalidated the statute as offending the free exercise clause, stating:

> By fiat [the statute] displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.

344 U.S. at 119. *Kedroff* dealt with a state's refusal to recognize a hierarchy under any circumstances and therefore is distinguishable from a case of a failure to recognize the hierarchy because of a lack of effort on the part of that hierarchy to meet the minimal burden of stating its structure in legally cognizable form. *See* text accompanying notes 58 & 60 *infra.*

50. 396 U.S. 367 (1970).

51. *Id.* at 368.

52. *See* Carnes v. Smith, 236 Ga. 30, 34-37, 222 S.E.2d 322, 326-27 (1976). In Maryland, if the congregation is incorporated under the Religious Corporation Law, regardless of its situation in the hierarchical church, it retains the property upon schism unless there is an express provision to the contrary in the deeds, corporate charter of the congregation, or the constitution of the church. *See* Maryland & Virginia Eldership v. Church of God, Inc., 249 Md. 650, 659, 661, 241 A.2d 691, 699, 701 (1968), *vacated,* 393 U.S. 528, *aff'd on rehearing,* 254 Md. 162, 254 A.2d 162 (1969), *appeal dismissed,* 396 U.S. 367 (1970).

53. In *Maryland & Virginia Eldership,* the General Eldership deliberately had omitted from the constitution of the church any statement in regard to the control or ownership of church property. Appended to the constitution were two resolutions *advising* and *recommending* that the local congregation insert a provision for a trust in favor of the general church upon schism, with which the congregation did not comply. There was additional affirmative evidence that the Church of God allowed the local congregations autonomy in many matters.

54. *See* St. Louis Post-Dispatch, July 13, 1979, at 9D, col. 2 (statement by Rev. James E. Andrews, official of PCUS in Georgia).

55. 99 S. Ct. at 3034.

56. *Id.*

final authority in deciding the use of the congregation's property and in determining which persons constituted the VPC. Under Georgia's neutral principles of law approach, however, the desired arrangement with respect to the church property had to be specifically stated to overcome presumptions of majoritarian congregational rule. Thus, the excommunicated majority in *Jones* ultimately retained control over the property and was recognized by the civil court as the VPC, although this result was in direct contradiction of the Presbyterian scheme.

The Supreme Court found that Georgia's "neutral principles" approach did not violate the Constitution because: (1) it imposed no limitation on the form of polity the church might adopt;[57] (2) "minimal" effort was required to express the church's polity in "legally cognizable" form before a dispute arose;[58] and (3) the parties were on notice before the particular dispute arose that state law required such a provision.[59] The Court concluded that any state approach meeting these requirements is sufficiently flexible to avoid interference with the form of government a church might select.[60]

The dissent in *Jones* would have required the states to follow the deference approach of *Watson* as the best means for avoiding constitutional questions in church property disputes.[61] As the dissent perceived, once a civil court identifies and follows the authoritative tribunal within a church, the church's choice of government, which is protected by the second part of the *Jones* test, will not be subverted by the state. In addition, there is no opportunity for a civil court to decide further ecclesiastical questions in violation of the first part of the *Jones* test because the civil court accepts the tribunal's decree at face value. The majority conceded that the *Watson* approach would meet its test in most cases, but noted that when the locus of authority in the church is "ambiguous," application of *Watson* would be unconstitutional because it would require "a searching and therefore impermissible inquiry into church polity."[62] In that situation, the dissent would have allowed civil courts to "carefully examine" church polity and to decide all ecclesiastical controversies necessary for the identification of the authoritative tribunal.[63]

The dissent noted two constitutional difficulties with the majority approach. First, it stated that the *Jones* test will "inevitably . . . increase involvement of civil courts in church controversies,"[64] because civil courts will be required to decide more church property disputes under the *Jones*

57. *Id.* at 3025-26.
58. *Id.* at 3027.
59. *Id.* at 3027 n.4 ("retroactive application" of a neutral principles approach might create free exercise problems).
60. *Id.* at 3027. *But see id.* at 3030 (Powell, J., dissenting).
61. *Id.* at 3032 (Powell, J., dissenting).
62. *Id.* at 3026.
63. *Id.* at 3034 (Powell, J., dissenting).
64. *Id.* at 3029 (Powell, J., dissenting).

test than under *Watson*.[65] This concern, however, appears not to be founded on constitutional considerations. In *Presbyterian*, the Court observed, "It is obvious . . . that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment."[66] Thus, the mere presence of added suits in civil courts should not be a matter of constitutional concern.

The dissent also found constitutional difficulty with the majority approach which would ignore church desires in those cases where the church failed to express its political arrangement in a form the state court recognizes.[67] This complaint apparently misconceives the nature of the "neutral principles" approach. The difference between a *Watson* jurisdiction and a "neutral principles" jurisdiction is that the former resolves church property disputes by applying the law of voluntary associations[68] while the latter resolves church property disputes by applying property law.[69] A "neutral principles" jurisdiction merely requires that while drafting title instruments and subsequent agreements in compliance with ordinary principles of conveyancing law, the parties give some thought to the possibility of title disputes arising from schism.

The majority noted that "[t]he neutral principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property."[70] Under the compelling state interest test of state regulations, the presence of a less burdensome means to serve the state's interest in providing a meaningful forum for the resolution of claims to church property might be fatal to the "neutral principles" approach[71] which, unlike the *Watson* deference approach, requires some effort on the part of the hierarchy to secure its claims to the property. The infringement of free exercise, however, must be more than minimal before substantive due process tests stricter than the rational basis test are applied.[72] In one sense

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65. *Id.* at 3030-31 (Powell, J., dissenting).

66. Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 449 (1969).

67. 99 S. Ct. at 3030-31 (Powell, J., dissenting).

68. Watson v. Jones, 80 U.S. (13 Wall.) 679, 714 (1872).

69. 99 S. Ct. at 3025. *See also* Maryland & Virginia Eldership v. Church of God, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring). The only significant difference is that the court requires more clarity of expression for those opposing the congregation's claim because in disputes over church property, the court cannot hear the evidence of both sides in clarifying ambiguous language, as it can in non-religious cases. *See* text accompanying notes 26-37 *supra*.

70. 99 S. Ct. at 3027.

71. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978); Shapiro v. Thompson, 394 U.S. 618, 637 (1969); Sherbert v. Verner, 374 U.S. 398, 407 (1963) (religion clause).

72. *See* Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978); Whalen v. Roe, 429 U.S. 589 (1977) (no significant infringement of right to privacy, therefore no stricter analysis than rational basis); Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("We turn first to the question whether the [state action] imposes any burden on the free exercise of appellant's religion."). For strong and widely followed dicta

there is no restriction of religious liberty at all because the state imposes no restrictions on the types of church organization which may be expressed in property law terms. Furthermore, the infringement involved in the neutral principles approach—the need to write down the property relationship—is by definition minimal if it meets the requirements of the second part of the *Jones* test.[73] Thus, while there is great practical force in the dissent's argument that "the evidentiary rules . . . should be fashioned to avoid interference with the resolution of the dispute within the accepted church government,"[74] due process clause jurisprudence does not compel invalidation of the neutral principles approach.

Both the majority and dissent in *Jones* agreed that the major constitutional problems arising from civil court resolution of church property disputes are the use of civil courts to resolve theological controversies and the potential threat to the integrity of church judicial systems by providing a civil forum for property dispute resolution. The disagreement in *Jones* was over the best method of avoiding these problems. Although the approaches of the majority and dissent potentially involve sacrifice of first amendment values in extreme cases, on balance both approaches appear equally useful in keeping the states from encountering constitutional difficulties. In view of the equal constitutional validity of the approaches, the question of the soundness of the result in *Jones* should be resolved by looking at the impact of the two approaches on the states since the law governing resolution of church property disputes is state law.

The state ultimately determines the goals it wishes to attain by providing a forum for property disputes. Some state ends are constitutionally impermissible and some means unconstitutionally impact on fundamental rights protected by the fourteenth amendment. The majority's two-part test separates unconstitutional state ends and practices from those that are

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dealing with the impact of state constraints on property ownership upon the free exercise of religion, note the words of Chief Justice Vinson in American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 397-98 (1950):

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

The ordinances referred to in *Douds* have continuing vitality. *See* Corporation of the Presiding Bishop v. Porterville, 90 Cal. App. 2d 656, 203 P.2d 823, *appeal dismissed,* 338 U.S. 805 (1949). The constitutional validity of these ordinances makes an a fortiori case for the constitutional validity of neutral principles. Under these ordinances, religious exercise is forbidden in certain forms in certain areas by the state. Under neutral principles, the only reason that the religious organization would not obtain what it desires is a lack of effort on its own part to describe its form of organization in legally cognizable terms.

73. *See* text accompanying notes 57-60 *supra.*

74. 99 S. Ct. at 3031 n.4 (Powell, J., dissenting).

permissible. The dissent would, in addition, dictate the particulars of church property law to the states. By restricting the state's freedom, the dissent might irrevocably put beyond the reach of the states attainment of many constitutionally permissible goals.[75] The majority decision in *Jones* is sound because it protects the various constitutional rights involved and wisely leaves the states considerable latitude to fashion approaches suitable for the pursuit of all constitutionally permissible ends rather than placing restrictions on the states which would substantially foreclose such pursuit.[76]

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75. This proposition may be illustrated by the following example: a state might wish to protect the legal rights to congregational property of those labeled dissident by their church. As the Court discussed in *Watson,* congregations affiliating with a hierarchical church consent to be bound by the decisions of the church's superior tribunals even when those decisions terminate their rights to property retained for use by the congregation. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1872). The act of affiliation greatly dilutes the legal rights of the congregation to the property *vis-à-vis* the general church. Nevertheless, commentators have suggested that the consent to be bound is conditional on a minimal amount of fairness by the tribunal. *See* C. ZOLLMAN, AMERICAN CHURCH LAW § 302, at 287-89 (1933); Bernard, *Churches, Members and the Role of the Courts: Toward a Contractual Analysis,* 51 NOTRE DAME LAW. 545, 559-62, 567-69 (1976); Sampen, *Civil Courts, Church Property, and Neutral Principles: A Dissenting View,* 1975 U. ILL. L.F. 543, 566-68, 573. Church members generally do not subject the rights to their property to arbitrary and capricious termination. After *Serbian,* however, a state following *Watson* must enforce even arbitrary decisions of the tribunal. If there is a valid approach under the majority's test which would allow attainment of this goal, the dissent would subvert a salutary state endeavor with no compensating furtherance of constitutionally protected rights.

76. There are two arguments for abandonment of the *Watson* approach which have nothing to do with the state's purposes in providing a forum for resolution of church property disputes. The initial determination under *Watson* of the locus of authority in the church is an ecclesiastical question according to *Jones* which can only be decided by the civil court if the locus of authority is not ambiguous. The first argument against the *Watson* approach is that the state must develop another approach in anticipation of these ambiguous cases because it may not inquire further if the locus of authority is ambiguous. The second argument arises from the possibility of the existence within the state of two methods of resolving church property disputes: one for ambiguous cases and the *Watson* approach for unambiguous cases. Because cases dealing with an ambiguous church political arrangement will be, as the majority noted in *Jones,* rare, the hierarchy might naturally neglect to meet the requirements of the alternative approach, whatever it may be. A shrewd dissident group sensing a better chance to retain the church's property under the alternative approach developed for ambiguous cases might be encouraged by the existence of the dual system of law to attempt grand usurpation schemes in hopes of confusing the church polity question under *Watson* to the point of ambiguity. Thus, the dissidents would receive treatment by the state under the more favorable alternative approach and already bitter schisms would be indirectly aggravated by the state.