Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments

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The image of the melting pot depicts our nation of immigrants as a crucible in which ethnic peoples of every description are forged into "Americans," free from the identities they left behind in their countries of origin.¹ Not all immigrants came here with the purpose of shedding their old identities, however. Some groups, such as the Amish and the Hasidic Jews, came here with the intention of remaining distinct from the rest of American society.² The Mormons and many Native American nations attempted to avoid or even violently resisted the authority of the United States,³ and African slaves came here against their will.⁴ Even when immigrants sought to assimilate into "American" society, they often retained some aspects of their ancestral heritage. One of the most durable of these aspects was religion.

². Eg., LEONARD DINNERSTEIN & DAVID M. REIMERS, ETHNIC AMERICANS: A HISTORY OF IMMIGRATION AND ASSIMILATION 139, 151 (Irwin Unger ed., 1975). The Dutch Calvinists who settled in Western Michigan and other parts of the Upper Midwest represent another group of immigrants who sought to retain their cultural distinctness. JAMES OLSON, THE ETHNIC DIMENSION IN AMERICAN HISTORY 90–93 (1979).
Indeed, some researchers have observed that the United States is actually a nation of multiple melting pots defined by religion. Ethnicity often loses significance over the course of several generations, but religion continues to distinguish one group of people from another.

Religious cultures encompass their own sets of traditions, laws, values, and beliefs. The religion clauses of the First Amendment foster the preservation of distinct religious cultures by prohibiting government from interfering with religious beliefs, and from showing a preference for one set of religious beliefs—or non-belief—above another. The clauses guarantee each religious group the freedom to interpret its own laws and doctrines, to maintain standards of behavior for its members, and even to organize its own judicial system.

5. See, e.g., DINNERSTEIN & REINERS, supra note 2, at 146-47.

6. Researchers have found, for example, that when members of immigrant societies begin to marry outside of their ethnic groups in large numbers, they still exhibit a strong tendency to marry within their religious groups. More recent research suggests that even religion gradually loses significance. See id. at 147-49. It might be more accurate, however, to conclude that the barriers between different religious cultures become more permeable over time, so that individuals have greater freedom to move from one religious group to another, but that religious cultures continue to exhibit many of their distinct characteristics. For a discussion of the debate that this permeability has generated within the Jewish community as American Jews seek to ensure the survival of a distinct Jewish culture in this country, see Peter Steinfels, Debating Intermarriage, and Jewish Survival, N.Y. TIMES, Oct. 18, 1992, § 1, at 1.

7. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 209-13, 216-19 (1972) (discussing Amish traditions, values, and religious beliefs). Religious groups may see their own law as equal or superior to secular law and may view religious and secular law as competing against each other. Carol Weisbrod, Family, Church and State: An Essay on Constitutionalism and Religious Authority, 26 J. FAM. L. 741, 745-47 (1987-88).

8. The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” U.S. CONST. amend. I.


Native American tribal courts serve as another example of a type of court system that operates in the United States outside of state and national government judicial systems. The tribal courts are not analogous to ecclesiastical courts, however, because Indian tribes are “a separate people” who retain “inherent powers of a limited sovereignty which has never been extinguished.” United States v. Wheeler, 435 U.S. 313, 321 (1978) (emphasis omitted) (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)). In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court held that “(t)he Cherokee nation... is a distinct community, occupying its own territory... in which the laws of Georgia can have no force...” Id. at 560. To extend such sovereignty to a religious group would violate the First Amendment’s Establishment Clause, which applies to both the federal government and the states under Everson v. Board of Education, 330 U.S. 1 (1947). Id. at 15. Even with respect to the Indian tribes, however, the federal government can restrict the bounds of tribal sovereignty. Allison M. Dussias,
In tension with this promise of religious freedom to all religious groups is an equally powerful promise of religious liberty to individuals. Individuals can choose to violate religious doctrine, change their religious affiliation, or abandon religion entirely. Conflicts between religious groups and their individual members, or between opposing factions of religious groups, often create a situation in which the religious freedom of one party must yield to the religious freedom of the other. On the other hand, individuals may choose to submit to religious authority and even seek religious adjudication of matters ordinarily subject to civil court resolution. Religious tribunals sometimes adjudicate matters involving parties who may not have submitted to ecclesiastical authority willingly, however. Furthermore, granting excessive authority to religious leaders can compromise the interests of the secular government.


Indian tribes' limited sovereignty does not provide Native American religions with greater insulation from secular interference than other religious societies enjoy. See Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (upholding an Oregon law prohibiting intentional possession of a controlled substance even when the controlled substance, peyote, was ingested for sacramental purposes within the context of religious observance by members of the Native American Church). Similarly, the Mormon Church, despite its members' efforts to avoid the authority of the United States, is subject to both state and federal regulation to the same extent as other religious groups. See, e.g., Davis v. Beason, 133 U.S. 333, 348 (1890) (upholding a law of Idaho Territory prohibiting members of the Mormon Church from registering to vote because the Church advocated polygamy in violation of territorial law). The specific holding, but not the reasoning, of Davis v. Beason was effectively overruled in Torcaso v. Watkins, 367 U.S. 488 (1961), which ruled that religious tests for public office are unconstitutional. Id. at 496. Nevertheless, Davis remains valid insofar as it stands for the proposition that the Mormons must obey state as well as federal law even where the laws infringe upon Mormon religious practices. See id. at 492 n.7 (citing Davis as one of the major cases explicating the history, scope, and meaning of the First Amendment's religious freedom guarantee).


13. See, e.g., Milivojevich, 426 U.S. at 712–13 (determining whether a hierarchical church can defrock a bishop arbitrarily); Guinn, 775 P.2d at 777 (determining whether a congregational church can institute disciplinary proceedings against a person who already has withdrawn from church membership).


15. In Mikel v. Scharf, 432 N.Y.S.2d 602, 605–06 (Sup. Ct. 1980), aff'd mem., 444 N.Y.S.2d 690 (App. Div. 1981), for example, the respondents argued that their submission to rabbinical court authority was made under duress.

16. See infra part II.A.
This Note considers the standard of deference that civil courts
should apply in cases where a religious judicatory already has
decided an issue which subsequently is submitted for civil court
resolution.\textsuperscript{17} It proposes a framework designed to protect the
rights of religious groups to preserve their cultural integrity
while also protecting individuals’ personal liberty and the
interests of the secular state. The analysis is necessarily framed
by the opposing demands of the First Amendment’s religion
clauses.\textsuperscript{18} The Free Exercise Clause prohibits civil courts from
intruding into religious societies’ internal affairs,\textsuperscript{19} and the
Establishment Clause limits religious authority over secular
issues.\textsuperscript{20} To meet the requirements of both religion clauses, civil
courts must refuse to rule on wholly internal, wholly religious
issues, but must defend parties’ secular rights.

Part I of this Note considers the standard of deference that
civil courts should apply when they are asked to review
ecclesiastical adjudications of wholly religious disputes. Part I.A
recognizes that civil courts lack authority to resolve ecclesiastical
questions, and that civil courts therefore must defer to religious
decision makers’ judgments on these questions. When the civil
adjudication of a secular right depends upon the resolution of
an ecclesiastical dispute, the civil court must accept as binding
the decree of the highest ecclesiastical tribunal that will hear
the dispute. Part I.B observes, however, that the First
Amendment protects only religious decisions. Thus, when a
religious tribunal acts fraudulently by resolving a religious
dispute in bad faith for secular purposes, the civil court must
have the power to intervene. Part I concludes by arguing that,
because the First Amendment prohibits secular authorities
from entangling themselves in religious societies’ internal

\textsuperscript{17} This Note defines the term “religious court” broadly to include any authoritative
individual or religious body which resolves ecclesiastical controversies. The secular
enforceability of religious judgments can appear unpredictable to religious leaders, who
may have difficulty understanding why some religious adjudications are enforced while
others are reversed or simply ignored. This Note attempts to devise a framework which
will provide predictability for religious authorities and practicability for secular jurists.

\textsuperscript{18} The Supreme Court has noted that if the Free Exercise and Establishment
Clauses were each taken to their logical extremes, they would “tend to clash” with each
other. Walz v. Tax Comm’n, 397 U.S. 664, 668–69 (1970); see also Jesse H. Choper, The
Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev.
673, 673–75 (1980) (discussing the tensions that exist between the two clauses).

\textsuperscript{19} E.g., Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian

\textsuperscript{20} E.g., Guinn v. Church of Christ, 775 P.2d 766, 776–79 (Okla. 1989).
affairs, civil courts can provide only secular remedies for ecclesiastical fraud and cannot provide religious remedies.

Part II of this Note considers the standard of deference that civil courts should apply in reviewing religious adjudications of secular issues. It begins with the premise that the First Amendment protects disputants from having the outcome of their secular disputes dictated by religious authorities. In a case in which both parties wish to submit a secular dispute to an ecclesiastical court for adjudication, however, the ecclesiastical court may have power to decide the case.

This Part also addresses the issue of the circumstances under which a religious authority's adjudication of a secular law claim would be binding upon the civil courts. Part II.A discusses the doctrine of waiver and concludes that, within the limits imposed by the public interest in preventing religious organizations from gaining excessive power over the secular realm, the parties to a secular dispute can waive their constitutional right to have their secular claim resolved by secular authorities. Part II.A.1 discusses the public policy concerns which restrict the enforceability of a party's plenary waiver of her First Amendment religious freedoms, and II.A.2 argues that, to the extent that such waivers do not conflict with public policy, courts should enforce parties' waivers of their religious freedoms.

Part II.B considers three ways in which the parties might indicate their wish to waive their First Amendment rights and submit their dispute to ecclesiastical adjudication. Part II.B.1 considers the adequacy of a party's maintenance of membership in a religious organization as evidence of a waiver and concludes that membership in a religious organization is an insufficient basis for determining that a party has waived his constitutional right to a hearing in a secular court. Part II.B.2 considers the adequacy of actual participation in an ecclesiastical court proceeding as evidence of a waiver and concludes that even actual participation in a religious court proceeding is not by itself sufficient to demonstrate that a party has waived his right to have a secular court resolve a secular issue. It further concludes that even if a religious authority has already decided a secular issue, the secular court, upon hearing the case, must apply a standard of *de novo* review. Part II.B.3 considers the adequacy of a binding arbitration agreement as evidence that a party has waived his right to have a secular court decide his case. It concludes that a properly formulated written agreement to have religious functionaries arbitrate a secular dispute should be
treated like any arbitration agreement involving secular arbitrators; if the religious agents perform the arbitration according to statutory arbitration provisions, the ecclesiastical decision should have binding legal force.

Finally, Part III of this Note argues that subordinate bodies of religious denominations have religious freedoms under the First Amendment just as individuals and denominations do. This Part argues that, like individuals, independent congregations which choose to unite with religious denominations should be free to separate from those denominations without losing the property rights that they enjoyed prior to affiliation with the higher church. This Part thus advocates the neutral principles approach to resolving religious property disputes rather than the polity approach. This Part recognizes that congregations can waive their property rights and other freedoms voluntarily, and argues that the public policy concerns which constrict the enforceability of individuals' waivers of their First Amendment rights do not apply in the context of congregations. It therefore concludes that such waivers by congregations should be strictly enforced.

I. CIVIL COURT REVIEW OF RELIGIOUS DECISIONS INVOLVING PURELY ECCLESIASTICAL SUBJECT MATTERS

The First Amendment's religion clauses prohibit civil authorities from resolving religious controversies. If secular authorities were to step into the spiritual realm, religious societies would lose their freedom to develop their own systems of belief, and we would risk the possibility that our religious groups would become arms of the state. This Part develops the proposition that only religious courts can resolve religious controversies, and that civil courts must therefore defer to the judgment of ecclesiastical tribunals when a religious matter is in controversy. Examples of "purely religious" subjects requiring deference from civil courts include matters of "theological controversy, church discipline, ecclesiastical government, or the
conformity of the members of the church to the standard of morals required of them." This Part also argues, however, that

21. Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1871). Before Employment Div. v. Smith, 494 U.S. 872 (1990), the law was that when the subject matter of the case involved an area in which the state or federal government had acted, secular law would take precedence if the state showed that a limitation on religious liberty was essential to the accomplishment of a compelling governmental interest. United States v. Lee, 455 U.S. 252, 257 (1982); see also Reynolds v. United States, 98 U.S. 145, 166 (1878) (holding that laws against polygamy do not violate the free exercise of religion, even if polygamy is considered a religiously affiliated duty by Mormons); Frolickstein v. Mayor of Mobile, 40 Ala. 725, 728 (1867) (holding a municipal ordinance, prohibiting the sale of goods by merchants on Sundays was not violative of the state constitution, as applied to religious Jews); Hill v. State, 88 So. 2d 880, 885 (Ala. Ct. App.) (holding that, although snake handling is a ritual in some religions, a statute prohibiting any person from using dangerous snakes in a manner as to endanger another person did not violate federal or state constitutional guarantees of freedom of religion), cert. denied, 88 So. 2d 887 (1956); Hames v. Hames, 316 A.2d 379, 383 (Conn. 1972) (holding that a priest's attempts to "revalidate" a previous legal divorce were "inconsequential" because any other holding would put the court in a "position of supplanting state power with ecclesiastical power"); Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 39 (D.C. 1987) (en banc) (holding that a religiously affiliated university could not deny tangible benefits to homosexual student groups); Lawson v. Commonwealth, 164 S.W.2d 972, 973 (Ky. 1942) (holding that a statute prohibiting snake handling in connection with religious services was a valid exercise of the state's police power); Harden v. State, 216 S.W.2d 708, 710–11 (Tenn. 1948) (upholding constitutionality of statute prohibiting snake handling in a manner endangering another person by finding that although snake handling is a ritual in some religions and the freedom to believe is absolute, the freedom to act is subject to regulation). Smith repudiated the strict scrutiny standard. See 494 U.S. at 885–89 (holding that generally applicable criminal statutes are not subject to strict scrutiny even if they burden religious practice). Even after Smith, however, the secular law does not overturn the religious ruling of law, or challenge the validity of the religious group's beliefs, but only regulates the conduct of the religious group's members. See id. at 887 (finding that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim") (citations omitted); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940). But cf. Davis v. Beason, 133 U.S. 333, 341–42 (1890) (arguing that "to call [the Mormon] advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind").

The distinction between "religious" and "secular" subject matter or activities is often unclear. In Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987), the Supreme Court reversed a lower court ruling prohibiting the Mormon Church from imposing religious requirements upon its employees who worked at a Church-run, nonprofit gymnasium which was open to the public. The Supreme Court held that the religious exception to Title VII of the Civil Rights Act of 1964, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e–1 (1988)), did not violate the Establishment Clause, at least as the exception applied to the religious group's nonprofit activities. 483 U.S. at 329–30. The Court assumed in dictum that the Free Exercise Clause did not require Congress to exempt religious organizations from Title VII with regard to the religious groups' employment of individuals to perform nonreligious functions. Id. at 335–36. The Court recognized that a broad exception was constitutionally permissible, however, holding that, "as applied to the nonprofit activities of religious employers, [the religious exemption] is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Id. at 339. The Court recognized:
It is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336 (footnote omitted).

The Court did not determine whether the religious exemption could also apply to a religious organization’s for-profit activities. Id. at 349 (O’Connor, J., concurring). In future cases, the Court will need to recognize that certain for-profit religious activities could not be carried out if employers were obligated to adhere both to religious law and to secular antidiscrimination law. Jewish law, for example, prohibits habitual sinners from receiving authorization to serve as a kosher butcher, a position which is considered to be a role of authority over the rest of the community. See Eliezer Finkelman, *Homosexuality in Jewish Law*, 1 J. SOCY RABBIS ACADEMIA 37, 40–41 (1991). Although the preparation and sale of kosher meat is a for-profit activity, the Jewish community must be free to determine for itself who is and is not qualified to engage in this activity. See United Kosher Butchers Ass’n v. Associated Synagogues, 211 N.E.2d 332, 334–35 (Mass. 1965) (declining to intervene in a controversy over the interpretation and enforcement of kashruth in Boston, as the issue is exclusively one of “religious practice and conscience”).

On the other hand, some activities which may at first glance appear to be religious may actually be secular in nature. See Minkin v. Minkin, 434 A.2d 665, 667–68 (N.J. Super. Ct. Ch. Div. 1981) (holding that the acquisition of a Jewish certificate of divorce is not a religious act); J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201, 208–15 (1984) (arguing that the Jewish divorce decree is not religious in nature and therefore should be recognized by a secular court as a mutual agreement to abandon one another).

Lower courts have found that a religious society’s activities or facilities sometimes have a hybrid religious/secular character. In Dignity Twin Cities v. Newman Center & Chapel, 472 N.W.2d 355 (Minn. Ct. App. 1991), an association of gay Catholics asserted that the Newman Center’s refusal to renew their organization’s lease of space within the Center’s building because of their group’s views on homosexuality violated the Minneapolis Civil Rights Ordinance. Id. at 356. The Newman Center and the other defendants (the Roman Catholic Archdiocese and its Archbishop) asserted that the application of the antidiscrimination law to the Newman Center’s rental activities violated the defendants’ free exercise rights. Id. Holding for the defendants, the court ruled that, to determine whether the rental of property which had a “dual religious/secular nature,” id. at 357, was subject to secular antidiscrimination law, the court would look to the “form of the relationship” between the lessor and the lessee. Id. The court held that the relationship between Dignity and the Newman Center was “clearly religious,” and therefore concluded that the application of the Civil Rights Ordinance in this situation would create an excessive government entanglement in religious affairs. Id. The court thus overturned the Minneapolis Commission on Civil Rights’ ruling that the ordinance, while not applying to the religious facilities within the Newman Center, would be enforceable with regard to the Center’s secular functions. Id. The appellate court’s logic in *Dignity* is disturbing, however, in that it suggests that the Minneapolis Civil Rights Ordinance, although not enforceable to require the Newman Center to lease space to gay Catholics, would be enforceable to require the Center to lease to gay Protestant or Jewish organizations, which presumably would lack a religious connection with the Center. Thus, the court appears to have interpreted the ordinance in a manner which withholds a benefit from members of one faith while providing that benefit to members of other religious groups.
religious court decisions influenced by fraud or collusion are not entitled to First Amendment protection, and therefore are not entitled to deference from civil authorities.

A. The Need for Civil Courts to Defer to Ecclesiastical Rulings on Religious Issues

Civil courts have been called upon to enjoin anticipated religious disciplinary proceedings, to overturn excommunications, and to determine whether a claimant has a right to assume or to

Gay Rights Coalition also involved the application of a municipal antidiscrimination ordinance to a defendant with a dual religious/secular character, in this case an educational institution which provided its students with a secular education informed by Roman Catholic values and traditions. 536 A.2d at 5–8. The plaintiffs, two gay student organizations, asserted that Georgetown University's refusal to grant official "University Recognition" to their groups and to supply their organizations with the tangible benefits (such as a mailbox and University mailing services, id. at 10) that came with recognition violated the District of Columbia Human Rights Act. Id. at 4. The University asserted that the Free Exercise Clause exempted it from the Human Rights Act's requirements. Id. at 30. Unlike the Dignity court, the Gay Rights Coalition court determined that, although enforcement of the ordinance would infringe upon the defendant's free exercise rights, the city had a compelling interest in ending sexual orientation discrimination and held that this governmental interest outweighed the minor burden imposed upon the defendant in this case. Id. at 31–39. The court concluded that enforcement of the ordinance was the least restrictive means available for achieving the government's purpose and therefore held that the ordinance would be enforced against the defendant. Significantly, however, the court held that the Human Rights Act did not require that official "University Recognition" be provided to the student groups, but only required the University to supply the groups with the tangible benefits that accompany recognition. Id. at 39.

If the burden on the defendant's free exercise of religion had been more substantial, for example, by requiring the University to endorse gay student organizations—"University Recognition" at Georgetown included a religiously based endorsement—rather than merely provide them with tangible benefits, the balance between the governmental and religious interests in this case might have been different. See id. at 38. The Supreme Court's subsequent decision in Employment Division v. Smith suggests that the Human Rights Act would apply to the University, even if the Act had not been adopted in furtherance of a compelling governmental interest, because the Free Exercise Clause alone does not protect religious groups from the application of neutral, generally applicable laws. 494 U.S. at 881. Even after Smith, however, the University most likely would not be obligated to endorse its gay students' organizations because the Free Exercise Clause, coupled with a freedom of speech claim, would protect the University from being forced to engage in speech offensive to Georgetown's religious mission. See id. at 881–82.


23. See, e.g., Mount Olive Primitive Baptist Church v. Patrick, 42 So. 2d 617, 618 (Ala. 1949) (deciding action seeking reinstatement of plaintiffs as members and officers of the Church).
maintain an ecclesiastical title. Where there is no issue of fraud or collusion on the part of the religious tribunal, however, civil courts must refuse to intervene in such cases. The Free Exercise Clause bars civil courts from overturning religious determinations regarding religious issues, and the Establishment Clause prohibits civil courts from enforcing most religious decrees.

Civil courts not only lack authority to resolve religious conflicts, but they are also incompetent to do so. Just as the study of secular law is a lifelong pursuit, many religious groups have their own systems of laws and traditions, which are so complex that they can be mastered only through years of study. In a nation with numerous religious groups, the civil courts cannot achieve the competence to resolve the many disputes that arise in religious societies whose spiritual missions may be beyond the

24. E.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 706-07 (1976) (deciding action seeking to enjoin administrator of the diocese from interfering with diocesan assets of plaintiff and seeking to declare plaintiff as the true diocesan bishop); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929) (deciding action seeking to direct the archbishop to appoint plaintiff to a chaplaincy and to pay him the income accrued during the position's vacancy).

25. Cf. Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (finding civil courts less competent in ecclesiastical law than religious courts); Morris St. Baptist Church v. Dart, 45 S.E. 753, 754 (S.C. 1903) ("To assume such jurisdiction would not only be an attempt by the civil courts to deal with matters of which they have no special knowledge, but it would be inconsistent with complete religious liberty, untrammeled by state authority."); JAMES MADISON, To the Honorable General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance, in JAMES MADISON ON RELIGIOUS LIBERTY 55, 57 (Robert S. Alley ed., 1985).

26. The Court in Watson reasoned:

Nor do we see that justice would be likely to be promoted by submitting [religious] decisions to review in [secular] judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

80 U.S. at 729. Watson was a diversity case decided according to principles of federal common law before the Supreme Court's decision in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), and before the application of the First Amendment's religion clauses to the states in Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940), and Everson v. Board of Educ., 330 U.S. 1, 8 (1947). Nevertheless, the Court has accorded constitutional significance to much of the Watson Court's holding. See Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445-48 (1969).
comprehension of secular tribunals. Secular courts that base their opinions on religious doctrine risk misunderstanding the theological issues involved and may arrive at results that are theologically unsound. Moreover, civil courts that decide religious issues risk becoming entangled in religious groups' internal affairs, with the possibility that they inadvertently will violate the Free Exercise Clause either by altering or invalidating religious doctrine, or by preventing doctrine from developing and changing.

While the Supreme Court has long recognized the impropriety of allowing secular courts to answer religious questions, the Court's decision in *Gonzalez v. Roman Catholic Archbishop* held open the possibility that civil courts might overturn religious court decisions in highly unusual circumstances. In *Gonzalez*, the Court held that the civil courts cannot inquire into the validity of a religious organization's internal decisions, but, in dictum, the Court limited the scope of its holding to include only cases in which the ecclesiastical decision showed no signs of

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28. E.g., Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555, 558 (E.D.N.Y. 1983) (refusing to resolve a dispute for lack of justiciability when resolution of the legal issues would also require the court to determine who is the rightful successor to a deceased religious leader).

29. E.g., Paul v. Watchtower Bible & Tract Soc'y, Inc., 819 F.2d 875, 881 (9th Cir.) (refusing to impose tort liability on Jehovah's Witnesses who shunned a disassociated member of the Church because such liability would "have the same effect of prohibiting the practice and would compel the Church to abandon part of its religious teachings"), cert. denied, 484 U.S. 926 (1987); Mitchell v. Albanian Orthodox Diocese in Am., Inc., 244 N.E.2d 276, 280 (Mass. 1969) (Kirk, J., dissenting) (opposing the majority's decision ordering an ordained clergyman to comply with a religious corporation's by-laws relating to the selection of a bishop because the order "constitutes interference in a controversy which is essentially ecclesiastical in nature").

30. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449–50 (1969) (repudiating the "departure-from-doctrine" standard as a tool for resolving religious property disputes); see also Guinn v. Church of Christ, 775 P.2d 766, 772 (Okla. 1989) (holding that judicial interference with legislatively mandated religious freedoms is only proper when there is a clear and present danger of disorder or when there is any other immediate threat to public safety).

Of course, civil courts face the same risk of error when they apply voluntary associations' by-laws to resolve those organizations' internal disputes. The First Amendment requires, however, that the possibility of error be minimized where religious organizations are involved. Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 346 (1986). For a criticism of the distinct judicial treatment of religious societies' internal disputes, see CARL ZOLLMAN, *American Church Law* §§ 296–310 (1933).

31. 280 U.S. 1 (1929).
"fraud, collusion or arbitrariness."\textsuperscript{32} When a case apparently involving arbitrariness actually reached the Supreme Court, however, the Court eliminated the arbitrariness exception.

In \textit{Serbian Eastern Orthodox Diocese v. Milivojevich},\textsuperscript{33} the Court defined an "arbitrary" decision as a decision in which a religious tribunal has decided a case without complying with its own laws and regulations.\textsuperscript{34} The Court explained that "arbitrary" decisions were not subject to civil court review because it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.\textsuperscript{35}

\textit{Milivojevich} should be understood to prohibit civil courts from reviewing religious court determinations with regard both to the religious tribunal's adherence to substantive ecclesiastical law and to ecclesiastical judicial and administrative procedure. Plaintiffs have asserted on various occasions that they were entitled under religious law to have a hearing or other proceeding before being disciplined or otherwise affected by a religious judgment.\textsuperscript{36} The argument has been made that arbitrary changes in religious groups' practices defeat the reasonable expectations of the religious groups' members.\textsuperscript{37} This argument rests on a contractual theory of the relationship between religious societies and their members and proposes that people who join a religious group do so in reliance upon the information they have about the group's beliefs and practices.\textsuperscript{38} Thus, plaintiffs have argued that their religious organizations should not be allowed to

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 16.
\item \textsuperscript{33} 426 U.S. 696 (1976).
\item \textsuperscript{34} \textit{Id.} at 712–13.
\item \textsuperscript{35} \textit{Id.} at 714–15 (footnote omitted).
\item \textsuperscript{38} \textit{See generally id.} at 547–52.
\end{itemize}
discipline them using procedures which are arbitrary or inconsistent with due process of ecclesiastical law. 39

Secular courts, however, are not an appropriate forum for resolution of religious rights. Only a religious decision maker can determine what a party's rights are and remedy any violations that may have occurred. A party who is dissatisfied with the process provided by the religious society can express her dissatisfaction through whatever channels the society itself provides 40 or can leave the religious group altogether. For many people, the choice to abandon the group can be an extremely painful one, 41 and a person who leaves his religious group, by choice or through excommunication, may also have to sever well-developed social connections 42 and even business ties, 43 but leaving the group can lead to religious reform as well. Religious leaders may pay little attention when only a few adherents choose to abandon their group, but when large numbers of people do so, leaders often respond by working to make their groups more attractive. 44 This type of pressure is the type which is most


41. Cf. Baugh v. Thomas, 265 A.2d 675, 677 (N.J. 1970) ("We believe that expulsion from a church or other religious organization can constitute a serious emotional deprivation which, when compared to some losses of property or contract rights, can be far more damaging to an individual.").


43. See Bear v. Reformed Mennonite Church, 341 A.2d 105, 106 (Pa. 1975).

44. American religious groups are free to innovate or regress to whatever extent the market will bear. Thus, they compete in a laissez-faire free market of religious ideas. For a description of the factors influencing this market's fluctuations in supply and demand, see generally Kenneth L. Woodward et al., A Time to Seek, NEWSWEEK, Dec. 17, 1990, at 50, 50–56.

Although a system of religious freedom based on a notion of freedom to choose one's beliefs enables religious societies and individuals to allow their beliefs to evolve over time, this type of system does not recognize that religious beliefs are often based on the dictates of conscience rather than on choice. The notion that people can choose a religion is rooted in the theological rhetoric of a segment of the ancient Jewish population and of the early and medieval Christians, and contrasts sharply with the views of groups—including most modern Jews—which see religion as an inalienable heritage one receives upon being born into one's family, tribe, or nation. John E. Boswell, Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities, 1 YALE J.L. & HUMAN. 205, 221, 225 (1989).

Choice-based First Amendment jurisprudence sometimes fails to accommodate religious obligations which arguably could be accommodated without breaching the wall of separation between church and state. This jurisprudence also sometimes fails to
appropriate for keeping religious leaders from trampling on religious rights. Any role that the civil courts might play would only further destroy religious freedom.\textsuperscript{45}

In deferring to religious court decisions regarding purely religious issues, civil courts should show equal respect to the decisions rendered by the tribunals of both hierarchical and congregational religious societies. It has been suggested that congregational religious tribunals must adhere more closely to notions of due process and fundamental fairness than must appreciate the religious nature of certain symbols and holidays. For a critique of the choice-based American approach to guaranteeing religious freedom, see generally Michael J. Sandel, \textit{Freedom of Conscience or Freedom of Choice?}, in \textsc{Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy} 74 (James D. Hunter & Os Guinness eds., 1990).

James Madison recognized that religious beliefs are matters of conviction, \textit{see}, MADISON, \textit{supra} note 25, at 56, but nevertheless advocated competition among sects as a way of promoting both freedom of conscience and governmental independence from religious authority. Madison argued that multiplicity of sects, without State establishment of any, would promote clerical responsiveness to congregants' needs, and minimize the persecution of religious dissenters. Large religious organizations would command greater respect if they could show that they had achieved their broad appeal without State support and in spite of the free proliferation of smaller sects. \textit{Id.} at 57–59. A free, competitive atmosphere would also protect smaller denominations against persecution, since these denominations would be so numerous that, in aggregate, they would have the power to prevent the larger sects from acquiring sufficient power to become oppressive. This actual power, Madison argued, would be a greater protection of universal religious freedom than any apparent protection that might be written in a proposed Bill of Rights. \textsc{James Madison, Defense of the Constitution: Virginia Ratification Convention June 12, 1788, in James Madison on Religious Liberty, supra note 25, at 71; see also Robert J. Morgan, James Madison on the Constitution and the Bill of Rights 131–32 (1988).} Finally, competition among sects, as reflected in the lack of any established State Church, would promote respect for the secular government and its laws by minimizing the resentment that members of minority sects might feel if the State compelled them to support the dominant sect. \textit{See MADISON, supra note 25, at 59.} For a comparison of James Madison's view with the views of Thomas Jefferson and Roger Williams, see LAURENCE TRIBE, \textsc{American Constitutional Law} § 14-3, at 1158–59 (2d ed. 1988).

\textsuperscript{45} Removing both substantive and procedural issues of ecclesiastical jurisprudence from secular court authority also spares civil courts the difficulty of distinguishing substantive issues from procedural issues. The purpose of removing these issues from the secular realm is not to save secular courts from making difficult decisions, however, but rather to protect religious interests from secular intrusion. \textit{See Jones v. Wolf, 443 U.S. 595, 613 n.2 (1979) (Powell, J., dissenting).} The secular court's interest in preserving the fundamental fairness of religious proceedings is greater in a country such as Israel, in which religious courts have authority over secular matters, such as issues surrounding marriage and family. \textit{E.g.,} Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713/1953, No. 64, \textit{reprinted in 7 Laws of the State of Israel 139} (5713/1952–53). Under a system which obligates people to obey religious decrees, the religious tribunals are state actors, and the state must accept responsibility for any abuses these tribunals may commit.
hierarchical religious authorities. Arguably, hierarchical religions, which might allow parties to appeal unfavorable decisions to higher authorities which are detached from the parties' dispute, provide a more objective, more just forum for resolving disputes than any congregational judiciary might afford. Constitutionally, however, the Establishment Clause requirement that government not prefer some religious groups over others must be understood to prohibit civil courts from extending greater deference toward hierarchical religious authorities than toward congregational tribunals.

Deference to ecclesiastical judgments becomes improper where a secular right is at stake, however. In cases where religious and secular rights are linked, civil courts must strive to protect the endangered secular rights without intruding into the religious realm. Civil courts commonly face this task when a congregation fires a cleric, and the cleric disputes the validity of the dismissal. The freedom to employ or dismiss a religious leader

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48. First Baptist Church, 591 F. Supp. at 682 ("[B]ecause the 'hands off' policy espoused by the [Milivojevich] Court is of constitutional dimension, we find it difficult to justify the application of a different standard where a congregational church is involved."). In Guinn v. Church of Christ, 775 P.2d 766 (Okla. 1989), the Oklahoma Supreme Court stated:

[We are of the opinion that a church's disciplinary decisions are protected from judicial scrutiny whether the church is 'congregational' or 'hierarchical'. . . . Disciplinary decisions made by [congregational churches] are no less fair or deserving of judicial deference than decisions made by churches structured in a hierarchical fashion. The lack of a congregation's own 'religious' court of appeals is not justification for the intervention and review by a civil tribunal.

Id. at 772 n.18.

49. Excommunications give rise to another class of cases in which civil courts must protect secular rights without infringing on religious ones. Typical excommunications are purely religious in nature and therefore immune from civil court review. See, e.g., Guinn, 775 P.2d at 771 n.18; Paul v. Watchtower Bible & Tract Soc'y, Inc., 819 F.2d 875, 883 (9th Cir.); cert. denied, 484 U.S. 926 (1987); Brown v. Mt. Olive Baptist Church, 124 N.W.2d 445, 446 (Iowa 1963); cf. Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting) ("Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be."). But cf. Baugh v. Thomas, 265 A.2d 675, 677 (N.J. 1970) ("The loss of the opportunity to worship in familiar surroundings is a valuable right which deserves the protection of the law where no constitutional barrier exists."). See generally T.W. Cousens, Annotation, Suspension or Expulsion from Church or Religious Society and the Remedies Therefor, 20 A.L.R.2d 421, 429–32 (1951).

Bear v. Reformed Mennonite Church, 341 A.2d 105 (Pa. 1975), exemplifies the task civil courts face in resolving excommunication cases when secular issues do arise. Bear
is a constitutionally protected freedom under the Free Exercise Clause. Civil courts, therefore, cannot force a congregation to allow a cleric to complete the term of his contract or require that the congregation provide appropriate internal proceedings before terminating the contract.

Appropriately, however, civil courts have investigated the issue of whether the body which dismissed the cleric had authority to do so. The court may be able to determine without overstepping its bounds that a congregation could oust its leader only upon majority vote of the members, or that only the congregation’s board of trustees could dismiss the cleric. Where such determinations can be made in a constitutionally permissible

involved a plaintiff who, because of the Mennonite practice of “shunning,” suffered the collapse of his business, marriage, and family. Even his wife and children refused to speak to him. The Supreme Court of Pennsylvania remanded for a determination of whether the shunning in this case was so severe as to constitute an excessive interference within areas of ‘paramount state concern,’ i.e., the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship,” such that the Free Exercise Clause could not serve as a defense. Id. at 107; see also O’Neil v. Schuckardt, 733 P.2d 693, 700 (Idaho 1986) (upholding husband’s cause of action for invasion of privacy when members of his wife’s religious group urged her to cease living with her husband as his wife); Carriero v. Bush, 419 P.2d 132, 137 (Wash. 1966) (upholding a husband’s cause of action for alienation of affections after his wife joined a church whose pastor urged her to leave her marriage and ruling that “one does not, under the guise of exercising religious beliefs, acquire a license to wrongfully interfere with familial relationships”); Justin K. Miller, Comment, Damned If You Do, Damned If You Don’t: Religious Shunning and the Free Exercise Clause, 137 U. PA. L. REV. 271, 273-74 (1988) (arguing that absolute constitutional protection for shunning is inappropriate).

50. Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952); see also Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 717-20 (1976) (holding that civil courts must defer to the decision of a hierarchical church’s highest tribunal concerning the suspension and removal of a church bishop); Simpson v. Wells Lamont Corp., 494 F.2d 490, 494 (5th Cir. 1974) (holding that civil courts are prohibited by the First Amendment from hearing a plaintiff’s claim for damages resulting from his removal as pastor of a congregation).


People v. Gordon, 16 N.Y.S.2d 833 (Sup. Ct.), aff’d mem. per curiam, 28 N.E.2d 717 (N.Y. 1940), extended to the criminal context the concept that courts must verify that a religious body has authority to make a particular decision. Gordon was found guilty of violating New York’s statute forbidding fraudulent sale of nonkosher poultry as kosher food. The Appellate Division reversed, holding that the state, which had relied upon a religious determination that Gordon’s poultry was not kosher, had failed to demonstrate that the religious decision makers had authority to make such a determination. 16 N.Y.S.2d at 834.
manner, the court can protect the cleric's secular employment right, which can be divested only by a body that has authority to terminate that right. If the dismissal was made by an appropriate body, however, the civil court must defer to that body's judgment without further investigation. Even when the dismissal is binding, however, civil courts should have authority to award damages for breach of contract because this secular remedy protects the cleric's contract right without interfering with the congregation's freedom to repudiate the cleric's authority.

In some cases, the actions of a religious body may interfere with its members' secular rights to such an extent as to require immediate rectification by civil authorities. When the religious society's abuses become so severe that delay in civil adjudication would result in irreparable harm to the plaintiff's rights or overriding state interests, the civil courts have a duty to protect the endangered interests. When this threat does not exist, however, civil courts should refuse to provide relief to the complaining party until after the plaintiff has exhausted all internal rights of appeal available within the religious society.

52. In Morris St. Baptist Church v. Dart, 45 S.E. 753 (S.C. 1903), the South Carolina Supreme Court stated:

Therefore, where it is admitted, as in this case, that property belongs to a particular church, and the only question is whether the defendant claiming to be pastor should be excluded from its use, this court will only consider whether the church has ordered his exclusion, not whether it was right in doing so. Neither will the court, as a civil tribunal, undertake to determine whether the resolution directing exclusion was passed in accordance with the canon law of the church, except in so far as may be necessary to do so in determining whether it was in fact the church that acted.


53. See Dart, 45 S.E. at 756; see also Simpson v. Wells Lamont Corp., 494 F.2d 490, 494 (5th Cir. 1974) (recognizing that a dismissed pastor may have a breach of contract action under state law even though he has no cause of action under federal civil rights statutes or the United States Constitution).

54. Cf. Kusper v. Pontikes, 414 U.S. 51, 55 (1973) (stating that where a state statute cannot possibly be interpreted in a manner which would avoid the necessity of constitutional adjudication, federal courts have a "solemn responsibility ... to 'guard, enforce, and protect every right granted or secured by the Constitution'" and therefore cannot abstain from such adjudication) (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)).

55. See First Baptist Church v. Ohio, 591 F. Supp. 676, 683 (S.D. Ohio 1983); Holiman v. Dovers, 366 S.W.2d 197, supp. op. on reh'g, 366 S.W.2d 203, 204 (Ark. 1963).

Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929), involved civil court review of a subordinate authority's decision within a hierarchical church. The Court did not consider the Archbishop's assertion that the plaintiff's failure to pursue
This policy maximizes the religious organization's independence from civil interference and gives the religious society a broad opportunity to resolve controversial issues in accordance with their own doctrine and procedures. The decision of the society's appellate tribunal also may correct the secular injustice that the plaintiff has suffered, eliminating the need for civil adjudication. An abstention policy would also spare religious groups the indignity of having to explain and justify their actions in civil court.

While the Free Exercise Clause protects religious societies from having their resolutions of ecclesiastical controversies overruled by civil courts, the Establishment Clause prohibits civil courts from enforcing religious decrees. When a civil court enforces an ecclesiastical court's orders, the civil court risks violating the Establishment Clause by putting state authority behind the religious court's decision. A civil court's refusal to overturn a religious determination effectively upholds the validity of that determination, but withholds the government's enforcement power. The religious group is left to enforce its own decrees through whatever social pressure it can use against its members.

Where a secular right is based on a religious issue, however, the civil court must accept the religious tribunal's determination and rely upon the religious ruling in adjudicating secular rights. For example, a congregation can use appropriate state agencies to have its former pastor ejected from a parsonage, or barred from addressing the congregation from the pulpit, upon showing that the pastor has been dismissed. This civil court deference to the religious determination is

his Canon-Law right of appeal within the Church barred the plaintiff from initiating further proceedings, however, because the Court reached its holding in favor of the Archbishop based on other factors. Id. at 15–16.

56. See Carey v. Sugar, 425 U.S. 73, 78–79 (1976) (per curiam) (holding that federal courts must avoid friction with the states by refusing to rule on the constitutionality of state laws until the state courts have had an opportunity to construe those laws, possibly in such a way as to eliminate the apparent constitutional problem); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499–501 (1941) (same).


59. E.g., Simpson v. Wells Lamont Corp., 494 F.2d 490, 494–95 (5th Cir. 1974) (holding that it is a public official's duty to execute a valid eviction order); Antioch Temple, Inc. v. Parekh, 422 N.E.2d 1337, 1344 (Mass. 1981) (holding that the enforcement of an eviction of a former pastor does no more than honor a decision of a church's ruling body).

60. E.g., Morris St. Baptist Church v. Dart, 45 S.E. 753, 754 (S.C. 1903).
necessary under the First Amendment’s guarantee that civil courts will not resolve religious questions.\textsuperscript{61}

There has been disagreement within the Supreme Court, however, regarding the question of whether civil courts must give effect to the decisions of "the highest court of a hierarchical church organization,"\textsuperscript{62} or "the highest body within the hierarchy that has considered the dispute."\textsuperscript{63} Actually, neither of these positions is exactly right. The correct formulation should be that civil courts must defer to the highest body within the hierarchy or congregation that will consider the dispute. Before a civil court acts in reliance upon a religious tribunal’s decision, the civil court must be certain that the religious courts consider the matter settled and not subject to rehearing.\textsuperscript{64} In many cases, the issues will not be settled until the highest body in the hierarchy has spoken, or until the matter has passed through any appellate process a congregational society might have. In other cases, however, the parties might exhaust their remedies without reaching the religious group’s highest judicial body. The religious group might conceivably limit the time period within which appeals can be heard or might allow appeals only when the superior body agrees to consider the case.\textsuperscript{65} The key issue is that the matter must be settled from a religious perspective. Only then can the civil courts act in reliance upon the ecclesiastical judgment.

\textbf{B. Marginal Civil Court Review of Ecclesiastical Decisions Based on Fraud or Collusion}

In \textit{Serbian E. Orthodox Diocese v. Milivojevich}, the Supreme Court found that the \textit{Gonzalez v. Roman Catholic Archbishop} decision’s language suggesting that marginal civil court review might be appropriate when religious decisions were tainted with

\textsuperscript{61} \textit{Wolf}, 443 U.S. at 602; \textit{Milivojevich}, 426 U.S. at 724–25.
\textsuperscript{62} \textit{Wolf}, 443 U.S. at 602.
\textsuperscript{63} \textit{Id.} at 619 (Powell, J., dissenting) (emphasis added).
\textsuperscript{64} \textit{See}, e.g., \textit{First Baptist Church v. Ohio}, 591 F. Supp. 676, 683 (S.D. Ohio 1983) (holding that all internal rights to appeal must be exhausted before a civil court may rely on the ecclesiastical judgment).
\textsuperscript{65} \textit{See} \textit{Putman v. Vath}, 340 So. 2d 26, 27 (Ala. 1976) (stating that the religious tribunal refused to hear plaintiff’s case because the matter was an administrative, and not a judicial one).
“fraud, collusion or arbitrariness” was merely dictum. The Court held that arbitrariness actually cannot serve as a basis for marginal civil court review, calling into question the status of fraud or collusion as a basis for such review. The Milivojevich Court left this question open. While the Supreme Court was correct to disclaim its authority to review arbitrary ecclesiastical decisions, the Court should retain the authority to review fraudulent decisions and should elevate the surviving portion of the Gonzalez dictum to the status of law when an appropriate case arises.

Both arbitrary decisions and fraudulent or collusive decisions involve the problem of a religious tribunal’s departure from religious doctrine. A tribunal’s actions can be considered arbitrary when “the decisions of the highest ecclesiastical tribunal of a hierarchical church [do not] comply with church laws and regulations.” The freedom to engage in such departures from old doctrine and to evolve new doctrine is part of the religious liberty guaranteed by the First Amendment, however. The Supreme Court’s recognition of its lack of authority to interfere in this evolutive process ensures that religious groups will be free to develop their beliefs on their own. “Fraud” and “collusion,” by contrast, occur “when church

66. The Gonzalez opinion stated, “In the absence of fraud, collusion or arbitrariness, the decisions of the proper Church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.” Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929).

Like Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871), Gonzalez was decided on nonconstitutional grounds, but has influenced the subsequent development of constitutional law. See, e.g., Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447, 449 (1969) (holding that civil courts cannot determine ecclesiastical questions when resolving property disputes); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952) (prohibiting legislative intervention in religious groups’ selection of clergy). The Kedroff Court exemplified this influence by finding: “Freedom to select the clergy, where no improper methods of choice are proven, . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.” (footnote omitted).


68. Id. at 713.


70. Milivojevich, 426 U.S. at 713.

71. Id.

tribunals act in bad faith for secular purposes.” By definition, “secular purposes” are not within the scope of the First Amendment’s protection of religious free exercise. Therefore, the “purely ecclesiastical” character of the dispute is destroyed, and secular courts have authority to protect the rights which the religious tribunal attempted to dispose of under the false guise of ecclesiastical adjudication. Thus, while departures from religious doctrine are beyond the scope of civil court review when the departures are “arbitrary,” but made in good faith for spiritual purposes, the Constitution permits secular court review of departures from doctrine when the departures are fraudulent or collusive.

The extent of the analysis that civil courts must undertake in order to find fraud or collusion is also less troubling constitutionally than the analysis necessary to determine that a decision was made arbitrarily. The Milivojevich Court recognized that a civil investigation into the issue of whether an ecclesiastical decision was arbitrary “must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits...” An investigation into whether a religious decision was fraudulent, on the other hand, does not require any investigation into the correctness of the religious tribunal’s decision, but only requires investigation into the decision maker’s motive. Thus, to prove fraud or collusion, a plaintiff need not necessarily show that the religious tribunal would have reached a different conclusion if the ecclesiastical dispute had not been tainted by secular considerations. The plaintiff need only show that, regardless of the correctness of the tribunal’s ultimate decision, the procedure by which the tribunal reached its decision involved bad faith on the part of the decision makers. A showing by the defendant that the religious tribunal’s decision, although based in part upon improper considerations, rested primarily upon legitimate religious concerns might influence the remedy available to the plaintiff, however. Moreover, as in other

73. Milivojevich, 426 U.S. at 713.
75. Milivojevich, 426 U.S. at 713.
76. But cf. Miller v. Catholic Diocese, 728 P.2d 794, 797 (Mont. 1986) (holding that a judicial inquiry into the presence or absence of good faith on the part of a cleric would violate the Free Exercise Clause).
cases in which fraud is alleged, the plaintiff will be required to meet a heightened standard of proof before the plaintiff will be able to obtain civil relief.\textsuperscript{77}

\textit{United Kosher Butchers Ass'n v. Associated Synagogues}\textsuperscript{78} serves as an example of a case in which the court might have found fraud but instead declined to analyze this issue for fear of interfering in a religious group's internal affairs. Both the plaintiff and the defendant were involved in the religious activity of certifying meats and poultry as kosher.\textsuperscript{79} The plaintiff alleged that the defendant had used anticompetitive trade practices to become the dominant kashruth certification body in the local market, and in the process had illegally interfered with the plaintiff's contractual relations and with the plaintiff's ability to compete in a free market.\textsuperscript{80} Specifically, the plaintiff alleged that the defendant, which certified kosher caterers in the Boston area, told its clients that they could no longer accept meat from butchers who were certified by the plaintiff's rabbinical inspectors, but rather could only accept meat from butchers who were supervised by the defendant's inspectors.\textsuperscript{81} The court conceded that "[t]he benefits attaching to a contract or to an advantageous business relationship are recognized as property rights and any unjustified interference with their enjoyment is actionable,"\textsuperscript{82} but the court refused to provide any relief in this case because intervention in the dispute would require the court to resolve questions of religious law.\textsuperscript{83}


\textsuperscript{78} 211 N.E.2d 332 (Mass. 1965).

\textsuperscript{79} \textit{Id.} at 333.

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} at 335 (citations omitted).

\textsuperscript{83} The court found:

\textit{Id.} (citations omitted).
Under the definition of fraud subsequently set forth in *Milivojevich*, however, the court would have been able to resolve the secular dispute without addressing the religious issues. To understand the facts of the case fully, the court might have needed to hear testimony regarding Judaism's dietary laws, but the court would not have needed to settle any doctrinal disputes. If some of the testimony was contradictory, the court simply should have acknowledged that disagreements over doctrine often arise within evolving religious traditions, and that the existence of disagreements is no discredit to the opposing religious authorities, each of whom may hold their divergent views with conviction. The issue for the court would merely have been whether the plaintiff had shown sufficient evidence under the heightened standard of proof applicable to fraud cases to establish that the defendant's motive in attempting to centralize kashruth certification under its own authority was entirely or partially secular rather than religious.

If the plaintiff prevailed on this issue, then the court would have needed to fashion an appropriate remedy. The court correctly recognized that it could not compel the defendant and its clients to accept the plaintiff's guarantee that meats prepared under the plaintiff's supervision were authentically kosher, as this remedy would interfere with the freedom of religious groups to interpret their own laws. The court might have found it appropriate to award compensatory damages for lost income from breached contracts, however, and might also have awarded punitive damages. Of course, in some cases, a court might conclude that a plaintiff is not entitled to relief even though the plaintiff has proven fraud. For example, a court might elect to deny relief to a plaintiff where the defendant's behavior, although partially motivated by inappropriate secular considerations, was predominantly motivated by spiritual concerns and had not actually impaired the plaintiff's interests to any further extent than those interests would have been impaired in the absence of fraud.

*Katz v. Uvegi*, a case involving religious arbitration of a secular business dispute, further illustrates the appropriateness

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84. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976); see also *supra* text accompanying note 73.
of reversing fraudulent decisions. In Katz, the respondent in a motion to confirm an award by a religious arbitration panel alleged facts which, if true, clearly would have established fraud on the part of the religious arbitrators. These facts included allegations that the arbitrators met privately with the opposing party, that the arbitrators were uninterested in hearing the respondent's case, and even refused to summon one of the respondent's witnesses even though the witness's testimony was relevant to the case. Most significantly, the respondent alleged that one of the arbitrators had telephoned him prior to the panel's announcement of its award and told the respondent that, even though he (the arbitrator) apparently disagreed with the panel's decision, he planned to sign the decision "because if he refused he would never be permitted to sit as a judge in future cases and he needed the income he received from these proceedings." The Katz court did not reach the fraud issue, however, because the arbitration was invalid under state law for procedural reasons.

Debates preceding the admission of women to the Cantors Assembly of Judaism's Conservative movement also gave rise to allegations of fraud, although the issue was resolved without secular litigation. The qualifications of women for the role of cantor raises questions of Jewish law which can be resolved only by internal religious bodies. Some women alleged, however, that the men who previously had voted not to admit women to the Assembly had been motivated by economic concerns created

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87. Cf. Cooper v. Weissblatt, 277 N.Y.S. 709 (App. Term. 1935). In Cooper, the plaintiff proved that one member of the three-rabbi religious panel conspired with the other party to the religious proceeding, Mr. Nelson, to obtain a fraudulent judgment which Mr. Nelson later sought to enforce in civil court. Id. at 716. The secular appellate court affirmed a civil judgment awarding the plaintiff money damages in the amount of the expenses the plaintiff incurred in defending Mr. Nelson's enforcement action. Id. at 719–20.


89. Id. at 515.

90. Id. at 517–18.

91. Litigation did arise, however, after the Jewish Theological Seminary of America began admitting women to its rabbinical ordination program. See Faur v. Jewish Theological Seminary, 536 N.Y.S.2d 516 (App. Div. 1989) (mem.), appeal dismissed, 561 N.E.2d 888 (N.Y. 1990). A member of the seminary's faculty resigned in response to the change in policy and sued the seminary for breach of contract and religious discrimination. The court found that the seminary had no contractual obligation under secular law to refrain from changing its policies and held that any finding of culpable religious discrimination based on a change in religious doctrine would amount to impermissible secular interference in a wholly religious dispute. Id. at 517.

by the tight job market for cantors. Unlike religious doctrinal concerns, these economic concerns could not justify a determination that women are "unqualified" to serve as cantors, and, if true, should have been held to substantiate an action for fraud.

As in United Kosher Butchers, it would have been inappropriate for a secular court to grant a religious remedy, such as forcing the Cantors Assembly to accept women, because such a remedy would interfere in the religious society's internal affairs. A secular court, however, could offer a secular remedy, such as money damages. This type of remedy would diminish or remove the secular advantage that male cantors received by excluding women, and might thus have led the Cantors Assembly to a more thoroughly religious determination of whether Jewish law allows women to serve as cantors. Of course, the Cantors Assembly still might have ruled that women were unfit for this position, but the later ruling might have been less likely to be tainted by impermissible secular considerations. Ultimately, the fraud issue has become moot in this case, as women are now members of the Cantors Assembly.

The secular courts' inability to offer equitable religious remedies, such as reinstatement of a fired minister, may be unsatisfactory to the plaintiff who suffered harm as a result of fraud. The rule proposed here, that secular courts should offer only secular remedies, offers the advantage, however, of allowing religious groups to maintain authority over their internal affairs even when their internal affairs are in a state of disarray, thus allowing religious doctrine and practice to evolve free from secular interference. Meanwhile, by focusing the civil court's attention on the motive underlying an ecclesiastical decision rather than on the correctness of that decision, the fraud test remains a potentially valuable, although poorly developed, analytical tool for remedying the effects of ecclesiastical intrusions into the secular realm.

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93. Id. (reporting that the professional association of cantors had only 400 members).
94. Thus, proof of a "secular purpose" is essential to a claim of religious fraud. See Kaufmann v. Sheehan, 707 F.2d 355, 359 (8th Cir. 1983) ("[T]he proposed amendments to the complaint deal only with matters of religion and there is no allegation that we can construe in any other light. Accordingly, we do not here deal with secular purposes and the 'fraud' or 'collusion' exceptions are unavailable.")
II. CIVIL COURT REVIEW OF RELIGIOUS DECISIONS INVOLVING SECULAR INTERESTS

While civil courts cannot resolve "wholly ecclesiastical" disputes and must defer to ecclesiastical decisions regarding "wholly internal" religious issues, the secular courts must retain jurisdiction over secular issues. Courts would violate the First Amendment if they required litigants to adhere to ecclesiastical determinations resolving secular disputes. The Free Exercise Clause guarantees to each individual the right to decide for oneself whether to recognize the authority of any religious functionary, and the Establishment Clause should be understood to prohibit secular courts from granting ecclesiastical bodies power to decide secular issues.

Parties may choose to waive these First Amendment protections, however, and obtain a binding adjudication from an ecclesiastical tribunal. When religious judicatories provide proper procedural safeguards and do not violate public interest, civil courts should enforce religious adjudications of secular disputes.

A. The Legality of Waivers of First Amendment Rights

The constitutional guarantee of religious freedom includes the freedom to abandon one's religious group in favor of another religion or no religion at all. Submission of a secular dispute to a religious body for binding resolution requires that the parties give up some of their freedom to reject their religious leaders' authority. Such waivers should be allowed to the extent that they do not conflict with public policy.

1. Limits on Citizens' Abilities to Waive Their Free Exercise Rights—Private parties cannot waive their individual statutory or constitutional rights if such waivers jeopardize public interests. The Supreme Court has ruled, for example, that employees cannot waive their individual rights under the Fair

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97. Everson v. Board of Educ., 330 U.S. 1, 15–16 (1947); Guinn, 775 P.2d at 776.
Labor Standards Act (FLSA or Act). In *Brooklyn Savings Bank v. O'Neil*, the Court held that "to allow waiver of statutory [minimum and overtime] wages by agreement would nullify the purposes of the Act." On the other hand, when waivers of private rights do not contradict the public interest, properly made waivers are valid.

A person may wish to waive her constitutional right to act independent of any religious authority. She may prefer to demonstrate her piety by submitting herself irrevocably and completely to her religious leaders' oversight, and she might assert, paradoxically, that her right to waive her religious freedom is itself protected by the Free Exercise Clause. Thus, a state's decision to refuse to recognize her waiver might violate the Free Exercise Clause and therefore be subject to strict scrutiny.

Even if a state's decision not to enforce a contract fully waiving a party's freedom of religion were subject to strict scrutiny, however, the state's decision should be upheld.

100. 324 U.S. 697 (1945).
101. *Id.* at 707. For the same reason, the Court held that employees could not waive their rights to liquidated damages for employer violations of the FLSA. *Id.*
102. *Id.* at 704; see also *North Carolina v. Butler*, 441 U.S. 369, 372–73 (1979) (holding that a criminal suspect can knowingly and intelligently effect a valid waiver of his privilege against self-incrimination and right to counsel); *Faretta v. California*, 422 U.S. 806, 835–36 (1975) (holding that a criminal defendant can knowingly and intelligently waive his right to be represented by counsel at trial); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (holding that a state bears a heavy burden in proving that a criminal defendant knowingly and intelligently waived his privilege against self-incrimination and right to counsel); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277–79 (1942) (holding that a criminal defendant can knowingly and intelligently waive his right to trial by jury, even when he has also waived his right to counsel); *Johnson v. Zerbst*, 304 U.S. 458, 464–65, 467–69 (1938) (holding that a criminal defendant can waive his right to counsel); *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883) (holding that a state can waive its Eleventh Amendment immunity from being sued in federal court by citizens of other states).
103. See Bleich, supra note 21, at 227–28 (suggesting that the Free Exercise Clause requires secular courts to enforce contracts binding parties to a religious practice); see also Bernard, supra note 37, at 558–59 n.76 (discussing generally an individual's right to contract with regard to his religious practices).
104. It is unclear whether strict scrutiny would apply in such a case. In *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), the Supreme Court ruled that states cannot restrict the free exercise of religion unless the restriction is necessary in order to accomplish a "compelling state interest." More recently, however, the Court has held that the *Sherbert* doctrine is limited to cases arising in the area of unemployment compensation and similar fields of law in which the "state's eligibility criteria invite consideration of the particular circumstances," or laws that make classifications based on religion. *Employment Div. v. Smith*, 494 U.S. 872, 884, 886 n.3 (1990). In *Smith*, the Court refused to apply strict scrutiny in reviewing the constitutionality of a religiously neutral statute banning the use of peyote even though the statute did not make an exception for use of peyote as part of a bona fide religious ceremony. *Id.* at 855. Two bills currently pending in Congress may overturn the *Smith* decision. See H.R. 2797, 102nd Cong., 1st Sess. (1991); H.R. 4040, 102nd Cong., 1st Sess. (1991).
In defining the strict scrutiny standard as it applies to religion cases, the Supreme Court, in *Sherbert v. Verner*, observed from previous cases involving restrictions on religious observance that laws meeting this high standard of scrutiny invariably governed conduct or actions that "posed some substantial threat to public safety, peace or order." The Court did not define what it meant by the word "order" in this phrase, but, from the cases used to support the "public safety, peace or order" standard, the term "order" appeared to refer to the social structure of American society. Two of the cases that the Court cited to support its standard were *Reynolds v. United States* and *Cleveland v. United States*, both of which upheld criminal convictions of Mormons practicing polygamy. Polygamy does not threaten public safety or peace, but is inconsistent with a social structure based on monogamous marriage.

If a state refused to enforce a waiver of religious freedom, a religious organization might argue on appeal that the courts should apply *Sherbert's* strict scrutiny test and overturn the lower court's decision because the state was directly infringing upon their organization's religious freedom. The court's refusal to enforce the waiver would be a classification designed to impede the practice of religion in general and would be, therefore, unconstitutional. Even if the refusal to enforce the waiver would not impede any religious activity on the part of the individual congregant, the court's refusal to enforce the agreement arguably would impede the religious group's ability to discipline a member who has agreed to waive her freedom.

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106. Id. at 403.
109. Cf. *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion) ("If the purpose or effect of a law is to impede the observance of one or all religions . . ., that law is constitutionally invalid even though the burden may be characterized as being only indirect."). But cf. *Employment Div. v. Smith*, 494 U.S. 872, 883–86 (1990) (holding that religion-neutral criminal statutes which may burden religious practices need not meet the "compelling state interest" test).
110. From the point of view of the religious group, disciplinary actions may be necessary to define the limits of acceptable behavior within the group, to persuade wayward members to conform their behavior to the religious society's standards, and to maintain the integrity of the group's commitment to its distinct religious doctrine and tradition. *See Guinn v. Church of Christ*, 775 P.2d 766, 779 (Okla. 1989); see also Miller, *supra* note 49, at 283–84 (stating that the unity of a group is dependent on its members' fear of being forced to live outside the group); Jan Shipps, *Speaking Out: Sonia Johnson, Mormonism and the Media*, THE CHRISTIAN CENTURY, Jan. 2–9, 1980, at 5 (illustrating how a church may use discipline to limit the diversity of belief and behavior of its "members").
Thus, the court's policy against enforcing the waiver may constitute an unjust bias against religion.

A court's decision to hold unenforceable a waiver of free exercise rights should withstand even a strict scrutiny challenge, however. Even when it is clear that a party has intentionally waived her free exercise rights, her agreement should not constitute a legally enforceable waiver, but should instead be considered an illegal contract in violation of the public interest.111

A contract authorizing civil courts to compel a party to submit to religious authority would threaten the order of American society in several ways. First, the United States is founded on principles of freedom of thought and freedom from government establishment of any particular religion. The Supreme Court has determined:

In the realm of religious belief, and in that of political belief, sharp differences arise .... But the people of this nation have ordained in the light of history, that ... these liberties are ... essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed.112

This diffusion of ideas is central to a second element of the American social order: the public goal of preserving an "uninhibited marketplace of ideas in which truth will ultimately prevail."113 "[T]he right of the public to receive suitable access to social, political, esthetic, moral, and other ideas ... is crucial ...."114 Religious groups sometimes attempt to restrict their members' expressions of unconventional beliefs,115 and sometimes

114. Id. The freedom of expression protected by the First Amendment does not compel people to participate in the free market of ideas, Wooley v. Maynard, 430 U.S. 705, 715 (1977), but requires that states protect the rights of people to choose to express their ideas, Cantwell, 310 U.S. at 310.
Thus, contracts to waive a person's free exercise rights and force the person to submit to the judgment of religious bodies can violate the public interest in an open marketplace of ideas. Civil courts must therefore preserve the rights of all people to choose whether to contravene religious doctrine by expressing unconventional ideas or to follow their religious teachings and keep any dissenting beliefs to themselves. A civil court order silencing a congregant who dissented from established religious doctrine after waiving his religious freedom would violate not only the free speech rights of the congregant but also the public interest in maintaining access to new ideas.

Finally, a plenary waiver of a person's free exercise rights could conceivably give a religious group so much power over the person's life that the waiver would amount to a contract for slavery. In light of the history of slavery in this country, culminating in a civil war and a resolution by the people and states that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction," such a contract would be unsustainable. Since Reconstruction, American society has been based on a concept of liberty requiring that no person be subject to slavery in any of its forms.

2. The Extent to Which Voluntary, Intentional Waivers of Free Exercise Rights Should Be Enforced—Even though aspects of a person's waiver of her free exercise rights would violate the

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116. Charles H. Mindel & Robert W. Habenstein, Introduction to Bruce L. Campbell & Eugene E. Campbell, The Mormon Family, in ETHNIC FAMILIES IN AMERICA 386 (Charles H. Mindel & Robert W. Habenstein eds., 2d ed. 1981) (quoting Mormon sociologists writing about the Mormon family as having felt "pressures" from within the Mormon Church and social community which may have introduced "bias" into their analysis); Edward Alexander, A Talmud for Americans, COMMENTARY, July 1990, at 27, 29 (stating that Orthodox Jewish Rabbi Adin Steinsaltz admitted "mistakes" in some of his writings and offered to refund readers' money).

117. The Supreme Court has specifically recognized that the marketplace of ideas protected under the First Amendment includes the marketplace of religious ideas. See Heffron v. International Soc'y for Krishna Consciousness., Inc., 452 U.S. 640, 647 (1981); Murdock v. Pennsylvania, 319 U.S. 105, 114–15 (1943); see also Davis v. Beason, 133 U.S. 333, 342 (1890) (stating that the religion clauses of the First Amendment were adopted to prevent the government from imposing religious beliefs and behavioral standards upon people and from using religion "to control the mental operations of persons").


119. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438–41 (1968) (holding that the Thirteenth Amendment and legislation adopted under its Enabling Clause were intended to eradicate all "badges and incidents of slavery") (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883) (emphasis omitted)).
public interest, civil courts should uphold such waivers to the extent that the public interest is not implicated. Complete refusal to enforce religious pacts deprives people of their free exercise rights by limiting the extent of the commitment they can make to their religious movements and violates the Establishment Clause by creating an unjustified legal bias against religious practice. Enforcement of such contracts may actually promote public policy by promoting the diversity of beliefs and lifestyles that the Court embraces as desirable.

To the extent that civil courts immunize religious groups from liability for "wholly internal" conduct involving congregants or functionaries, parties should be allowed to waive their free exercise rights. The legal distinction between an internal matter and an external matter is demonstrated most clearly by Guinn v. Church of Christ. In Guinn, the plaintiff had been a member of the defendant church, but withdrew her membership after the church elders told her that they were planning to initiate disciplinary proceedings against her in response to her sin of fornication. Despite her withdrawal from the congregation, the elders continued with the disciplinary process, informing the entire congregation of the nature of her misconduct and publicly disavowing her sin. Ms. Guinn sued in tort for invasion of privacy and outrage, and the Supreme Court of Oklahoma held that the church was allowed to discipline its member up until the time that she withdrew from the church, but could not discipline her once she terminated her membership and simultaneously terminated the "wholly internal" character of the disciplinary action.

In order to enable members of religious groups to commit themselves to their religious organizations without harming the public interest in maintaining the structure of American society, civil courts should allow people to waive their rights to withdraw from religious societies, but should not allow them to waive their freedoms of thought, expression, or conduct. This policy would

120. See Bernard, supra note 37, at 558–59 n.76; Bleich, supra note 21, at 228.
121. Cf. Donald A. Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part II The Nonestablishment Principle, 81 HARV. L. REV. 513, 518 (1968) (stating that a failure of the state to aid religious groups only because religion will be advanced discriminates against religion).
123. 775 P.2d 766 (Okla. 1989).
124. Id. at 768.
125. Id. at 769.
126. Id. at 783, 786.
protect against the possibility that civil courts would become "excessively entangled" in religious groups' internal affairs, and at the same time enable people to authorize that they be held to a stricter standard of religious conduct. Under this policy, Ms. Guinn, for example, if she had waived her right to free herself from church discipline by withdrawing from her church, would have been subject to a higher disciplinary standard. She would have had no cause of action against her church for its internal proceedings against her, but she could continue to violate church doctrine if she chose to do so, and might sustain a cause of action against the church if the church destroyed the "internal" character of the discipline by disclosing the nature of her misconduct to people not affiliated with the church.

B. Evidence of a Party's Intent to Waive the Right to a Civil Hearing

1. Membership in a Religious Organization as Evidence of a Party's Consent to be Bound by the Religious Group's Decrees—The defendant church in Guinn v. Church of Christ argued that the plaintiff, by becoming a member of the church, had consented to be bound by the church's doctrines, including those doctrines of which she was unaware. Thus, the church argued, Ms. Guinn had waived her right to withdraw from the church when she became a member even though she did not know when she joined that her membership would necessarily be for life. This subsection discusses the question of whether members of religious groups are, by virtue of their membership, contractually bound to obey the decisions of religious tribunals without recourse to civil courts.

In Watson v. Jones, the Supreme Court upheld a religious tribunal's decree and declared that "[a]ll who unite themselves to [a religious organization] do so with an implied consent to [the authority of the organization's] government, and are bound to

127. Id. at 775-77.
128. Along similar lines, it has been argued that the doctrine of consent might protect religious groups from "religious tort" liability. See Comment, Religious Torts: Applying the Consent Doctrine as Definitional Balancing, 19 U.C. DAVIS L. REV. 949, 961-64, 971-76 (1986).
129. 80 U.S. (13 Wall.) 679 (1871).
submit to it.\textsuperscript{130} Perhaps the most forceful application of this viewpoint came from a California appellate court in \textit{Mitty v. Oliveira}.\textsuperscript{131} In this case, Mrs. Oliveira, a Roman Catholic, was denied the right to disinter the bodies of her husband and two sons from a Catholic cemetery so that she could have the bodies cremated. The cemetery's representatives argued that Catholic doctrine prohibited disinterment under the facts of this case, and the court held that Mrs. Oliveira willfully had submitted to the church's rules:

What reasons does she give why a court of equity should intervene and give [her] permission [to have the bodies removed]? She says she was not informed of these canons of the church which proscribe burial of the faithful in other than hallowed ground and forbid the cremation of their remains. That is hardly a reason . . . . [W]e do not think she can plead ignorance of those doctrines of her church. Her very membership tokens subscription to them. From the act of joining a voluntary society there is implied an agreement to abide by the society's rules and regulations, to the extent at least that they are not in contravention of law or against public policy.\textsuperscript{132}

The \textit{Oliveira} court went on to quote from \textit{Permanent Committee of Missions v. Pacific Synod of the Presbyterian Church}:\textsuperscript{133}

When a person joins an organized society, such as a church or congregation associated for religious worship, under the supervision and control of higher church courts, he necessarily by that act agrees to abide by its rules of government and the judgments of its courts regularly made, and consents that all his rights, privileges, and duties as a member, or in respect to his membership, shall be governed and

\textsuperscript{130} \textit{Id.} at 729; \textit{see also} Nunn v. Black, 506 F. Supp. 444, 448 (W.D. Va.), \textit{aff'd mem.}, 661 F.2d 925 (4th Cir. 1981), \textit{cert. denied}, 454 U.S. 1246 (1982); (holding that church members did not have their constitutional rights abridged when they were expelled from church membership and that the First Amendment prohibited judicial resolution of whether or not the expulsion was in accordance with church procedures).

\textsuperscript{131} 244 P.2d 921 (Cal. Ct. App. 1952).

\textsuperscript{132} \textit{Id.} at 927.

\textsuperscript{133} 106 P. 395 (Cal. 1909).
controlled by those rules and judgments. This agreement is always implied from the fact of membership.\textsuperscript{134}

While the decision of the California court is appropriate with regard to a person's religious rights, the religious government's decisions should not impair the ability of a religious group member to pursue secular rights through channels external to the religious group.\textsuperscript{135} Any express or implied waiver of secular rights must clearly indicate that the party intentionally relinquished a known right.\textsuperscript{136} Although an intentional waiver can be implied by conduct,\textsuperscript{137} a person's mere membership in a group adhering to doctrines with which the person is not familiar cannot constitute an implied waiver, since the waiver must be made intentionally and not by ignorance.\textsuperscript{138} On the other hand,  

\textsuperscript{134} Oliveira, 244 P.2d at 927 (quoting Permanent Committee of Missions, 106 P. at 401).

\textsuperscript{135} While a civil court would not provide relief to a member of a religious group who asserted that his co-religionists were using threats of excommunication to pressure him to drop his secular court action, the court would provide relief if members of the religious group threatened to use legally cognizable forms of harm to coerce him from pursuing his case. See Grunwald v. Bornfreund, 696 F. Supp. 838, 840 (E.D.N.Y. 1988).


\textsuperscript{138} See Guinn v. Church of Christ, 775 P.2d 766, 777 (Okla. 1989); see also NCNB Nat'l Bank v. Tiller, 814 F.2d 931, 938 (4th Cir. 1987) ("A waiver is an intentional abandonment of a known right, not a mere trick to catch one napping."); Midwest Petroleum, 603 F. Supp. at 1114 (stating that intent can be implied from conduct, but in order to do so, "there must be a clear, unequivocal and decisive act implying the intent and the implication must be so consistent with an intention to waive that no other reasonable explanation is possible" (quoting Grebing v. First Nat'l Bank, 613 S.W.2d 872, 876 (Mo. Ct. App. 1981))).

Thus, the correct outcome in Mitty v. Oliveira should have been to allow Mrs. Oliveira to remove the bodies, as she had not knowingly waived her right to do so. Cemeteries seeking to prevent disinterments could protect their interests easily by simply informing the deceased's family prior to burial that the cemetery does not allow disinterments and that, by burying a relative in the cemetery, the family is waiving its right to move the body to another location at a later time. A legal requirement that cemeteries give this type of advance warning protects the interests of both the cemetery operator and the deceased's family by placing the obligation to speak upon the party most likely to be aware of its legal rights and responsibilities.
a properly made waiver can terminate even a constitutional right as long as the waiver does not violate the public interest. 139

In Guinn, the plaintiff had a constitutionally protected right to practice or not practice her religion as she saw fit. Included within this right was the right to withdraw from her church whenever she pleased. The church, however, asserted that just as a familial relationship can never be severed, a member of the church, upon joining, becomes a member for life and cannot terminate her affiliation. 140 The problem in Guinn was how to balance the rights of the religious group against the rights of the individual member, since both parties are protected by the Free Exercise Clause. 141 The agreement by both sides that Ms. Guinn was unaware of the church's doctrine of membership for life was crucial to the outcome of the case.

Ms. Guinn's status as a member of the Church of Christ was an entirely internal matter for the church to decide. The Guinn case was different from an excommunication case, however, in that while an excommunication involves the dismissal of a religious group member against her will, Guinn involved a plaintiff who was maintained as a church member after she had expressly declared herself to have withdrawn from the church.

Ms. Guinn's cause of action did not arise when the Church of Christ refused to acknowledge Ms. Guinn's withdrawal, however. The church could maintain Ms. Guinn's membership just as easily as it could have excommunicated her before she declared her separation. The church even could have excommunicated Ms. Guinn after she withdrew. 142 The church was obligated to

140. Guinn, 775 P.2d at 776.
141. Id. at 790 (Wilson, J., dissenting in part and concurring in part).
142. The Guinn court distinguished Ms. Guinn's situation from the plaintiff's position in Paul v. Watchtower Bible & Tract Soc'y, Inc., 819 F.2d 875 (9th Cir.), cert. denied, 484 U.S. 926 (1987). Guinn, 775 P.2d at 780–81. Paul involved a religious society's "shunning" of a former member. Unlike the Church of Christ, however, the defendant in Paul merely rejected and excluded the plaintiff; it did not engage in any active, invasive disciplinary activities requiring the plaintiff's consent. The Guinn court thus found that,

[For purposes of First Amendment protection, religiously-motivated disciplinary measures that merely exclude a person from communion are vastly different from those which are designed to control and involve. A church clearly is constitutionally free to exclude people without first obtaining their consent. But the First Amendment will not shield a church from civil liability for imposing its will, as manifested through a disciplinary scheme, upon an individual who has not consented to undergo ecclesiastical discipline.

Id. at 781.
recognize, however, that because Ms. Guinn had declared herself to be separated from the church, Ms. Guinn now had the same right to religious independence that any nonmember had. The church violated this obligation when, in the process of excommunicating her, the church committed the torts of invasion of privacy and outrage.\textsuperscript{143} Ms. Guinn was therefore entitled to civil court relief. As Justice Alma Wilson wrote in a separate opinion, the church’s right to free exercise extended only so far as it could extend without interfering with Ms. Guinn’s individual free exercise rights.\textsuperscript{144} The church’s defense, that Ms. Guinn had waived her constitutional right to follow her own religious conscience when she accepted membership in the Church of Christ, necessarily failed because the church itself admitted that Ms. Guinn had not relinquished her right knowingly.

The question of waiver may become slightly more difficult when a person is born into a religious group and is educated in the group’s teachings. Such a case would differ from Guinn in that the person might well be aware of the religious group’s major doctrines and may have participated in certain ceremonies, such as confirmation, bar or bat mitzvah, or adult baptism, which, for the purposes of the religious group, might indicate acceptance of its doctrines. These ceremonies, which often take place before the person reaches majority age, are not necessarily void as waivers simply because the actor is still a minor. Rather, the waivers, if they are waivers, would only be voidable and might become binding if not repudiated within a reasonable time after the person reaches majority.

The solution to the problem presented here lies in the intent of the party. Unlike estoppel, which involves a bilateral action where one party relies on the intentionally or negligently

\textsuperscript{143} But see Guinn, 775 P.2d at 792, 796–97 (Hodges, J. dissenting) (arguing that the plaintiff’s “attempted unilateral withdrawal of membership” should have no effect upon the Church Elders’ freedom to discipline her because the Elders’ disciplinary actions did not present “a sufficient threat to public peace, safety or order as to warrant civil court intervention”); David K. Ratcliff, Note, Constitutional Law: Guinn v. Collinsville Church of Christ: Balancing an Individual’s Right to Tort Compensation and the First Amendment’s Religion Clauses, 42 OKLA. L. REV. 627, 638–40 (1989) (arguing that the court should have allowed the church to retain authority over Ms. Guinn’s prewithdrawal acts, even after Ms. Guinn withdrew from the church, while the church should have lost authority over her postwithdrawal acts).

\textsuperscript{144} Guinn, 775 P. 2d at 789, 791 (Wilson, J., dissenting in part and concurring in part).
misleading statements or conduct of another party, waiver involves a unilateral act of forfeiture of known rights, and looks mainly to the intent of the party alleged to have relinquished a right. In determining whether a person has waived certain religious freedoms by implication, a court should not emphasize the person’s behavior, but should instead look primarily to the intent with which that person acted. An implied waiver can be established only if the person’s acts constitute “a clear, unequivocal and decisive” indication of intent and if the person’s acts are so consistent with the intention to waive that “no other reasonable explanation [of the person’s behavior] is possible.”

2. Participation in a Religious Court Proceeding as Evidence of a Party’s Consent to Be Bound by the Religious Group’s Decrees—Even actual participation in a religious court proceeding is not sufficient evidence to prove that a party has voluntarily waived all rights to a hearing in secular court. Religious communities are capable of exerting considerable social pressure to hail their members into the religious group’s courts, and a person may feel compelled to participate in a religious court proceeding to protect his status within his religious community or to defend his reputation. Once the unwilling party has submitted to the religious court’s authority, the religious court may resolve secular controversies without providing the procedural and structural fairness that secular courts strive to achieve. While the civil courts have no interest in the “fundamental fairness” of proceedings involving purely ecclesiastical issues, the civil courts must not acquiesce in unfair ecclesiastical decisions regarding secular subject matter. In order to protect

145. See Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990); Dade County v. Rohr Indus., Inc., 826 F.2d 983, 989 (11th Cir. 1987); Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1096 (9th Cir. 1985).

146. Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1179 (N.D. Cal. 1988) rev’d on other grounds, 952 F.2d 1551 (9th Cir. 1991); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”).


149. While Indian tribal courts are not exactly analogous to ecclesiastical courts, see supra note 11, it is interesting to observe that a parallel argument has been made with regard to the tribal court systems, see Duro v. Reina, 495 U.S. 676, 708 n.4 (1990) (Brennan, J., dissenting).

150. See supra note 45.
the rights of parties who may have been coerced into participating in unfair religious court proceedings, civil courts should refuse to accept mere participation in a religious court proceeding as dispositive evidence of a party's intent to be bound by the religious tribunal's decree.

The fact patterns of cases involving Orthodox Jewish litigants are particularly illustrative of the type of social pressure that religious communities can impose upon their members in order to make members conform to communal standards. *Cabinet v. Shapiro*, for example, involved a controversy over whether a kosher poultry shop's chickens were *treifa* (nonkosher). According to the plaintiffs, the poultry had been properly slaughtered by a certified kosher butcher, but the butcher had not received his certification from the rabbi favored by the defendants. The defendants, in order to warn observant Jews that the shop's chickens were not kosher, circulated handbills which read in part:

Be Cautious . . .
Keep Your Home Kosher
The Chickens Sold at
Ben's Poultry Market
Atlantic and Congress Aves.
Are Treifa . . . .

The circulars, which were distributed throughout the city and even on the plaintiff's premises, urged observant Jews to

. . . Buy Your Meats and Poultry From
Reliable Kosher Butcher Stores . . .

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152. *Id.* at 316.
153. *Id.* at 317.
154. *Id.* at 316.
155. *Id.* Additional cases describe similar handbills and posters. See Meisels v. Uhr, 547 N.Y.S.2d 502, 508 n.** (Sup. Ct. 1989) (finding that two-foot by four-foot posters allegedly affixed to street poles in Orthodox Jewish neighborhoods displayed petitioner's photograph and reproductions of rabbinical letters condemning him for resorting to the secular courts); Berman v. Shatnes Lab., 350 N.Y.S.2d 703, 704 (App. Div. 1973) (finding that a circular warned observant Jews that a rabbinical tribunal had found plaintiff unqualified to test for *shatnes*, a prohibited mixture of linen and wool in a single garment and that plaintiff continued to test for the mixture anyway).

Many immigrant groups set up dispute-resolution systems upon arriving in this country to serve immigrant communities defined by nationality rather than religion. These judiciaries, like the Jewish tribunals, often depended upon social pressure to reinforce their
In another case, *Grunwald v. Bornfreund*,” the plaintiff alleged that the defendants tried to have him excommunicated and declared a religious outcast in retaliation for his decision to sue the defendants in civil court rather than in a rabbinical court. These types of cases suggest that mere participation in a religious proceeding is insufficient to show that a party intended her participation in religious proceedings to have secular legal effects in addition to social and possibly spiritual effects.

A civil court’s refusal to uphold a religious court’s decree even when both parties participated in the religious proceeding creates a problem, however, since a party who willingly submitted to the religious court’s jurisdiction can refuse to acknowledge the religious judgment and reopen the case in civil court. This unfair situation can be avoided by putting religious courts on notice that they can render enforceable decrees by using statutory arbitration procedures. When civil courts choose to uphold religious decrees resolving secular issues without any binding arbitration agreement, the religious court should, at a minimum, verify that the religious proceeding satisfies the requirements of a common-law arbitration.

3. **Binding Arbitration Agreement as Evidence of Waiver**—While secular courts must claim final authority over secular issues, this claim of ultimate power creates a hardship for members of religious groups that prohibit their adherents from suing each other in secular courts. Some Christians, for example, believe that the New Testament prohibits Christians from suing

power over secular matters. The authority of all of these tribunals, including the Jewish courts, declined as community members assimilated into American culture and began to see themselves more as individuals than as members of their groups. See generally JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 69–94 (1983). The cases described here show, however, that close-knit communities continue to exist in which significant pressure to submit to communal, rather than governmental, judicatories persists.

158. *E.g.*, *Berman*, 350 N.Y.S.2d at 704 (finding that the plaintiff brought a trade libel action in civil court because a religious court found him to be unqualified to perform a particular religious function).
159. See Kozlowski v. Seville Syndicate, Inc., 314 N.Y.S.2d 439, 445–46 (Sup. Ct. 1970); see also *Berman*, 350 N.Y.S.2d at 704 (holding that because the religious arbitration was similar to a common-law arbitration award, the parties were prohibited from relitigating essentially the same issue in court).
each other.\textsuperscript{160} Jewish law permits observant Jews to sue each other, but usually only in Jewish courts.\textsuperscript{161} To resolve disputes among their followers in a religiously acceptable manner, Christians have organized a national network of Christian Conciliation Services,\textsuperscript{162} and Jews continue to operate Jewish courts.\textsuperscript{163} In addition, Jewish mediation/arbitration services are available in Washington, D.C. and New York City.\textsuperscript{164}

These religiously organized forums for alternative dispute resolution would be of no concern to the secular legal system if the parties to the religious proceeding never attempted to re-argue their cases in civil court. Cases occasionally arise, however, in which a party attempts to enforce an agreement purporting to resolve a secular dispute through religious mechanisms.\textsuperscript{165} On other occasions, parties seek to assert a civil claim after obtaining less than complete satisfaction through the religious organization's process.\textsuperscript{166} Religious groups which seek to achieve legally binding resolutions can ensure the enforceability of their decrees by conducting their proceedings in accordance with the arbitration laws of the state in which they sit.

By putting religious authorities on notice that ecclesiastical proceedings to resolve secular disputes will be legally enforceable only if the procedures conform with state arbitration laws, the states enable religious groups to retain jurisdiction over their

\textsuperscript{160} The relevant passage states: "Must brother go to law with brother—and before unbelievers? Indeed, you already fall below your standard in going with one another at all." 1 Corinthians 6:7 (New English). Relying on this verse, the founder of the Christian Conciliation Service of Metro Washington observed, "When a Christian takes another Christian to court, it splashes mud all over Jesus Christ and it splashes mud all over Christianity." UPI, Sept. 4, 1982, available in LEXIS, Nexis Library, UPI File.


\textsuperscript{163} See BERNARD J. MEISLIN, JEWISH LAW IN AMERICAN TRIBUNALS 123–24 (1976); see generally Note, supra note 161, at 56–68 (describing the different types of Jewish courts in the United States in 1970).


members' secular affairs while preserving the members' due process rights to fundamentally fair hearings. A signed arbitration agreement serves as an objective manifestation of a party's intent to be bound by the religious court's decree and that the party knowingly and voluntarily waived his rights to pursue the litigation in secular court without any religious group's interference. As in contract law, giving legal effect to a signed agreement still leaves open the possibility that the agreement will be invalidated if a party signed the agreement under duress. Equally important, a formal agreement to arbitrate requires a minimum standard of appropriate conduct from the arbitrators in order for the proceeding to be legally valid.

Agreements to arbitrate a dispute before ecclesiastical arbitrators differ from other agreements to arbitrate in that a party to an ecclesiastical arbitration agrees to be bound by ecclesiastical law, and thus waives her freedom of religious conscience. This distinction should be of no consequence, however, as long as the waiver is made knowingly and voluntarily. Parties can enter binding agreements to arbitrate before nonecclesiastical arbitrators, and an agreement should be equally binding when the arbitrators happen to be religious leaders who apply principles of religious doctrine in resolving issues.

167. See supra notes 136–38 and accompanying text.

168. See, e.g., Mikel v. Scharf, 432 N.Y.S.2d 602, 606 (Sup. Ct. 1980) (holding that a threat to submit to rabbinic authority or face ostracism is mere social pressure and not duress).


170. See Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983). The Avitzur court held that a ketubah, a Jewish marriage contract, signed by the defendant at the time of his marriage, required that the defendant submit to the authority of a rabbinical tribunal for religious proceedings related to his divorce. Under Jewish law, a divorced woman is not eligible to remarry until she has obtained a get, a Jewish certificate of divorce, from her former husband. Id. at 137. In ordering the defendant to appear before the rabbinical tribunal, the Avitzur court rejected the husband's constitutional claim of excessive entanglement and stated that it was merely enforcing an agreement that the defendant had made with his wife. Id at 138. The court grounded its authority to do so in the “neutral principles” approach approved by the Supreme Court in Jones v. Wolf, 443 U.S. 595, 602 (1979). See infra notes 186–89 and accompanying text. Similarly, the Illinois Court of Appeals upheld a trial court order, also based on a signed ketubah, that a Jewish husband “participate in the verbal and physical acts necessary to validate” a get. In re Marriage of Goldman, 554 N.E.2d 1016, 1021 (Ill. App. Ct. 1990).

Nonconstitutional arguments against enforcement of a ketubah include the possibility that the parties did not intend secular legal consequences when they signed the marriage contract, that the contract is too vague to be enforceable, and that the parties did not understand the contract, which typically is written in Hebrew and Aramaic. For an example of an English-language document designed to withstand both constitutional and contract-law challenges, see Bleich, supra note 21, at 249 n.164.
a party has agreed to submit to foreign law, the secular courts should have no concern with whether the foreign law is from a foreign country or from a religious group. The authority of the religious arbitration panel should have the same scope as other panels, and under circumstances that give rise to a valid common-law arbitration without a signed agreement, the common-law arbitration should be upheld regardless of whether the arbitrators are religious leaders. All that matters is that each party unequivocally expressed an intent to submit to the arbitration panel's authority and voluntarily agreed to accept the tribunal's decree as binding.

III. Disputes Between Higher and Lower Denominational Bodies

The preceding analysis of relationships between religious groups and their individual members can be applied by analogy to relationships between denominations and their constituent organizations. Just as civil courts must protect the First Amendment rights of both religious societies and their members, New York now has a statute which compels Jewish husbands to execute a valid Jewish divorce decree in conjunction with civil dissolution of their marriages. N.Y. Dom. Rel. Law § 253 (McKinney 1986). The constitutionality of this statute is unclear, but New York adopted the statute as an attempt to remedy the "tragically unfair condition" in which the "requirement of a get is used by unscrupulous spouses who avail themselves of [New York] civil courts and simultaneously use their denial of a get vindictively or as a form of economic coercion." 1983 N.Y. Laws 2818-19 (italics added). In Goldman, for example, the defendant attempted to use the get as a bargaining chip in his custody battle with his wife. 554 N.E.2d at 1019-20, 1023-24; see also Burns v. Burns, 538 A.2d 438, 440 (N.J. Super. Ct. Ch. Div. 1987) (holding that a former husband's offer of a get was for economic concerns and was therefore not protected by the Establishment Clause). 171. Cf. Bernard, supra note 37, at 558-59 n.76 (explaining that a person may contract away their civil rights to a religious organization).

172. See In re Berger, 437 N.Y.S.2d 690, 692 (App. Div. 1981) (holding that it is against public policy to allow arbitration panels to probate a will). While some religions have religious laws of inheritance, the Berger court held that the public policy in favor of having wills probated in court supersedes any religious interest in the will. Of course, in a case in which a party seeks to compel arbitration of a dispute, the party must assert a cause of action cognizable under secular law. In Schwartz v. Jacobs, 352 S.W.2d 389 (Mo. Ct. App. 1961), the plaintiff went to civil court to compel ecclesiastical arbitration of a purely religious claim. The civil court held that the ecclesiastical nature of the claim placed the dispute beyond the jurisdiction of the civil court. Id at 392. The civil court's inability to compel arbitration of the religious claim is analogous to a civil court's inability to enforce an ecclesiastical decree. See supra notes 21-30 and accompanying text.

the courts also must protect the rights of congregations and other religious factions. This Part argues that autonomous congregations, like individuals, have a constitutional right both to submit to a higher religious body and to withdraw from such a body. Congregations also have the right to waive their First Amendment rights, and, because the policy reasons for limiting individuals' ability to waive those rights do not apply in the context of congregations, intelligent and unmistakable waivers by congregations should be strictly enforced. This part argues that the loss of property, the only secular harm that a congregation might suffer by waiving its First Amendment rights, should be permissible where a proper waiver has been made. Thus, this Part favors the "neutral-principles" approach to resolving religious property disputes and opposes the "polity" approach.

174. Cf. Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 31 (D.C. 1987) (en banc) (acknowledging that a religiously affiliated university has free exercise rights); United Kosher Butchers Ass'n v. Associated Synagogues, 211 N.E.2d 332, 334 (Mass. 1965) (acknowledging that constitutional freedoms would be at risk if the court were to force one kashruth certification board to accept the kashruth certification of another certifying board).

The polity approach assumes that a congregation which is part of a hierarchical denomination has consented to be governed by the parent organization.\textsuperscript{176} Therefore, a civil court faced with a dispute between higher and lower bodies of a hierarchical religious society must defer to the judgment of the religious group's own tribunals even though such deference will almost certainly favor the higher church.\textsuperscript{177} Under this analysis, only when a religious organization's structure is congregational rather than hierarchical does authority over all controversies, both religious and temporal, lie entirely within the local congregation itself.\textsuperscript{178}

In \textit{Jones v. Wolf},\textsuperscript{179} the Supreme Court unanimously agreed that the polity approach is the proper method for review of ecclesiastical adjudications of wholly religious issues.\textsuperscript{180} Such issues are beyond both the authority and the competence of the civil courts.\textsuperscript{181} Application of the polity approach to secular disputes, however, endangers congregations' First Amendment rights. Just as mere membership in a religious organization is insufficient to prove that an individual has waived his religious liberties,\textsuperscript{182} submission to a hierarchy cannot by itself prove that

\begin{itemize}
\item \textsuperscript{176} See \textit{Jones v. Wolf}, 443 U.S. 595, 612–13 (1979) (Powell, J., dissenting). The Supreme Court first explained its rationale for approving the polity approach in \textit{Watson v. Jones}, 80 U.S. (13 Wall.) 679 (1871), which adopted this method as the federal common-law approach to resolving religious property disputes arising within hierarchical religious organizations. The Court stated:

In this country . . . [t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

\textit{Id.} at 728–29.
\item \textsuperscript{177} \textit{Wolf}, 443 U.S. at 619 (Powell, J., dissenting) (quoting Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724–25 (1976)).
\item \textsuperscript{178} \textit{Id.} (citing \textit{Watson}, 80 U.S. at 724–26).
\item \textsuperscript{179} 443 U.S. 595 (1979).
\item \textsuperscript{180} \textit{Id.} at 602, 604; \textit{id.} at 619 (Powell, J., dissenting).
\item \textsuperscript{181} See \textit{supra} notes 25–27 and accompanying text.
\item \textsuperscript{182} See \textit{supra} part II.B.1.
a congregation has extinguished all of its rights as an independent religious organization.\textsuperscript{183} Because a waiver of rights must be unmistakable,\textsuperscript{184} ambiguities in the extent of the congregation's waiver of its rights should be resolved in favor of congregational autonomy.\textsuperscript{185}

The "neutral-principles" approach, approved in \textit{Jones v. Wolf}, enables civil courts to discover and to enforce the actual relationship that the denomination and congregation established between themselves. This method of resolving intra-denominational disputes permits civil courts to examine deeds, church constitutions, and other documents to adjudicate claims according to principles of secular law without resolving religious controversies.\textsuperscript{186} Unlike the polity approach, the neutral-principles approach provides religious societies with the flexibility to structure their internal relationships according to their own beliefs and administrative needs and empowers civil courts to intervene to protect the rights which the disputants have

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\textsuperscript{183} E.g., Antioch Temple, Inc. v. Parekh, 422 N.E.2d 1337, 1343–44 (Mass. 1981) ("Although [Pentecostal Churches of the Apostolic Faith Association, Inc.] appears to have a hierarchical structure, we cannot assume that, by voluntarily affiliating itself with a hierarchical church, Antioch gave up the power to govern itself in matters such as its selection of a pastor and its control and use of its own property." (footnote omitted)); First Presbyterian Church v. United Presbyterian Church, 464 N.E.2d 454, 463 (N.Y. 1984) ("The mere fact of First Church's association with the denominational body, even an association lasting 200 years, does not by itself support a finding that an implied trust [granting the higher church a beneficial interest in congregational property] was created."), \textit{cert. denied}, 469 U.S. 1037 (1984).

\textsuperscript{184} See \textit{supra} notes 136–38.

\textsuperscript{185} The South Dakota Supreme Court, however, has found:

\begin{quote}
In the absence of a specific understanding or agreement preserving a separate identity and expressing an intention to withhold its property, we think it must be presumed that by voluntarily merging itself as an organ of the larger body, [the congregation] intended to dedicate its all to the purposes of that body.
\end{quote}


\textsuperscript{186} Jones v. Wolf, 443 U.S. 595, 603–04 (1979). \textit{Jones v. Wolf} expanded upon the Supreme Court's earlier declaration that civil courts could apply "neutral principles of law" to resolve religious property disputes without violating the First Amendment. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969). These neutral principles are equally applicable to secular subject matter other than property. Relying upon \textit{Jones v. Wolf}, secular courts have applied neutral principles of law to a contract dispute between a minister and his denomination, see \textit{Minker v. Baltimore Annual Conference of United Methodist Church}, 894 F.2d 1354, 1358–61 (D.C. Cir. 1990), and to a divorce case involving suit to enforce a Jewish marriage contract. See \textit{Avitzur v. Avitzur}, 446 N.E.2d 136, 138–39 (N.Y. 1983); see also \textit{In re Marriage of Goldman}, 564 N.E.2d 1016, 1023 (Ill. App. Ct. 1990) (upholding trial court order requiring a husband to obtain an Orthodox \textit{get} in accordance with the marriage contract).
allocated to one party or the other. Of course, religious groups do not always document their structures with sufficient clarity to ensure that civil courts will be capable of enforcing the relationship that the denomination and congregation intended to create, and sometimes a religious document may not be amenable to secular interpretation. The neutral-principles

187. See Jones v. Wolf, 443 U.S. at 603–04. The dissent in Jones v. Wolf argues that the neutral principles approach restricts the scope of the Court's inquiry by excluding evidence of church polity, from which an inference might be made that the parent church has acquired authority over the congregation's property. See id. at 612–13 (Powell, J., dissenting). By insisting that such an inference be made, however, the dissenters would exclude evidence of the actual extent of the higher church's authority and of the lower church's autonomy.

188. Cf. Claude D. Morgan, The Significance of Church Organizational Structure in Litigation and Government Action, 16 VAL. U. L. REV. 145, 161 (1981) (urging religious organizations to "exercise resourcefulness in structuring themselves to minimize judicial intrusion in their organizational affairs and to substantially improve the prospects that the government will relate to the organization on the same terms in which the church perceives itself").

189. See Jones v. Wolf, 443 U.S. at 604; id. at 612 (Powell, J., dissenting); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 (1976). Courts must be careful not to attempt to read religious documents in secular terms when such a reading would misconstrue the document's purpose. See Jones v. Wolf, 443 U.S. at 612 (Powell, J., dissenting). In actions to enforce a religious trust, for example, the terms of an intended trust may be unenforceably vague if stated in religious terms. E.g., Katz v. Singerman, 127 So. 2d 515, 517 (La. 1961) (dedicating property for "the worship of God according to the orthodox Polish Jewish Ritual"); Katz v. Goldman, 168 N.E. 763, 764 (Ohio Ct. App. 1929) (dedicating property to promote the cause of orthodox or traditional Judaism). Where a religious body with authority under religious law to interpret the trust terms provides the civil court with an explanation of the trust terms' meaning in the context of the case at bar, the civil court is bound to accept the religious authority's explanation. See Jones v. Wolf, 443 U.S. at 604 (citing Milivojevich, 426 U.S. at 709); see also Milivojevich, 426 U.S. at 721 ("Nevertheless the Supreme Court of Illinois substituted its interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation. This the First and Fourteenth Amendments forbid."). Thus, under the framework advocated in this Note, litigation of cases in which such an interpretation has been provided is likely to focus on the issue of whether the religious authority that has interpreted the trust actually has the power to bind the subordinate body. See Milivojevich, 426 U.S. at 732 (Rehnquist, J., dissenting). But see First Presbyterian Church v. United Presbyterian Church, 464 N.E.2d 454, 458 (N.Y.) (holding that civil courts lack authority to determine the extent of a Presbytery's authority over a local church), cert. denied, 469 U.S. 1037 (1984).

When a trust document describes religious practices which a congregation must always observe, civil courts should be allowed to enforce the terms of the trust if the principles are stated in language comprehensible to the court. See Presbyterian Church, 393 U.S. at 452 (Harlan, J., concurring). Without this type of clear guidance, however, civil courts have no authority to determine that a controversial ritual or belief constitutes a "substantial departure" from the purpose for which an express or implied trust was created. Id. at 450. Before the Supreme Court's ruling in Presbyterian Church, a majority of states appear to have prohibited religious factions from using church buildings for "purposes constituting a fundamental departure from the traditional faith, customs, usages, and practices of the church." Holiman v. Dovers, 366 S.W.2d 197, supp. op. on reh'g, 366 S.W.2d 203, 206–07 (Ark. 1963).
approach offers religious groups an opportunity, however, to ensure that secular jurists will settle intradenominational disputes in a manner consistent with the relationship that the parties intended. When the subject matter of a case is secular rather than religious, the neutral principles approach avoids the constitutional issues raised by the polity approach, protecting the local congregation's autonomy without violating the higher church's rights.

A dispute between a denomination and one of its constituent congregations may be difficult to characterize as either wholly religious or wholly secular, however. In *Jones v. Wolf*, the majority and the dissenters disagreed about whether the resolution of a religious property dispute should be considered a religious or secular matter. The dissent properly observed that religious property disputes typically arise out of disputes over ecclesiastical matters. Spiritual significance also can permeate throughout a building or a parcel of land. For these reasons, when a religious body has the authority to decide who may use religious property, the civil courts must defer to the religious authority's decree. The question in *Jones v. Wolf*, however, was whether the right to possess the local church's property was vested in the church hierarchy or in the schismatic faction. The majority recognized that this is a secular question

190. See supra note 21.
191. Compare *Jones v. Wolf*, 443 U.S. at 602 (“There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.”) with id. at 614 (Powell, J., dissenting) (“When civil courts step in to resolve intrachurch disputes over control of church property, they will either support or overturn the authoritative resolution of the dispute within the church itself.”).
192. *Id.* at 616 (Powell, J., dissenting).
194. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988); *see also Exodus* 3:5-6 (relating that when God spoke to Moses from the burning bush, God said, “Come no nearer... the place where you are standing is holy ground”); *THOMAS L. FRIEDMAN, FROM BEIRUT TO JERUSALEM* 300–01, 305, 306–12, 319–21 (1989) (explaining the significance of the land of Israel to the Jewish religion).
195. See *Dignity*, 472 N.W.2d at 357. Of course, religious groups also might own property which lacks a religious character, in which case secular antidiscrimination laws must be observed if the laws do not include a broadly worded religious exemption. *Id.*
involving disposition of secular rights.197 Thus, secular courts have proper authority to resolve such disputes as long as the civil tribunals do not, in the process of resolving the property issues, also become entangled in religious controversies.198

The issue of whether a subordinate body has the autonomy to withdraw from a denomination and take its property with it depends upon the history of the relationship between the higher and lower church and on the property arrangements the parties have made between themselves. Factors that a civil court should consider include the following: whether the subordinate body existed as an independent religious society before uniting with the higher church;199 whether the subordinate body agreed to be bound by the decrees of the higher authority;200 whether the property in question was acquired before or after the two organizations became affiliated;201 whether the property was

197. Id. at 602; see also Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445, 449 (1969) (stating that civil courts can resolve church property disputes under secular law but must not resolve any religious controversy underlying the property dispute).

198. Jones v. Wolf, 443 U.S. at 602. In Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the majority and dissenters disagreed about whether civil courts can resolve intradenominational administrative disputes which impact upon religious property rights. The majority held that administrative controversies are as immune as doctrinal controversies are from secular intervention. Id. at 709–10. The dissenters believed that civil courts impartially can resolve administrative disputes arising within religious organizations just as easily as they can resolve comparable controversies arising within other voluntary associations. Id. at 725–26 (Rehnquist, J., dissenting).

This Note agrees with the majority's position that civil courts must not interfere in denominational administration where no secular right is involved. This Note disagrees with the majority, however, in one respect: civil courts must be allowed to resolve the singular issue of whether a subordinate body can withdraw altogether from a hierarchical church and take its property with it. In Milivojevich, the Supreme Court of Illinois resolved this question using the neutral-principles-of-law approach and held, among other things, that the American-Canadian Diocese of the Serbian Orthodox Church did not have the right to secede. Serbian E. Orthodox Diocese v. Milivojevich, 328 N.E.2d 268, 282–84 (Ill. 1975), rev'd on other grounds, 426 U.S. 696 (1976).

199. See Protestant Episcopal Church v. Barker, 171 Cal. Rptr. 541, 544–46 (Ct. App. 1981); Baldwin v. Mills, 344 So. 2d 259, 265 (Fla. Dist. Ct. App. 1977), rev'd on other grounds, 362 So. 2d 2 (Fla. 1978), reversal vacated, 443 U.S. 914 (1978), reversal reinstated, 377 So. 2d 971 (Fla. 1979). The Florida Supreme Court reversed the Florida District Court of Appeal's decision in Baldwin v. Mills because the district court applied the neutral-principles approach and the supreme court held that Florida law requires application of the polity approach. 362 So. 2d at 7. The district court's opinion remains instructive, however, with regard to application of the neutral-principles approach.


201. See Baldwin v. Mills, 344 So. 2d at 268 (Smith, J., dissenting).
acquired in the name of the higher or lower church;\textsuperscript{202} whether the higher church provided funds for the acquisition or improvement of the property in question;\textsuperscript{203} whether a state statute regulates the disposition of property held by organs of the denomination;\textsuperscript{204} whether church documents expressly vest legal or equitable title in the higher or lower body;\textsuperscript{205} and whether any other evidence indicates that an express or implied trust exists in favor of one of the claimants.\textsuperscript{206} The polity approach ignores these factors, and always vests title in the higher church.\textsuperscript{207} The polity approach is therefore likely to inhibit congregations from joining larger denominations for fear that the denomination will take possession of the congregation's property if the two organizations ever separate. By examining the parties' actual relationship, the neutral-principles approach frees religious organizations to experiment with a variety of ecclesiastical structures and affiliations, effectively enhancing free exercise.

Of course, if a court finds that the local congregation has extinguished its right to remove its property from the control of the parent organization or never had such a right to begin with,

\begin{itemize}
  \item \textsuperscript{202} See Harris v. Apostolic Overcoming Holy Church of God, Inc., 457 So. 2d 385, 387 (Ala. 1984); Fluker Community Church v. Hitchens, 419 So. 2d 445, 446, 448 (La. 1982).
  \item \textsuperscript{203} Barker, 171 Cal. Rptr. at 544–46; Baldwin, 344 So. 2d at 261; Carnes v. Smith, 222 S.E.2d 322, 327 (Ga. 1976); First Presbyterian Church v. United Presbyterian Church, 464 N.E.2d 454, 462 (N.Y. 1984).
  \item \textsuperscript{204} See Barker, 171 Cal. Rptr. at 555; Carnes, 222 S.E.2d at 327–28.
  \item \textsuperscript{205} Harris, 457 So. 2d at 387; Barker, 171 Cal. Rptr. at 546; Crumbley v. Solomon, 254 S.E.2d 330, 332 (Ga. 1979); Carnes, 222 S.E.2d at 328; Fluker Community Church, 419 So. 2d at 448; Maryland & Va. Eldership of the Churches of God v. Church of God, 241 A.2d 691, 696–97 (Md. 1968), vacated, 393 U.S. 528, reaft'd, 254 A.2d 162 (Md. 1969), appeal dismissed per curiam, 396 U.S. 367 (1970).
  \item \textsuperscript{206} Courts in different states will reach different conclusions regarding the existence of a valid trust because the relevant state law to be applied under the neutral-principles approach will vary from state to state. Compare Parent v. Roman Catholic Bishop, 436 A.2d 888, 891 (Me. 1981) (holding that the court will not enforce any express or implied trust in favor of the local church unless the local congregation produces "a writing plainly evidencing conditions or restrictions on the bishop's use of the [local] property") with Bishop & Diocese v. Mote, 716 P.2d 85, 100 (Colo. 1986) (en banc) ("Colorado recognizes that the intent to create a trust can be inferred from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular documents or language employed, and the conduct of the parties.").
  \item \textsuperscript{207} Before a court can reach a finding in favor of the higher church, the court must be certain that the disputants in fact are united under a hierarchical structure. This issue is an issue of fact for the civil courts to resolve, and a statement by the purported higher church that a hierarchical relationship exists is not binding on the civil tribunal. See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 725 (1976) (White, J., concurring); Southside Tabernacle v. Pentecostal Church of God, Inc., 650 P.2d 231, 235 (Wash. Ct. App. 1982).
\end{itemize}
then, as under the polity approach, the dispute must be resolved in favor of the higher church. 208 A congregation which has submitted itself fully to the control of a higher ecclesiastical organization is obligated to abide by the dictates of that organization. 209 The higher church determines rules of law and religious observance and, in the event of a schism, determines who has the right to use the congregation's property.

The policy concerns which limit the rights of individuals to waive their First Amendment rights do not apply to waivers by congregations. Even if an autonomous congregation waives these rights completely, each individual member retains the right to profess unconventional beliefs, 210 to participate in the marketplace of ideas, 211 and to abandon the religious group if he so chooses. 212 As a collection of individuals, an entire congregation can exercise these individual liberties all at once. 213 All that the congregation risks losing by executing a valid plenary waiver is its property. This type of loss, while significant, is not as contrary to public policy concerns as is the loss of individual autonomy and freedom of expression. Indeed, while personal liberties are inalienable, the law promotes alienability of property. 214 Thus, civil courts should enforce congregations' plenary waivers of their First Amendment rights.

Strict enforcement of these waivers promotes the parent organization's free exercise rights without violating the congregation's rights. While the Establishment Clause should be understood to prohibit civil enforcement of denominational

208. Thus, several courts have observed that, under the fact patterns before them, the same results would be reached regardless of whether the courts applied the neutral-principles or polity approach. See, e.g., Fonken v. Community Church, 339 N.W.2d 810, 819 (Iowa 1983); Bennison v. Sharp, 329 N.W.2d 466, 475 (Mich. Ct. App. 1982).


210. See supra notes 115-16 and accompanying text.

211. See supra note 117 and accompanying text.

212. See supra notes 140-44 and accompanying text.

213. One court stated:

The individual defendants are free to disassociate themselves from St. Stephen's [Parish] and The Protestant Episcopal Church and to affiliate themselves with another religious denomination. No court can interfere with or control such an exercise of conscience. The problem lies in defendants' efforts to take the church property with them. This they may not do.


decrees regarding congregational property where the congregation has not waived its property rights, the Free Exercise Clause should be understood to prohibit secular courts from intervening when the congregation has made a proper waiver. Denominational leaders need the power to maintain denominational standards of belief and conduct, to expel dissidents, and to protect the integrity of the prayer environment. One aspect of this power is the authority to bar dissenters from denominational property. Thus, even when a majority of a congregation's members elect to secede from the higher church, if a proper waiver has been made, the congregation's property must be held for the exclusive use of the minority faction which continues to affiliate with the higher church.

Protestant Episcopal Church v. Barker serves as an example of how a civil court might apply the approach advocated in this Note to resolve a religious property dispute. Barker involved a suit by the regional and national bodies of the Protestant Episcopal Church in the United States of America (PECUSA) to obtain title and possession of property owned by four Los Angeles church congregations which had seceded from the denomination. Three of the churches had been formed as constituent congregations of PECUSA but retained title to their property in their own names, with no restrictions or limitations on the congregations' authority to possess or dispose of the property. These three congregations each contributed substantial sums of money to the Los Angeles Diocese during the course of the congregations' affiliation with the regional and national church.

The fourth congregation, worshipping at Holy Apostles Church, also held its church property in its own name, but was unlike the other three churches in several other respects. First, Holy Apostles Church was incorporated as a "subordinate body" of PECUSA and the Los Angeles Diocese, and, therefore, under California's Corporations Code, upon dissolution it was to convey its property or proceeds from the sale of its property to the higher church. Second, Holy Apostles' articles of incorporation

215. See supra note 110.
218. Id. at 542-43.
219. Id. at 544-45.
220. Id.
221. Id. at 546.
declared that the congregation’s property was dedicated irrevocably to religious or charitable purposes, and that, upon dissolution, the congregation’s property would be used or sold to benefit a charitable fund organized by the diocese.\textsuperscript{222} Finally, unlike the other three churches, Holy Apostles was incorporated after the diocese had adopted a canon declaring that upon dissolution of a parish, all parish property is conveyed to the diocese.\textsuperscript{223}

The court held that, with regard to the first three churches, no express trust existed in favor of the diocese or national church.\textsuperscript{224} Thus, these congregations retained their property even after they withdrew from the higher church. With regard to Holy Apostles Church, however, the court found that the language used in the church’s articles of incorporation, along with applicable provisions of California’s Corporations Code and the diocesan canon adopted prior to Holy Apostles’ incorporation, all indicated that the property of Holy Apostles Church was subject to an express trust in favor of the diocese.\textsuperscript{225} The court further found that the diocese had effectively revoked Holy Apostles’ charter.\textsuperscript{226} The court therefore concluded that the diocese had acquired a right to secure possession and title to the congregation’s property.\textsuperscript{227}

\textsuperscript{222} Id.
\textsuperscript{223} Id. at 546.
\textsuperscript{224} The court stated:

We conclude that no express trust exists in the property of St. Matthias, St. Mary’s, and Our Savior. St. Matthias and St. Mary’s held title to their property in their own names, paid for it out of their own funds, did not alienate it in any express manner in their articles of incorporation, and did not subject themselves to express restraints on their property . . . . It is true that these churches voluntarily conformed to certain financial requirements of the Diocese . . . . None of this, however, amounted to the creation of an express trust. The situation of Our Savior is similar . . . .

\textsuperscript{225} Id. at 556. In effect, the court either found that Holy Apostles Church never existed as an autonomous property-holding organization separate from PECUSA, or that, if Holy Apostles had at one point been autonomous, it waived all of its autonomy, including its property rights, when the church incorporated as a “subordinate body” of the diocese. For additional examples of cases in which application of the neutral principles approach led to a decision in favor of the higher church, see Harris v. Apostolic Overcoming Holy Church of God, Inc., 457 So. 2d 385, 387 (Ala. 1984); New York Annual Conference v. Fisher, 438 A.2d 62, 73–74 (Conn. 1980); Carnes v. Smith, 222 S.E.2d 322, 328 (Ga. 1976); Fluker Community Church v. Hitchens, 419 So. 2d 445, 448 (La. 1982).
\textsuperscript{226} Barker, 171 Cal. Rptr. at 556.
\textsuperscript{227} Id.
By focusing on the actual arrangement that each congregation had made for the disposition of its property upon separation from the diocese, the Barker court reached a result that was likely to be more consistent with the intent of the congregations that had chosen to unite with PECUSA than the court would have reached if the court had applied the polity approach. Barker illustrates that a single denomination can have different types of legal relationships with its constituent congregations and fosters a legal environment in which religious societies are free to innovate in structuring their organizations. Barker also sends a warning to religious organizations. Religious societies must document intra-denominational relationships in such a way that civil courts will be able to enforce the relationships that the parties actually intended to create.

CONCLUSION

By promising religious freedom both to religious groups and to individuals, the First Amendment promotes not only diversity in individual religious belief and expression, but also diversity of religious cultures. Ecclesiastical tribunals help religious groups maintain their cultural integrity by interpreting doctrine and by defining the behaviors expected of group members. Because the First Amendment prohibits secular authorities from becoming entangled in religious controversies, civil courts have no authority to review ecclesiastical judgments when the decrees involve only wholly religious subject matter. When the civil adjudication of a secular right is dependent upon the resolution of an ecclesiastical controversy, the civil court is bound to accept the judgment of the highest ecclesiastical judicatory that will consider the case.

The Free Exercise Clause removes only religious decisions rendered in good faith for spiritual purposes from civil court jurisdiction. Ecclesiastical decisions tainted with fraud or collusion, in which religious courts resolve disputes in bad faith for secular purposes, do not merit protection from civil court review. Civil courts must defend parties’ secular rights even when the party violating those rights is a religious actor. In religious fraud cases, civil courts must do so by providing secular remedies, yet must be careful to avoid providing a religious remedy, such as an injunction overturning a religious decree.
When individuals submit secular issues to religious court jurisdiction, civil courts must not enforce the ecclesiastical decree unless certain requirements are met. The parties to the religious proceeding must have submitted the dispute to ecclesiastical jurisdiction voluntarily, intentionally waiving their known right to have a secular forum resolve the dispute. This waiver of a right protected under the Establishment Clause must not violate the public's interest in maintaining individuals' freedom of thought and speech and in having a society free from involuntary servitude. Where the parties properly have waived their Establishment Clause right without violating these public policy concerns, secular courts must accord ecclesiastical adjudications of temporal issues the same respect that the secular courts would extend to decrees by secular arbitrators.

Subordinate bodies of hierarchical religious societies also have rights under the First Amendment's religion clauses. To protect the rights of these groups without violating the rights of the parent denomination, civil courts should use the neutral-principles-of-law approach to resolve secular disputes between higher and lower religious bodies. Unlike the polity approach, the neutral-principles approach provides civil courts with a practical method of resolving these disputes in a manner consistent with the actual relationship that exists between the higher and lower church. By facilitating this level of consistency, the neutral-principles approach assists civil courts in striking the proper balance between respecting religious leaders' need to maintain the integrity of their religious cultures and the secular courts' obligation to protect the liberties both of subordinate bodies and of individuals.