

THE COURTS AND CANON LAW

INTRODUCTION

For civil courts to analyze whether the ecclesiastical actions of a church judicatory are . . . 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow. . . . But this is exactly the inquiry that the First Amendment prohibits; . . . a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.¹

If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness.²

What happens when courts encounter questions answerable by canon law? In these quotations from Justice Brennan's majority opinion and Justice Rehnquist's dissent in *Serbian Eastern Orthodox Diocese v. Milivojevich*, the justices confront the difficulty of determining how courts should handle disputes based on religious questions. Justice Brennan concluded that courts cannot interfere with ecclesiastical law. Courts must accept the decision of a church's highest judicatory. Justice Rehnquist, however, maintained that the Illinois court which originally heard the case had correctly applied the canon law of the church in the court's attempt to resolve the question of who could control the Serbian Diocese in America. Thus, from Rehnquist's perspective, the canonical dispute merely required the Illinois court to recognize the correct choice of law as canon law, and to apply it according to the Illinois court's interpretation.

The point at which courts unconstitutionally trespass on a religion's private domain in cases where they attempt to resolve non-intrachurch religious disputes is not entirely clear from *Serbian* or any of the Supreme Court's decisions in the past fifty years. Its decisions in intrachurch disputes suggest that courts should avoid settling issues according to interpretations of church law or theology, but the Court has never addressed the use of church law in disputes which go outside the bounds of a church or religious community. When a party outside the

¹ *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976).

² *Id.* at 727 (Rehnquist, J., dissenting).

church is involved in litigation with the church, courts cannot simply defer to the judgments of the church, as Justice Brennan's majority opinion in *Serbian* advised.

This note discusses how courts should examine issues which seem to depend upon the determination of the meaning of Roman Catholic canon law. Courts confronted with canon law matters often contend that they avoid the theological issues, and concentrate on the civil aspects of a canon law definition. But it is questionable whether one can make such a distinction within a doctrinal document. Moreover, public policy considerations stemming from the Free Exercise and Establishment clauses of the First Amendment should discourage courts from interpreting canon law in any form. When courts interpret canon law, they violate the Free Exercise clause by dictating to a religion what meaning the government sanctions for their beliefs as codified in canon law. Furthermore, courts violate the Establishment clause when they interpret canon law, because the courts establish an official government position on the religious beliefs stated in the law.³

Historian Leonard Levy notes that the Establishment Clause serves to "maintain civility between believers and unbelievers as well as among the several hundred denominations, sects, and cults that thrive in our nation."⁴ The framers of the Bill of Rights did not want to encourage disputes over government support for the various churches among the states with established churches, or disputes even among the various churches for government support. Jesuit theologian John Courtney Murray, writing in 1964, agreed with the proposition which Levy espouses. Murray contended that the preservation of "the public peace" constitutes the most important reason for the Establishment Clause.⁵ Thomas Jefferson identified another serious problem that could result from judicial interpretation of canon law, when he averred that government compulsion of belief⁶ would "corrupt the principles of that very religion it is meant to encourage."⁷ Although it is unlikely that a court's interpretation of canon law would lead to the downfall of Catholic theology, the courts' willingness to decide a church's doctrinal beliefs codified in "law" indicates a lack of respect for the distinctiveness and value of religion and for the importance of a church's self-determination.

³ Justice Black's majority opinion in *Everson v. Board of Education*, 330 U.S. 1 (1947), gives a lengthy definition of the meaning of the Establishment Clause. One aspect of the meaning, he says, is that "[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Id.* at 16.

⁴ LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* xiv (2d ed. 1994).

⁵ JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 67 (1964).

⁶ Judicial interpretation of canon law represents a compulsion of belief, as it constitutes a government ruling on what a church's doctrine means.

⁷ Quoted in WILLIAM L. MILLER, *THE FIRST LIBERTY* 60 (1986).

Finally, any time a court concludes it can interpret canon law, one should wonder whether the court's willingness to look into canon law indicates the court's ignorance of the complexity of canon law. One commentator has suggested that judicial interpretation of canon law is analogous to an admiralty court hearing a products liability case.⁸

Nevertheless, courts have interpreted canon law. Non-intrachurch disputes, which seem to require an interpretation of canon law, encompass a much wider array of concerns than do intrachurch dispute cases. I will look at the intersection of canon law and the secular courts in cases involving questions of a bishop's vicarious liability for a priest's tortious actions; ownership of a deceased monk's property when that monk has taken a vow of poverty; necessity of payment of federal income taxes when the priest or nun employee has taken a vow of poverty; ownership of church property in an action for trespassing; and the secular legal validity of an antenuptial agreement requiring that a couple raise their children Catholic. With the exception of the antenuptial agreement cases, canon law issues in the courts generally concern agency law: Is the priest the agent of the bishop? Is the monk or nun the agent of his religious order?⁹ Frequently courts turn to canon law to determine how the Catholic Church defines these relationships. On other occasions, though, courts eschew turning to canon law for the answer, and they concentrate on the day-to-day realities of the relations between a priest and his bishop or a member of a religious order and his or her order.¹⁰

In general, the courts turn to canon law to answer these questions because the parties themselves often define their relationships through canon law. Thus, on a superficial level, looking to canon law to understand how the Church explains these agency relationships sounds reasonable. In a secular context, reference to an organization's internal rules in order to define relationships within that organization would seem the most rational means of understanding the legal relationships. Unlike rules regulating relationships in a secular context, however, canon law regulates these relationships within a context which defines religious beliefs. Any intrusion on these beliefs violates the Establishment and Free Exercise clauses.

⁸ Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211, 228 (1991).

⁹ On agency relationships in religious organizations, see David Frohlich, Note, *Will Courts Make Change for a Large Denomination?: Problems of Interpretation in an Agency Analysis in which a Religious Denomination is Involved in an Ascending Liability Tort Case*, 72 IOWA L. REV. 1377 (1987).

¹⁰ The dissent in *Schuster v. Commissioner*, 800 F.2d 672, 679 (1986), identified a workable means of determining the existence of an agency relationship between a member of a religious community and the religious community. *Infra* text accompanying notes 125-34.

Thus, courts should recognize the special position of religion in American society, and not base their holdings on their interpretations of church law. Even when church law apparently concerns only secular issues, it is so intricately connected to doctrine that separation is actually impossible. Moreover, the General Counsel of the U.S. Catholic Conference, Mark E. Chopko, has noted that "Church law cannot be interpreted in the same way or by the same rules of construction as statutory law."¹¹ I argue that courts may, however, rely on church law for certain evidentiary purposes.

JUSTICE POWELL ON THE COURTS AND RELIGIOUS LAW

Justice Powell's dissent in *Jones v. Wolf*¹² represents the standard by which courts should handle religious questions:

The neutral-principles approach¹³ appears to assume that the requirements of the Constitution will be satisfied if civil courts are forbidden to consider certain types of evidence. The First Amendment's Religion clauses, however, are meant to protect churches and their members from civil law interference, not to protect the courts from having to decide difficult evidentiary questions.¹⁴

For the constitutionally necessary limitations are imposed not on the evidence to be considered but instead on the object of the inquiry. . . .¹⁵

As *Jones v. Wolf* involved an intrachurch property dispute, it is not directly relevant to the discussion of disputes between churches and secular bodies. Still, one can extrapolate some of the principles of *Jones v. Wolf* and apply them in the cases with which this paper will be concerned.

Justice Blackmun, writing for the majority, argued that courts should interpret the secular legal documents of a church according to the civil effect which these documents would have if they were viewed simply as secular documents.¹⁶ However, Justice Powell noted in his dissent that Blackmun's approach could mean ignoring the actual intent of the religious body so that if the ruling body of a church made a decision for the church, a court might overturn it based on the court's interpretation

¹¹ Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. OF TRIAL. ADVOC. 289 (1993).

¹² 443 U.S. 595 (1979).

¹³ See *infra* *Presbyterian Church v. Blue Hull Church*, 393 U.S. 440 (1969), text accompanying notes 75-81.

¹⁴ 443 U.S. at 613 n.2.

¹⁵ *Id.* at 620.

¹⁶ *Id.* at 606.

of other documents with apparent civil effect.¹⁷ Powell also recognized that “[a]ttempting to read them [constitutional documents of churches] ‘in purely secular terms’ is more likely to promote confusion than understanding.”¹⁸ In order to understand the secular meaning of church documents, courts may have to ignore or they may misread the religious import of the documents. Powell maintained that the Court should accord as much deference as possible to the decision of churches.¹⁹ In the cases of intrachurch property disputes, following Justice Blackmun’s stance could mean that a court would ignore the determination of the church itself in order to accord certain documents full effect.²⁰

I agree with Blackmun to the extent that he argues that documents, such as contracts and articles of incorporation, offer the best means of drawing conclusions about the civil legal effect of church positions in disputes between churches and secular bodies, but this note differs with Justice Blackmun’s position to the extent that he could be understood to advocate the civil legal interpretation of canon law. Although Blackmun does assert that in cases such as intrachurch property disputes, he is primarily concerned with the language creating a trust or other property interest, if his position were taken to its logical conclusion, it could lead to court interpretation of canon law.²¹ On the other hand, Justice Powell’s acceptance of church documents for their evidentiary effect rather

¹⁷ *Id.* at 613.

¹⁸ *Id.* at 612.

¹⁹ *Id.* at 614.

²⁰ The second step in Blackmun’s analysis does provide that a court acquiesce in the decision of the general church, if state law “provides that the identity of the . . . church is to be determined according to the ‘laws and regulations’ of the general church. *Id.* at 609. A state could, then, fail to recognize the general church’s authority if state law did not require such recognition, and if church documents did not provide for general church authority in language recognizable by civil courts. Powell identified a difficulty with this approach when he noted that “[i]n the present case . . . the general and unqualified authority of the Presbytery over the actions of the Vineville church had not been expressed in secular terms of control of its property. As a consequence, the Georgia courts could find no acceptable evidence of this authoritative relationship, and they imposed instead a congregational form of government determined from state law.” *Id.* at 613.

²¹ John H. Mansfield has remarked that the secular aspect of church documents is not as distinguishable from the religious aspects as Justice Blackmun seems to believe. For example, if one leaves a trust to the Roman Catholic Church in Chicago, questions may arise as to what body is the Roman Catholic Church; or if one leaves a trust to the Roman Catholic Archbishop of Chicago, a court may have to determine who is the Archbishop; or if one leaves the trust to the body under the direction of the pope, a dispute may arise over who is the pope, as it did in the case of the Avignon papacy in the fourteenth century. Symposium: *The Religion Clauses Article: The Religion Clauses of the First Amendment and the Philosophy of the Constitution* 72 CAL. L. REV. 847, 866-67.

An additional problem with this allegedly secular approach involves the doctrinal decisions which determine issues as minute as the hierarchical or congregational character of a church, which, this note argues, is as far as courts may constitutionally go in making religious determinations. Blackmun is clearly wrong in believing that any church documents can be separated from church doctrine. The *Watson* court, which gave the greatest deference to

than their dispositive effect reflects greater concern with acknowledging the sovereignty of churches over their own affairs.

According to Powell's dissent, courts may accept canon law as evidence, but they may not interpret it, nor may they identify it as their object of inquiry.²² Moreover, in cases where a representative of the Catholic Church supplies an interpretation of canon law, that interpretation is binding on the courts. Thus, any decision that concludes whether canon law does or does not create an agency relationship impermissibly intrudes on church decisions as to what correct doctrine is, and thus intrudes on the free exercise of religion. Analogously, when a civil court upholds a religious antenuptial agreement, the court creates an establishment of religion.

This argument will develop in 3 parts. Part I describes canon law, and surveys the earliest associations between canon law and American law. The final section of Part I discusses historical cases in which the Supreme Court has turned to canon law for answers. Part II reviews Supreme Court holdings on the review of religious statements primarily in intrachurch disputes. This serves as a background for a discussion of religious questions which arise outside the confines of a single church. Finally, Part III considers cases in which courts have encountered questions answerable by canon law in cases extending beyond the bounds of a single church. This final section will assert that courts can always answer these questions more easily and more fairly by examining non-canonical evidence. Most importantly, by avoiding the canonical questions, courts will avoid free exercise and establishment concerns.

I. AMERICAN LAW AND CANON LAW

As a preface to the examination of how courts in the twentieth century have handled and how they should handle questions answerable by canon law, this section will first cursorily describe canon law, in addition to church constitutions, contracts, and religious corporate charters. The second section of Part One discusses some common ground between canon law and American law. And the third section looks at a few historical cases in which the Supreme Court has found it necessary to turn to canon law.

A. CANON LAW

Unlike church constitutions, charters, and contracts, canon law is unmistakably theological in all its aspects. It represents the codification

churches, left the determination of how to act on the structure of church government. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

²² 443 U.S. at 620.

of church theology into canonical or legal language.²³ Pope John Paul II noted in his Apostolic Constitution *Sacrae Disciplinae Leges* that the promulgation of the 1983 version of the Code "is an expression of pontifical authority and therefore is invested with a *primatial character*,"²⁴ which nevertheless also reflects the pope's collegiality with his fellow bishops around the world. Furthermore, the Pope indicates that canon law has developed from Old and New Testament Law.²⁵

The 1983 version of the Code of Canon Law derives from revisions described in the conciliar²⁶ documents of Vatican II. John Alesandro asserts that the contents of the Code do not constitute "statutes or laws but exhortative or theological statements more properly classified as 'a-juridic.'"²⁷ Additionally, Alesandro maintains that in order to interpret canon law, one must understand Catholic theology, as well as the significant differences between canon law and American law.²⁸ Nevertheless, Alesandro fails to make an important distinction between canon law, church constitutions, and contract.

Carl Zollman, in his classic but dated treatise on American civil church law, does draw a distinction between the functions of church constitutions and contracts, as opposed to canon law.²⁹ He says that generally where a church is incorporated under state law "its charter, or the law under which the incorporation has been effected, is its constitution, while any other document, no matter what name may be applied to it, is but at most a by-law which must be consistent with the constitution in order to be valid."³⁰ Church constitutions for unincorporated bodies, he says, signify more than just statements from the highest body in the church; that is, a constitution is more than just a high level ecclesiastical legislative act. A constitution describes how the religious body agrees to govern itself, and this description will usually require more than an internal legislative act to bring about change. However, longstanding common practice may also develop constitutional meaning within a church.³¹

²³ Iohannes Paulus PP. II [Pope John Paul II], *Apostolic Constitution Sacrae Disciplinae Leges*, in *THE CODE OF CANON LAW: A TEXT AND COMMENTARY* xxv (James A. Coriden et al. eds., 1985). "Canonical language" in this case means that the theology is expressed as law.

²⁴ *Id.* By "primatial character," the Pope is referring to his character as pope, or primate.

²⁵ Iohannes Paulus PP. II, *supra* note 23, at xxv.

²⁶ "Conciliar" is an adjective referring to a "council," such as Vatican II.

²⁷ John Alesandro, *General Introduction*, in *THE CODE OF CANON LAW*, *supra* note 23, at 11.

²⁸ *Id.* at 12-13.

²⁹ CARL ZOLLMAN, *AMERICAN CIVIL CHURCH LAW* (1917). Apparently, no book since Zollman has treated church law as well, if at all. Still, Zollman's work suffers from more than its antiquated nature. Zollman concentrates more on American Protestant church law than on American church law in general, as Roman Catholics and Jews receive little attention.

³⁰ *Id.* at 140.

³¹ *Id.* at 140-41.

The entire Roman Catholic Church is not an incorporated body in the United States; individual bishops overseeing their dioceses are either corporations sole,³² legally autonomous of each other and the Holy See,³³ or the dioceses themselves, rather than the bishops, are religious corporations.³⁴ Thus, the charters of the individual bishops as corporations sole and the charters of the dioceses as religious corporations can and do qualify as constitutions open to judicial interpretation. Canon law, on the other hand, does not fit well under Zollman's definition of church constitutions. The Code represents high level ecclesiastical church legislation, which includes the "Hierarchical Constitution of the Church,"³⁵ a delineation of the nature and structure of the Roman Catholic church, including a definition of the government of Vatican City, which is a sovereign nation capable of sending and receiving diplomats. Accordingly, the Code defines a government capable of forming treaties with the United States, but the Code does not embody a description of a form of church government open to judicial interpretation.

Contract is another area open to judicial intervention. Zollman notes that "[t]here can be no question but that the relation, of a member to the society, so far as it can be regulated by the courts must rest on contract."³⁶ He indicates that this relationship has special significance in cases of communal religious societies, such as the Oneida Community,³⁷ as well as in cases of vows of poverty to religious communities, such as orders of priests, monks, and nuns.³⁸ Of course, churches may also contract with businesses for services. In the case of Roman Catholicism, then, contract and canon law intersect primarily in cases concerning property ownership or taxation of members of religious communities requiring vows of poverty.³⁹ However, as I note in Part III, in none of these cases must the court reach its determination in terms of canon law.

Courts should not have to turn to canon law, as long as secular documents, such as constitutions and contracts, are available for judicial interpretation. Use of the latter prevents the free exercise and

³² A corporation sole is a corporation composed of only one person, the bishop. When the bishop dies a new person, the new bishop, takes over as the corporation.

³³ The Holy See is the body which governs the geographical area known as Vatican City. It also governs the Roman Catholic Church more generally.

³⁴ Massachusetts law, for example, constitutes bishops as corporations sole, while New York religious incorporation law provides for the incorporation of the entire diocese. See LEGAL DEPARTMENT OF THE NATIONAL CATHOLIC WELFARE CONFERENCE, *MODE OF TENURE: ROMAN CATHOLIC CHURCH PROPERTY IN THE UNITED STATES* 8, 9 (n.d.), and 30, 40 (Supp. 1954). See also N.Y. RELIG. CORP. LAW §§ 91 and 92 (McKinney 1990).

³⁵ 1983 CODE CC. 330-572.

³⁶ ZOLLMAN, *supra* note 29, at 313.

³⁷ *Burt v. Oneida Community*, 137 N.Y. 346 (1893).

³⁸ ZOLLMAN, *supra* note 29, at 315.

³⁹ *Order of St. Benedict v. Steinhauer*, 234 U.S. 640 (Fed. Cir. 1986).

establishment problems which occur when courts examine canon law; it also provides courts with the most accessible and easily understood documents for determining church-related secular problems.

B. AMERICAN LAW AND CANON LAW

Despite the problems which arise when courts attempt to interpret canon law, American law does share some principles with canon law, inasmuch as American law derives to a certain extent from canon law. Harold Berman affirms that all modern Western law derives from the codification of canon law in the eleventh and twelfth centuries:⁴⁰

[A]ll the national revolutions since the sixteenth century—except the American—were directed in part against the Roman Catholic Church or, in Russia, the Orthodox Church, and all of them transferred large portions of the transnational canon law from the church to the national state.⁴¹

Despite Berman's exception of the American revolution from his assembly of anti-church revolutions, America did like other revolutionary countries derive its law from canon law, since American law comes from England, which Berman does include among these national revolutions.⁴²

Additionally, Berman argues that canon law even forms the basis of some modern secular law. He notes that "[p]rior to the sixteenth century," ecclesiastical courts in England, "which had a wide jurisdiction over contract disputes involving not only clerics but also laymen, applied the canon law of the Roman Church."⁴³ Moreover, he relates that during the twelfth and thirteenth centuries, civil contracts often contained provisions that, in case a dispute develops over the contract, the contract conflict should go before an ecclesiastic court rather than a secular court, "[b]ecause of the primitive character of most secular procedure."⁴⁴ Berman describes the significant development of English contract law

⁴⁰ Berman asserts that canon law resulted from two eleventh century developments: first, in response to the Investiture Crisis of 1075-1122 in which Pope Gregory VII asserted supreme authority over secular rulers; and second the discovery of Justinian law. HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 39, 42, 267-68 (1993) [hereinafter *BERMAN, FAITH AND ORDER*]; and BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 2-4, 204 (1983) [hereinafter *BERMAN, LAW AND REVOLUTION*].

⁴¹ BERMAN, *FAITH AND ORDER*, *supra* note 40, at 29, and BERMAN, *LAW AND REVOLUTION*, *supra* note 40, at 24.

⁴² BERMAN, *LAW AND REVOLUTION*, *supra* note 40, at 24. *See also* Alesandro, *supra* note 27, at 11, where Alesandro asserts that "[c]anon law has had its own impact on civil law. This can be seen in both the legal systems of continental Europe and the common law tradition."

⁴³ BERMAN, *FAITH AND ORDER*, *supra* note 40, at 196.

⁴⁴ BERMAN, *LAW AND REVOLUTION*, *supra* note 40, at 223.

after England's break with Rome, but he says that the canon law understanding of contract continued to inform English law, despite the addition of Puritan understandings of the covenant to legal conceptions of contract.⁴⁵ Finally, he indicates that American laws on trusts and estates,⁴⁶ corporations,⁴⁷ and marriage⁴⁸ continue to show signs in the twentieth century of their canon law backgrounds.

Meanwhile, Alesandro emphasizes that canon law is thoroughly grounded in theology.⁴⁹ This theological grounding, however, served both secular and ecclesiastical needs in medieval Europe. Although the European nations created two distinct secular and ecclesiastical jurisdictions, ecclesiastical jurisdiction was so encompassing that all issues involving clergy and concerns of the church came under its jurisdiction. Many of the issues involving clergy, as well as many of the concerns of the church, including inheritance, property, contract "(on the foundation of pledges of faith), and criminal and tort law (on the foundation of jurisdiction over sins)"⁵⁰ would strike modern Americans as secular issues.

C. THE SUPREME COURT'S CANON LAW DECISIONS

The extensiveness of European ecclesiastical jurisdiction provided the basis for canonical influence on the only canon law cases to reach the Supreme Court. These cases reached American courts as a result of American conquests of Spanish North America colonies. Two of the cases involved questions of the legitimacy of marriages and the place of the ecclesiastical courts in determining such a question, and one of the cases involved the problem of ownership of church land. Despite the applicability of ecclesiastical law to these issues, the Supreme Court did not base its holdings on canon law. In fact, it concentrated on the evidentiary value of canon law, rather than on interpretations of canon law, which accords with Powell's perspective in his dissent in *Jones v. Wolf*.⁵¹ One could easily argue, nonetheless, that Powell's caution on the use of church law applies less forcefully in these cases in which ecclesiastical law served a secular purpose. In the cases of the former Spanish North American colonies, the Supreme Court did not avoid canon law from fear of creating a First Amendment entanglement, since canon law would have provided a reasonable secular legal basis for decisions based on conflicts of law. The Court's adherence to such a standard even under

⁴⁵ BERMAN, FAITH AND ORDER, *supra* note 40, at 196-205.

⁴⁶ BERMAN, LAW AND REVOLUTION, *supra* note 40, at 234-36.

⁴⁷ *Id.* at 239.

⁴⁸ *Id.* at 227.

⁴⁹ Alesandro, *supra* note 27, at 11.

⁵⁰ BERMAN, LAW AND REVOLUTION, *supra* note 40, at 223.

⁵¹ 443 U.S. 595 (1979).

these conditions, however, speaks still more forcefully in favor of Powell's position.

The first of these cases, *Hallett v. Collins*,⁵² concerned ownership of a plot of land in Alabama. In order to decide that question, though, the Supreme Court had to determine the legitimacy of a marriage entered into when Alabama was under Spanish rule. Spanish law granted jurisdiction over marriage to the ecclesiastical courts. Thus, the Supreme Court referred to the statement by the Council of Trent⁵³ that "marriage not celebrated before the parish or other priest, or by license of the ordinary [bishop] and before two or three witnesses" was invalid.⁵⁴ Thus, the Court considered whether a marriage contracted in Alabama under Spanish rule was valid, despite the absence of a priest at the marriage. The Court noted that the King of Spain did not extend this Tridentine ruling to the Spanish colonies, and consequently, that "general law of Europe antecedent to the council" remained in effect in the colonies.⁵⁵ Hence, despite the absence of a priest, the marriage was valid.

Ten years later, *Gaines v. Hennen*⁵⁶ came to the Supreme Court from New Orleans; it involved several inheritance questions which separately reached the Supreme Court six times.⁵⁷ The sixth time the case reached the Court, it considered the question of Mrs. Myra Gaines' legitimacy. Before Mrs. Gaines' mother, Zulime, had married Mrs. Gaines' father, Daniel Clark, Zulime had been married to Jerome Des Grange, who was believed to be a bigamist. If Mr. Des Grange were a bigamist, then his marriage to Zulime was invalid; the marriage between the Clarks would be valid; and Mrs. Gaines would be legitimate. But if Mr. Des Grange was not a bigamist, then his marriage to Zulime would be valid; Zulime's marriage to Daniel Clark would be invalid; and Mrs. Gaines' would be illegitimate. In a lower court proceeding, evidence was presented that an ecclesiastical court in New Orleans (then under Spanish colonial rule) had found Mr. Des Grange guilty of bigamy. Thus, the Supreme Court considered at great length the validity of such an ecclesiastical conclusion under applicable Spanish law and canon law. After considering the then recent history of the interrelationship between canon law and Spanish secular law, the Supreme Court concluded that Spain

⁵² 51 U.S. (10 How.) 174 (1850).

⁵³ The Catholic Church defined its doctrine in response to the theological challenges of the Protestant Reformation with the Council of Trent (1543-65). The adjective referring to the Council of Trent is "Tridentine."

⁵⁴ 51 U.S. at 181.

⁵⁵ *Id.* at 182.

⁵⁶ 65 U.S. (24 How.) 553 (1860).

⁵⁷ The Court noted that "[w]hen hereafter some distinguished American lawyer shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of the court." *Id.* at 615.

had restrained ecclesiastical courts from making decisions regarding polygamous marriages, and thus that the church court's determination of Mr. Des Grange's bigamy could not be considered a binding legal determination.⁵⁸

The third Supreme Court case touching on canon law entailed a less involved examination of canon law. *Beard v. Federy*⁵⁹ involved the ownership of church land which had been under Mexican rule before the Mexican-American War. The plaintiffs asserted that Governor Pio Pico had granted them the land, while Bishop Alemany of Monterey contended that the land belonged to the church which had held it for fifty years. However, the church held no deed to the land. The issue was, thus, whether Mexican law allowed the church to use the land without granting ownership to the church, or whether Mexican law simply did not require the church to hold a deed for the land. The Court noted that:

the canon law of the Roman Catholic Church was in force as the law of Mexico, as it had been previously of Spain when Mexico was a dependency thereof, in all things relating to the acquisition, transmission, use, and disposition of property, real and personal, belonging to the church or devoted to religious uses; that by the laws of Spain and Mexico, it was not necessary that a grant of land for ecclesiastical or church purposes should appear by deed or writing, public or private, but that the right of the church to such property was always recognized as regulated by canon law.⁶⁰

Accordingly, the court recognized canon law as the applicable decisional law. Nevertheless, the court held without discussing canon law that, since the church had previously requested from the United States timely recognition of the church's ownership of the land under Mexican law, the question of the ownership of the land had already been conclusively decided in the church's favor.⁶¹

Additionally, in two twentieth century cases, the Supreme Court recognized the validity of the Treaty of Paris of 1898 by which the United States agreed to continue to recognize Spanish law regarding the Catholic Church in the insular possessions, such as Puerto Rico and the Phillippines. In *Ponce v. Roman Catholic Apostolic Church In Porto Rico*,⁶² a property dispute between the Catholic Church and the city of Ponce, the Court did not directly face a question of applicability of canon

⁵⁸ *Id.* at 587.

⁵⁹ 70 U.S. (3 Wall.) 478 (1865).

⁶⁰ *Id.* at 488.

⁶¹ *Id.* at 490-91.

⁶² 210 U.S. 296 (1908).

law. However, it did face the problem of transfer of ecclesiastical property from a government recognizing a union of church and state to a government "prevented from having such associations with any church."⁶³ The Court held that, given the Treaty and the change in the government, the Catholic Church was entitled to keep land which the city of Ponce claimed for itself.⁶⁴

This recognition of the character of the Treaty served as precedent in a case in which the Supreme Court relied on canon law probably more heavily than any other. *Gonzalez v. Roman Catholic Archbishop of Manila*⁶⁵ involved a question of the validity of the inheritance of a chaplaincy by a boy who did not meet the legal canonical age and educational requirements. The Court accepted the archbishop's interpretation of canon law, which prevented the boy from receiving the chaplaincy, and the Court deferred to the Church's prerogative to make its own determinations of correct doctrine.⁶⁶ This deference to churches in their doctrinal determinations is developed further in Part II of the paper. What makes *Gonzalez* different from the previous cases, and different from the canon law cases in Part III is that *Gonzalez* and the cases in Part II all involve questions of intrachurch disputes. The Supreme Court has not explicitly defined how courts should deal with questions of canon law when these questions do not involve intrachurch disputes or conflict of laws questions stemming from the annexation of Spanish colonies.

In the cases concerning canon law which have come before the Supreme Court, the Supreme Court has not avoided canon law, and has recognized its applicability. However, the Court reached holdings in these cases which allowed canon law as evidence,⁶⁷ but which did not involve interpretations of canon law. Although the Court has not prohibited considerations of canon law in cases more intimately touching on church matters, the failure of the Court to interpret canon law, even in these cases, makes questionable lower courts' efforts to interpret canon law. This dubious applicability of canon law becomes more evident

⁶³ *Id.* at 322.

⁶⁴ *Id.* at 318.

⁶⁵ 280 U.S. 1 (1929).

⁶⁶ *Id.* at 17.

⁶⁷ The Supreme Court has also discussed canon law in some secular cases. In *Roe v. Wade*, 410 U.S. 959 (1973), Justice Blackmun, in summarizing the legal history of abortion, noted the position of canon law on abortion, and the fact that in England, abortion originally came under the heading of an ecclesiastical or canon law crime. *Id.* at 133, 134, 136. The Court has also made use of canon law as historical background in property cases. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 68 (1972). Finally, in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947), Justice Rutledge, dissenting from the Court's decision to allow municipally-funded bus transportation for Catholic school children, quoted from canon law to argue that the Catholic Church regards Catholic school education as a thoroughly religious enterprise. *Id.* at 22.

from the Court's holdings in cases of intrachurch disputes, discussed in the next part.

II. DOCTRINAL QUESTIONS AND THE COURTS

This section covers the progression of Supreme Court jurisprudence in intrachurch property disputes. Intrachurch property disputes, which have reached the Supreme Court, have led to a substantial body of law on how courts should handle church property disputes between members of a church who have separated because of doctrinal differences. These disputes give us some idea of how the Court believes lower courts should handle questions answerable by church law or church doctrine. Thus, they serve as background for Part III's discussion of how courts should handle doctrinal or canonical questions which arise outside the bounds of a single church.

The Court's policy on these disputes has become complex, since the first intrachurch dispute it heard in *Watson v. Jones*⁶⁸ in 1872. *Jones v. Wolf* appears last in this section, and represents the complication of the Court's simple principle for dealing with these disputes first enunciated in *Watson v. Jones*. Each of these cases presents the problem of how far the courts can go in resolving religious property disputes without interfering with religious freedom.

In *Watson* the Supreme Court defined for the first time how courts should handle intrachurch disputes. In 1865, the General Assembly of the Presbyterian Church decreed that any Southerner seeking to become a missionary, a member, or a minister of a Presbyterian church who had maintained during the War that slavery was a divine institution "should be required to repent and forsake these sins before they could be received."⁶⁹ When the Walnut Street Church divided over this issue; one side joined the General Assembly of the Confederate States, while the other remained with the General Assembly of the United States. These two groups then began a dispute over the ownership of the land.

In deciding this case, the Court made a distinction between forms of church government, which, the Court said, would determine the stance a court should take with internal church disputes. With hierarchical churches, such as the Presbyterian church—and the Roman Catholic Church in *Gonzalez*, courts must accept the judgment of the highest church body which has given a judgment in the case. However, with congregational or independent churches, such as Baptist and Pentecostal churches, courts must accept either the judgment of the majority within the church, or whatever other means the church has provided for

⁶⁸ 80 U.S. (13 Wall.) 679 (1871).

⁶⁹ *Id.* at 691.

settling disputes. In either case, courts must not substitute their own beliefs and judgments for the churches' judgments. In the case of both kinds of church polities, the members of the churches had joined the churches recognizing that the church would resolve its disputes, according to its internal form of government.⁷⁰

The Court refined its position for dealing with intrachurch disputes in five subsequent cases. *Kedroff v. St. Nicholas Cathedral*⁷¹ resulted from the New York State legislature's resolution to remove the Moscow patriarch from control over the Russian Orthodox New York cathedral, in order to grant control of the cathedral to an archbishop elected by the American Russian Orthodox community. The New York legislature believed that it was acting for reasonable political reasons, since it was attempting to avoid the Soviet-influenced patriarch from exercising control over property in New York.⁷² The Supreme Court, however, viewed this as an intrachurch property dispute analogous to *Watson*:

[T]he authority of courts is in strict subordination to the ecclesiastical law of a particular church prior to schism This very limited right of resort to courts for determination of claims, civil in their nature, between rival parties among the communicants of a religious faith is merely one aspect of the duty of courts to enforce the rights of members in an association, temporal or religious, according to the laws of the association.⁷³

Although this holding accords with the *Watson* reasoning, as well as the *Gonzalez* holding, that the will of the highest authority of a hierarchical church—here the Moscow patriarch—is binding on the courts, the *Kedroff* court went further by applying the Free Exercise Clause to the states through the Fourteenth Amendment for the first time.⁷⁴

⁷⁰ *Watson* was not decided on First Amendment grounds, nor was it decided based on Kentucky law (the location of the church). *Watson* preceded an application of the First Amendment to the states through the Fourteenth Amendment. The Supreme Court incorporated the Free Exercise Clause into the Fourteenth Amendment in 1952 in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); and it incorporated the Establishment Clause in 1947 with *Everson v. Board of Education*, 330 U.S. 1 (1947).

Watson also preceded *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), which would have required the Court to apply Kentucky law in this case. The Court based its holding on federal common law, or "general rules as to the limited role which civil courts must have in settling private intraorganizational disputes." For a discussion of this, see *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976).

⁷¹ 344 U.S. 94 (1952).

⁷² 344 U.S. at 108.

⁷³ *Id.* at 122.

⁷⁴ *Id.* at 107.

In 1969, in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,⁷⁵ the Court articulated its "neutral principles of law" formula for dealing with intrachurch disputes. The facts in *Presbyterian Church* resemble those in *Watson*. A Presbyterian church in Georgia split into one minority faction which supported the General Assembly under which the church had originally functioned, and one majority faction which wanted to follow another General Assembly. Like *Watson*, this case developed as a dispute between two factions, but unlike *Watson*, *Presbyterian Church* resulted from the original General Assembly suing the majority faction for the use of the church. By contrast, in *Watson*, the dispute never went beyond the congregation. More significantly, this case differs from *Watson*, because of Georgia's statutory effort to decide intrachurch disputes. At the time the *Presbyterian Church* dispute arose, Georgia law "implie[d] a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches."⁷⁶

The Supreme Court struck down the Georgia rule, and held that a determination whether a general church continues to adhere to the original tenets "existing at the time of affiliation," would involve an impermissible intrusion into a church's determination of its own doctrine.⁷⁷ A court cannot really say whether a doctrine is in substance the same or different. Georgia may decide property disputes solely on the basis of what the Court called "neutral principles of law."⁷⁸ Justice Brennan explained that this principle requires that "[s]tates, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."⁷⁹ This principle clearly prohibits secular determination of ecclesiastical questions whether the questions turn on internal property disputes or not, as Justice Brennan also noted that "[s]pecial problems arise . . . when these disputes implicate controversies over church doctrine and practice."⁸⁰ The Court ignored the fact that churches are unlikely to split over anything but questions of "church doctrine and practice." Thus, the neutral principles approach was bound to create difficulty in its application.

⁷⁵ 393 U.S. 440 (1969).

⁷⁶ *Id.* at 443.

⁷⁷ *Id.* at 449.

⁷⁸ *Id.* at 448.

⁷⁹ *Id.* at 449.

⁸⁰ *Id.* at 445. One year after *Presbyterian Church*, Justice Brennan reiterated his position against court interference in any doctrinal questions in his concurrence to the denial of certiorari in *Maryland and Virginia Eldership of the Churches of God v. Church of God of Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

Nevertheless, in reaching its holding, the Court did reiterate in dicta a principle from *Gonzalez* which has never achieved acceptance:

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.⁸¹

However, the Court indicated in *United State v. Ballard*⁸² that courts face possibly insurmountable difficulties if they try to determine whether a religious activity constitutes fraud. To do so may involve placing the truth of a religion before a jury. Hence, the most that a court can do is to determine whether a belief is sincerely held.

One year later, the Court dismissed an appeal in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg* for lack of a substantial federal question, as the Maryland Court of Appeals had avoided a religious question and decided the issue based on state law.⁸³ In a concurrence to the dismissal of the appeal, Justice Brennan stated that religious freedom could be inhibited if "church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."⁸⁴ Additionally, he asserted that:

Under *Watson* civil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determinations of religious doctrine. Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy. In other words, the use of the *Watson* approach is consonant with the prohibi-

⁸¹ *Id.* at 447 (quoting *Gonzalez*, 280 U.S. at 16).

⁸² 322 U.S. 78 (1944).

⁸³ 396 U.S. 367 (1970).

⁸⁴ *Id.* at 368. Justices Douglas and Marshall joined in Justice Brennan's concurrence.

tions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.⁸⁵

Thus, in 1970 four justices denied that a civil court could make any determinations requiring reference to church law.

In 1976, *Serbian Eastern Orthodox Diocese v. Milivojevich*⁸⁶ followed *Presbyterian Church* in the line of Supreme Court decisions concerning intrachurch disputes. Like *Kedroff*, this case concerned a dispute over diocesan control in an Eastern Orthodox denomination. After the Holy Synod of the Church removed and defrocked Bishop Dionisije Milivojevich, it replaced him with Bishop Firmilian Ocokoljich. The Holy Synod then split the diocese into three dioceses. Dionisije sued to have himself declared bishop of the undivided diocese. The Supreme Court of Illinois "held that the proceedings of the Mother Church respecting Dionisije were procedurally and substantively defective under the internal regulations of the Mother Church and were therefore arbitrary and invalid."⁸⁷ The Supreme Court held invalid both this determination and the Illinois court's conclusion that the diocese could not be split. Justice Brennan writing for the majority argued that

[T]he Illinois Supreme Court relied on purported 'neutral principles' for resolving property disputes which would 'not in any way entangle this court in the determination of theological or doctrinal matters.' . . . 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 this interpretation. This the First and Fourteenth Amendments forbid. [Citations omitted.]

We will not delve into the various church constitutional provisions relevant to this conclusion, for that would repeat the error of the Illinois Supreme Court.⁸⁸

Whether corporate bylaws or other documents governing the individual property-holding corporations may affect any desired disposition of the Diocesan property is a question not before us.⁸⁹

⁸⁵ *Id.* at 368.

⁸⁶ 426 U.S. 696 (1976).

⁸⁷ *Id.* at 697.

⁸⁸ *Id.* at 721.

⁸⁹ *Id.* at 724.

Justice Rehnquist in his dissent foresaw what it would mean for such a question to come up, as it did later in *Jones*. He commented that "the Illinois courts sought to answer [the question presented by both respondents and petitioner] by application of the canon law of the church, just as they would have attempted to decide a similar dispute among the members of any voluntary association."⁹⁰ Rehnquist viewed this as inevitable "[u]nless civil courts are to be wholly divested of authority to resolve conflicting claims to real property owned by a hierarchical church."⁹¹ He noted further that "[s]uch reasons will obviously be based on the canon law by which the disputants have agreed to bind themselves, but they also must represent a preference for one view of that law over another."⁹² Thus, he believed the Court should ignore *Watson* and permit courts to interpret church law. Rehnquist argued that *Watson* could not serve as precedent for interpreting the First Amendment, since *Watson* was decided according to federal common law prior to *Erie Railroad Co. v. Tompkins*.⁹³ Still, Rehnquist was dissenting. The majority did not overrule *Watson*.

*Jones v. Wolf*⁹⁴ in 1979 was the last of the intrachurch property disputes. Rather than making the Court's earlier position clearer, *Jones* complicated the Court's stance on the correct attitude which civil courts should take when confronted with religious questions. Like *Presbyterian Church*, *Jones* concerned the application of Georgia law to an intrachurch property dispute. This time the dispute arose as a result of a schism within the church. A majority of the Vineville Presbyterian Church of Macon, Georgia voted to separate from the presbyterian polity known as the Presbyterian Church in the United States. The presbytery of the PCUS under which the church had been governed concluded that the minority who remained loyal to the PCUS "constituted the true congregation of Vineville Presbyterian Church."⁹⁵ The minority then brought suit to remove the majority from the church property. The Georgia court found in favor of the majority, after applying what it believed to be "neutral principles."

When the case reached the Supreme Court, Justice Blackmun framed the issue as a question "whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical

⁹⁰ *Id.* at 726.

⁹¹ *Id.*

⁹² *Id.* at 726-27.

⁹³ *Id.* at 727.

⁹⁴ 443 U.S. 595 (1979).

⁹⁵ *Id.* at 598.

church.”⁹⁶ He concluded that neutral principles of law are an acceptable means of resolving a property dispute in cases where documents indicate that the property is held in trust for the general church.⁹⁷ If it is not, then the property will remain with the local church. But in cases of a schism, as in this case, the court will either allow a presumption in favor of the majority; or in cases where determining the correct identity of the controlling group in the local church requires an understanding of religious doctrine, the court will decide in favor of the decision of the larger ruling body of the church, which in this case is the presbytery which granted the church property to the minority.

Justice Blackmun acknowledged that “the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.”⁹⁸ Moreover, in expanding upon this, he quoted Justice Brennan’s concurrence in *Maryland & Virginia Churches* for the proposition that the Court could adopt “one of various approaches . . . so long as it involved no consideration of doctrinal matters whether the ritual and liturgy of worship or the tenets of faith.”⁹⁹ Blackmun used this assertion to conclude that courts could examine religious documents, as long as the examination would not place the courts in a position to “resolve a religious controversy.”¹⁰⁰ Unfortunately, such a conclusion misses the point that Justice Brennan was making. His full statement, which Blackmun omits, makes this clear:

Under *Watson* civil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. Such a determination, unlike the determination of the governing body, frequently necessitates the interpretation of ambiguous law and usage. To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil law determinations of religious doctrine.¹⁰¹

Thus, the full quotation from which Blackmun cites actually contradicts his position. According to Brennan, courts cannot even examine church doctrine to determine who rules the church. Blackmun ignored the fact

⁹⁶ *Id.* at 597.

⁹⁷ *Id.* at 603.

⁹⁸ *Id.* at 602.

⁹⁹ *Id.* (quoting Brennan, J., concurring in *Maryland & Virginia Churches*, 396 U.S. at 368.)

¹⁰⁰ *Id.* at 604.

¹⁰¹ 396 U.S. at 368.

that no question regarding a church's polity can avoid "consideration of doctrinal matters."¹⁰² Admittedly, Justice Blackmun recognized that

In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. . . . If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.¹⁰³

This position overlooks the connection between doctrine and religious law.

Nevertheless, Justice Blackmun contended that Justice Powell in dissent did not avoid this problem, as Justice Powell's approach would require a court to examine the documents of a church to determine whether its polity is congregational or hierarchical. Clearly, Powell's approach would involve much less of an inquiry into a religion's documents than would Justice Blackmun's approach. Additionally, the form of polity may be determined from the manner in which the denomination actually conducts its affairs between congregations within the denomination.¹⁰⁴ Finally, although Justice Blackmun's approach appears to give deference to the church, his willingness to allow the courts to examine church documents at all provides too much opportunity for intrusion into a church's doctrine as expressed in its law.

¹⁰² See *supra*, discussion of *Presbyterian Church v. Blue Hull Church*, 393 U.S. 440 (1969), text accompanying notes 75-81.

¹⁰³ 443 U.S. at 604.

¹⁰⁴ Frohlich, *supra* note 9, overstates the matter and he provides no support for his assumptions, when he asserts:

The three principal categories of polity are congregational, hierarchical, and presbyterial. *Watson* reduced these to two, placing the presbyterial form within the hierarchical category. The actual multiplicity of forms and the cryptic nature of much ecclesiastical law have presented analytical problems for courts. These problems have been compounded by the simplified dichotomy of *Watson's* categories.

Id. at 1381-82. The dichotomy is reasonable. Although a presbyterian polity shares characteristics of both congregational and hierarchical churches, presbyterian churches are in fact essentially hierarchical. This categorization is by no means an oversimplification. In fact, the "cryptic nature of much of ecclesiastical law," is exactly why courts should avoid interpreting it. Much of Frohlich's note concerns a discussion of how courts can interpret religious documents reasonably. I contend that any judicial interpretation of a religious document is unreasonable. See also Mark E. Chopko, *supra* note 11, at 346, who, citing Frohlich, notes that "Church law cannot be interpreted in the same way or by the same rules of construction as statutory law."

Justice Powell recognized the problems with Justice Blackmun's approach. As noted in the Introduction, Powell acknowledges that Justice Blackmun's two-step evidentiary approach denies:

to the courts relevant evidence as to the religious polity—that is, the form of governance—adopted by the church members. The constitutional documents of churches tend to be drawn in terms of religious precepts. Attempting to read them 'in purely secular terms' is more likely to promote confusion than understanding. Moreover, whenever religious polity has not been expressed in specific statements referring to the property of a church, there will be no evidence cognizable under the neutral-principles rule. Lacking such evidence, presumably a court will impose some rule of church government derived from state law.¹⁰⁵

Powell notes further that the First Amendment is not meant as a rule to exclude certain forms of evidence, but as a rule to avoid interference in religious affairs.¹⁰⁶ Thus, he remains loyal to *Watson*.

Jones has left the Court's position on judicial interpretation of canon law confused. Justice Blackmun's position does not necessarily disallow turning to canon law, since many of the canons appear as secular statements not doctrinal statements. Faced with the difficulty of winnowing out a secular statement from a religious document, lower courts really have no clear guidance on how to handle difficult intrachurch disputes. The Supreme Court has not plainly delineated the extent to which courts may examine and interpret church documents. Justice Powell's position probably expresses most accurately the stance which the Court should have taken based on its precedent. Church law is off limits to courts. Any interpretation of church law constitutes an intrusion into the freedom of the church.

In the following section, the paper will review the ways in which courts encounter questions apparently answerable by canon law. Consistent with Justice Powell's dissent, I will argue that courts should avoid the canon law question, and use canon law not as an object of inquiry, but as an evidentiary source for understanding the context of the question. Justice Powell's dissent would require deference and respect for the distinctiveness of the religious statement, and, I believe, would recognize the value of turning only to secular statements and actions in secular controversies with religious bodies.

¹⁰⁵ *Id.* at 612.

¹⁰⁶ *Id.* at 613 n.2.

III. CANON LAW AND THE COURTS

Questions of canon law can reach the courts in numerous ways. The cases which follow involve questions such as ownership of a deceased monk's property when that monk has taken a vow of poverty; a bishop's vicarious liability for a priest's tortious actions; necessity of payment of federal income taxes when the priest or nun employee has taken a vow of poverty; ownership of church property in an action for trespassing; and the secular legal validity of an antenuptial agreement requiring that a couple raise their children Catholic. As noted in the introduction, these questions frequently involve agency questions: Is the priest or the member of the religious order the agent of the bishop or the head of the religious order; or is the priest or the member of the religious order merely acting for himself? In the course of reviewing these cases, this section argues that courts act correctly when they refuse to resolve these questions by reference to canon law. In each of these cases the agency relationship is ascertainable by examination of the daily affairs of the priest or member of the religious order.¹⁰⁷ Generally, in cases in which courts answer the agency question by interpreting canon law, courts intrude on the free exercise of religion by defining the government's position on a theological statement. When this section discusses civil courts and religious antenuptial agreements, it argues that civil enforcement results in an establishment of religion.

The Supreme Court has never confronted directly the problem of questions answerable by canon law. The closest it has come to such a problem arose in 1914 in *Order of St. Benedict v. Steinhauser*¹⁰⁸ in which the Court happily concluded that it would not have to examine the issue according to the canon law description of religious community life. In reality, though, the Court did need to refer to religious law in order to come to a decision. The case involved ownership of royalties from books written by a monk in the Order of St. Benedict. In 1852, Father Augustin Wirth joined the Order of St. Benedict, a Roman Catholic order founded by St. Benedict in sixth century Italy. As a normal part of entry into the Order, Father Wirth took vows of obedience, stability, chastity and poverty. Father Wirth, who lived for awhile in Elizabeth, New Jersey belonged to the branch of the Order of St. Benedict, which had received a charter of incorporation from the State of New Jersey, and which was the branch suing Albert Steinhauser to whom Father Wirth had apparently devised his royalties in certain copyrights. The Order maintained that since Father Wirth had taken a vow of poverty, his property was not his to dispose of as he wished.

¹⁰⁷ The dissent in *Schuster v. Commissioner*, 800 F.2d 672 (7th Cir. 1986), did this successfully.

¹⁰⁸ 234 U.S. 640.

Chief Justice Hughes agreed with the order. He concluded that under the state charter, the Order did have a prior claim on the royalties. He held that Father Wirth's property belonged to the corporation to which he had taken a vow of poverty, because he had taken that vow in accordance with the state charter, and because neither Father Wirth nor the corporation had ever severed the relationship which gave rise to the vow of poverty.¹⁰⁹ In other words, as an agent of the corporation for whom he had taken a vow of poverty, Father Wirth held property for the benefit of the corporation. Normally, however, agents do not hold their own personal income for a principal. Thus, Justice Hughes argued that the Order had not infringed Father Wirth's civil rights by putting him in a position of "complete servitude" for the Order or by denying him the right to "acquire and hold property," since Father Wirth could leave at any time according to the constitution of the Order.¹¹⁰

At first glance, the case appears as a simple issue of following a corporation's state charter. But this case is actually an indication of the problems that could arise under Justice Blackmun's approach described in *Jones*. Justice Hughes does rely on a secular document to make his determination, but he also turns to the constitution of the Order as well as the Rule of St. Benedict to understand the charter, and in doing so, he subordinates the religious law to the secular law:

It [respondent's argument of denial of civil rights] overlooks the distinction between civil and ecclesiastical rights and duties; between the Order of St. Benedict of New Jersey, a corporation of the State, and the monastic brotherhood subject to church authority; between the obligation imposed by the corporate organization and the religious vows. As we have said, the question here is not one of canon law or ecclesiastical polity. The requirement of complainant's constitution must be read according to its terms and validity must be thus determined. Granted that it is to be examined in the light of that to which it refers, still, obligations which are inconsistent with its express provisions cannot be imported into it. Granted that it is to be examined in the light of that to which it refers, still, obligations which are inconsistent with its express provisions cannot be imported into it.¹¹¹

¹⁰⁹ *Id.* at 647.

¹¹⁰ *Id.* at 647-48.

¹¹¹ *Id.* at 648.

Justice Hughes relies on secular legal documents to make his determination. However, he finds that he must turn to the Rule and the constitution in order to define what the legal terms are supposed to mean. The Rule and the constitution give a meaning to the charter which corporations do not usually have. Although one could argue that Justice Hughes merely uses the ecclesiastical constitution and the Rule as evidence, as Justice Powell recommended sixty-five years later, what Justice Hughes actually did was to subordinate the religious law to its civil legal expression. Additionally, Justice Hughes refers to the Rule in order to argue that, although Father Wirth may appear to have had free use of his own property (in contradiction of his vow of poverty) Father Wirth's permission for the use of the money was limited to charitable purposes, and thus suitable for the purposes of the principal.

Examining Father Wirth's position from the perspective of his day to day relationship with the Order provides a superior method of dealing with questions like this one. One could argue that contrary to Justice Hughes' argument, Father Wirth's devising of the income from his copyrights to a person outside the Order of St. Benedict indicates that Father Wirth viewed the money as his own and not the Order's. This method of looking at the secular realities divorced from religious law would allow courts to avoid pretending that they are not intruding on religious law, when in fact they are actually using it to arrive at a determination of a legal relationship. Thus, courts could look at a religious body's actual relationship with its "agent," rather than the relationship as defined by religious law. In this case, the Order probably would have lost its case against Steinhauser, since Wirth clearly believed that the Order was not granting him the use of his income for charitable purposes, but as his own personal property, which he could devise to Steinhauser.

Religious freedom in general would be more secure under this approach, as religions would not be subject to the interference of courts interpreting their religious laws. Under Justice Powell's approach the Court could recognize as a fact that Father Wirth had agreed to give all of his property to the Order, but the Court would not be able to interpret the legal meaning of the agreement by reference to religious law.¹¹² This case would not, however, allow for deference to the hierarchical authority of the religious body, as this was not an intrachurch property dispute.

¹¹² Justice Powell's approach is essentially an affirmation of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *Watson* states that "When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right and no more, taking the ecclesiastical decisions out of which the civil right arises, as it finds them." 13 Wall. at 731. Here the *Watson* court was actually quoting *Harmon v. Dreher*, 17 S. C. Eq. (Speers Eq.) 87 (1843), a South Carolina case. Nevertheless, this statement contradicts Justice Hughes' reliance on ecclesiastical law.

The issues of the civil legal effect of vows of poverty and the agent-principal relationship between a religious order and its members arose again in 1986 in *Fogarty v. United States*¹¹³ and in *Schuster v. Commissioner of Internal Revenue*.¹¹⁴ Although I will discuss *Fogarty* first, since the *Schuster* court cited *Fogarty* as precedent, the dissent in *Schuster* employs a desirable method concentrating on day-to-day realities for ascertaining the validity of a vow of poverty. The cases have largely identical fact patterns. Before Father Gerald Fogarty, a member of the Society of Jesus (the Jesuits), began teaching in the Department of Religious Studies at the University of Virginia in 1977, he sought and received permission from the provincial head of his Order to teach at the state school. Like Father Wirth, Father Fogarty had taken vows of poverty, chastity, and obedience to his Order, and he, thus, required the permission of his Order in order to accept the position. As Fogarty's vow of poverty prevented him from owning any property, he and the Order opened a joint checking account into which Fogarty deposited his University of Virginia paychecks which he signed over to the Order. In turn, the Order provided him with living expenses. Fogarty paid no federal income tax on this income, as he and the Order believed the income was not taxable based on the IRS's previous practices, and based on a letter from the Commissioner of Internal Revenue to the U.S. Catholic Conference.

Fogarty's lawyer's brief referred to the IRS's "60-year administrative practice," first codified in O.D. 119, 1 C.B. 82 (1919), and reinforced in Rev. Rul. 68-123, 1968-1 C.B. 35.¹¹⁵ The brief quoted from O.D. 119: "*Members of religious orders are subject to tax upon taxable income, if any, received by them individually, but are not subject to tax on income received by them merely as agents of the order of which they are members.*"¹¹⁶ The brief then noted that the 1968 Revenue Ruling made similar provisions.¹¹⁷ An amicus brief from Fathers Valens J. Waldschmidt and Jerome G. Kircher, who were plaintiffs in similar actions then pending in the United State Claims Court, noted that the IRS

¹¹³ 780 F.2d 1005 (Fed. Cir. 1986).

¹¹⁴ 800 F.2d 672 (7th Cir. 1986). See also, Bridget R. O'Neil, Note, *Schuster v. Commissioner: An Appropriate Agency Test for Members of Religious Orders Working Under Vows of Poverty?* 1988 WIS. L. REV. 111 (1988), and Francine M. Corcoran, Comment, *Seventh Circuit's Taxation of Members of Religious Orders—A Change of Habit*, 31 CATH. LAW. 62 (1987).

¹¹⁵ Brief for Father Gerald P. Fogarty at 16, *Fogarty v. United States*, 780 F.2d 1005 (Fed. Cir. 1986) (No. 85-1218).

¹¹⁶ *Id.* (emphasis in quotation in brief, but not in O.D. 119.) Sister Francine Schuster's lawyers cited an identical statement from Rev. Rul. 77-290, 1977-2 (C.B.) 26. See O'Neil, *supra* note 114, at 111 n.3. Of course, the question for the Federal Circuit in *Fogarty* and the Seventh Circuit in *Schuster* is whether an agency relationship actually exists.

¹¹⁷ Brief for Fogarty, *supra* note 115, at 16.

had provided the U.S. Catholic Conference with a letter affirming the continued vitality of O.D. 119.¹¹⁸ However, by the late 1970s the IRS had different concerns than it had when it passed and later sustained these ruling. Tax protesters had begun taking false vows of poverty, turning their earnings over to their churches, and then receiving the equivalent amount in return, under conditions which they believed would render their income untaxable. These tax protesters were generally easy to spot, as they filed income tax forms claiming they had no taxable income, and containing tax protester comments.¹¹⁹ Essentially, the IRS decided to end a longstanding legitimate practice in order to combat all false attempts to avoid tax by a claim of a vow of poverty to a religious body. The Federal Circuit concluded that the best means of deciding any case involving taxability of income under a vow of poverty requires that the Court examine the agent-principal relationship between alleged agent and the alleged principal.¹²⁰ The Court maintained, however, that it could not use canon law to reach this determination, as canon law has no civil legal effect in defining the agent-principal relationship:

A careful reading of *Poe* indicates to us that the division of income and the agency relationship of the wage-earning spouse depended on the operation of state community property law. Appellant does not contend that the ownership rights involved between the Jesuit Order and its members are given effect by the operation of law. Rather we are told that the religious order's ownership rights, arising from the member's legal relationship with the Order, which is defined by the member's vows and is established by canon law of the Catholic Church, are given effect in civil courts. Although such a right may be established in law, an enforceable civil right arising

¹¹⁸ Brief for *Amicus Curiae*, *Fogarty v. United States*, 780 F.2d 1005 (Fed. Cir. 1986) (No. 85-1218) at 5 and Appendix A.

¹¹⁹ O'Neil, *supra* note 114, at 116 n.46, cites the following tax protester cases: *McGahan v. Commissioner*, 76 T.C. 468 (1981); *Page v. Commissioner*, 51 T.C.M. (CCH) 1351 (1986); *Speakman v. Commissioner*, 51 T.C.M. (CCH) 939 (1986); *Long v. Commissioner*, 50 T.C.M. (CCH) 23 (1985); *Noberini v. Commissioner*, 45 T.C.M. (CCH) 587 (1983).

Fogarty's lawyers referred to the IRS's interest in combatting tax fraud by tax protesters, as the lawyers noted that "Father Fogarty is *not* a tax protester involved with a scheme to avoid taxes and is easily distinguishable from tax protester cases." Brief for Fogarty, *supra* note 115, at 36 *et seq.* Fogarty's brief also noted that the tax court below asserted that the tax protester problem "has come to concern us more . . . *not because of anything the Jesuits have done*, but because many other people have started to claim religious exemptions. There are a floodgate of such cases. *And Father Fogarty happened to be among those cases that were made the subject of examination.*" (Emphasis supplied in brief.) Quoted in *id.* at note 20.

¹²⁰ However, the Court also claimed falsely that it was not overriding O.D. 119. It is impossible to see how it was not.

from church law is not the same as a right or legal relationship which is created by operation of state law.¹²¹

Hence, despite *Order of St. Benedict v. Steinhauser*, which the Court cites, the Court concludes that the canon law relationship expressed in vows of poverty is not "an enforceable legal right." Although the Court's holding that Fogarty wrongly withheld federal income tax payments was unfair to members of religious orders, as it overturned statements of the IRS upon which religious orders had relied since 1919, the Court treated canon law correctly.

Contrary to Fogarty's brief, which refers to canons 487 to 681, canon law does not "establish a legal relationship between an individual member of a religious order and the order."¹²² It establishes a canonical relationship, not a secular legal relationship. Moreover, for a court to interpret canon law in order to determine whether it creates an agency relationship would be an impermissible intrusion on the free exercise of religion, as it would involve a court telling a religion what its doctrine means. Still, the *Fogarty* court could have examined the day to day realities of Father Fogarty's relation with the Jesuits in order to determine whether Fogarty in fact was living a legally cognizable vow of poverty, distinguishable from the sham vows of poverty of tax protesters. In determining whether Fogarty was living a legitimate vow of poverty, the court could have accepted into its factfinding the constitution of the Jesuits, and the Jesuits' decrees on the vow of poverty,¹²³ evidence about the arrangements between the Jesuits and Fogarty, the history of the Jesuits and their vow of poverty dating back to the Counter-Reformation in the sixteenth century, and the fact of the Jesuits' incorporation in America in the eighteenth century as the Corporation of Roman Catholic Clergymen. All of this evidence should allow a court to determine the validity of Fogarty's claim to an exclusion from income tax as a result of a legitimate vow of poverty.¹²⁴

¹²¹ 780 F.2d at 1009.

¹²² Brief for Fogarty, *supra* note 115, at 3 *et seq.* The brief refers to the 1917 Code of Canon Law. Revisions in 1983 have changed the numbering of the canons.

Mark Chopko, General Counsel for the U.S. Catholic Conference, informed me in a letter dated 14 February 1996 that he knows "of no religious community that intends a Vow of Poverty to have a civil legal effect. They are also not held to be civil contract under consideration."

¹²³ Brief for Fogarty, *supra* note 115, at 4-5.

¹²⁴ Unfortunately, however, it might still be difficult for courts under such a system to draw a distinction between legitimate vows of poverty and sham vows, since all that *U.S. v. Ballard*, 322 U.S. 78 (1944), would require from a person claiming a religious right is a sincerely held belief. Surely, the tax protesters hold their beliefs in the wrongness of the income tax, as sincerely as Fogarty holds his belief in Catholicism. This difficulty, though, is not enough to overcome the fact that judicial interpretation of religious law constitutes an interference with the free exercise of religion.

*Schuster v. Commissioner*¹²⁵ resembled *Fogarty*. Sister Francine Schuster, who had taken vows of poverty, chastity, and obedience to her order of nuns, received in 1979 an offer from U.S. Public Health Service to work in a clinic in an impoverished area.¹²⁶ Her order accepted the offer for her, and in its letter of acceptance, the order made clear that Sister Schuster's checks should go to her order, rather than to her.¹²⁷ The Seventh Circuit purported to follow a test which the Federal Circuit used in its *Fogarty* decision, and held that Sister Schuster did owe taxes on her income, even though the income actually went to the order.¹²⁸

Judge Cudahy in his dissent in *Schuster*, however, worked out a much more reliable means for determining whether Sister Schuster, Father Fogarty, or anyone else in their positions would owe federal income tax. The dissent found a workable means for evaluating the actual circumstances of Sister Francine Schuster's employment outside of her Order in order to determine the validity of her actions as an agent for her Order.¹²⁹ The test has three parts. First, the court would examine the extent of control which the Order has over the member: "[T]he question of the principal's right to direct or control the agent's activities in a meaningful way would be central. Here there is no question about the vow of obedience and the right to control. This very sweeping basis of control creates an agency relationship now" ¹³⁰ Under this portion of the test, Judge Cudahy recognizes the significance of the Order's requirement that Schuster receive her Order's permission to work outside

¹²⁵ 800 F.2d 672 (7th Cir. 1986).

¹²⁶ *Id.* at 674.

¹²⁷ *Id.* at 675.

¹²⁸ *Id.* at 677.

¹²⁹ O'Neil, *supra* note 114, also favors the test in Judge Cudahy's dissent. Unlike the majority's test, Cudahy's does not make almost any case of a member of a religious order working outside the order per se impossible as an agency relationship. *Id.* at 136-38. The dissent's test is largely a response to the majority's application of what it called the *Fogarty* test. For example, the majority did examine questions such as the amount of control the principal has over the agent, but did not use the dissent's day-to-day realities test in applying the test. Nevertheless, the *Fogarty* court did not create a test:

There is no fixed way to approach the issue. The presence of unique facts in each case will inevitably lead the court to place more emphasis on one or more factors and less on others. The relationship between the order and the member gives rise to a number of factors. Relevant considerations there will include the degree of control exercised by the order over the member as well as the ownership rights between the member and the order, . . . the purposes or mission of the order, and the type of work performed by the member vis-a-vis those purposes or mission. . . .

Other factors will include the dealings between the member and the third-party employer . . . and dealings between the employer and order.

780 F.2d at 1012. Thus, the court did not mean these suggestions of relevant factors to create a rigid test, such as the one the majority used in *Schuster*.

¹³⁰ 800 F.2d at 682 (Cudahy, J., dissenting.)

the Order, and that the Order required Schuster not "to perform work that conflicts with a moral precept observed by the Order."¹³¹

Second, relying on *Order of St. Benedict v. Steinhauer*, Cudahy argues that the fact that the principal has "the right to claim and take possession of the compensation earned by the agent without question and without the possibility of any effective adverse claim"¹³² further indicates that Schuster really has no control over the income. Cudahy's reliance on *Order of St. Benedict* is problematic. Using a day-to-day realities test, one could argue instead that the fact that the member of the religious order does in fact turn over her income to her order, and receives in return a stipend should further indicate an agency relationship.¹³³ Third, Cudahy asks "whether the services performed are of a type within the mission or purpose of the alleged principal."¹³⁴ The traditional mission of Schuster's orders was to provide health care, and Schuster worked as a nurse-midwife. Additionally, the traditional mission of the Jesuits is teaching, and Fogarty taught at the University of Virginia. Hence, Judge Cudahy has demonstrated the possibility of respecting the structures of religious organizations without infringing on their free exercise by interpreting their religious law.

The most egregious case in which a court has ignored a religion's interpretation of its own law occurred in *Stevens v. Roman Catholic Bishop of Fresno*.¹³⁵ The question of the agency relationship between a priest and his bishop arose in this case in order to determine whether the Bishop of Fresno was vicariously liable for a priest's car accident. The priest was a missionary from the Basque region of France who was ministering to Basque immigrants in California. After visiting a Basque family in October 1970, the priest hit and killed two men driving in another car. In determining whether an agency relationship existed between the priest and the Bishop of Fresno, the California Court of Appeals not only concluded that it could interpret canon law, it concluded that it could hear and accept testimony that the diocese's own canon law expert was not interpreting canon law correctly. Thus, the Court accepted the testi-

¹³¹ *Id.*

¹³² *Id.*

¹³³ This would not weed out the tax protester cases as easily as the first and third prongs of the test. The tax protesters generally went about their lives as they normally would have with the exception that they turned over their income to their churches. One could reach them under this prong of the test, though, by recognizing that unlike Fogarty and Schuster, the tax protesters did not receive a stipend; they received their entire salaries back from the churches.

¹³⁴ 800 F.2d at 683.

¹³⁵ 49 Cal. App. 3d 877 (1975). Chopko, *supra* note 11, at 305, recognizes that judicial scrutiny of religious documents may lead to excessive entanglement. But he attests that religious bodies usually invite such scrutiny in tort cases, in order to prove lack of liability. Whether a religious entity invites scrutiny or not, judicial interpretation of a religious document is an infringement of free exercise.

mony of Dr. John Noonan, an expert witness, that an agency relationship did exist between the priest and the bishop under canon law, to such an extent that under Noonan's analysis of canon law, a priest acts for his bishop in virtually all of his daily activities.¹³⁶

The court did recognize that "[t]he significant test of an agency relationship is the principal's right to control the activities of the agent,"¹³⁷ but it concluded that the day-to-day realities of the relationship between the priest and the bishop would not provide adequate evidence of an agency relationship, since whether the bishop exercises the relationship or not, it still exists. Nevertheless, the Restatement (Second) of Agency does not require the abstraction from daily life that the Court of Appeals requires. The Comment on subsection 1 of § 1 Restatement states that

The relation of agency is created as a result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control.¹³⁸

Additionally, Chopko in an article on "ascending liability"¹³⁹ in cases involving religious entities, provides a simple test for liability:

First, the court must find that the person who committed the tort was the agent, employee, or servant in a relationship with the religious organization. Second, the court must find that the activity was within the scope of duties the person was to perform, or that the activity was a foreseeable consequence of that person's normal activities in the task.¹⁴⁰

¹³⁶ 49 Cal. App. 3d at 881-82.

¹³⁷ *Id.* at 884.

¹³⁸ RESTATEMENT (SECOND) OF AGENCY § 1(1) cmt. a, (1957).

¹³⁹ Chopko, *supra* note 11, at 290, indicates that the terms "ascending liability" has "not appear[ed] in any reported decision," but that the terms gained popularity ten or fifteen years ago in order to describe the reasoning the California courts used in *Barr v. United Methodist Church*, 90 Cal. App. 3d 259, *cert. denied*, 444 U.S. 973 (1979). In *Barr*, the court asserted jurisdiction over an "unincorporated community of believers, their churches, and agencies, to answer for the failure of separately incorporated Methodist retirement homes in California." See also Chopko at 292-99. However, commentators have not restricted the term to cases of *respondeat superior* involving unincorporated entities. His definition essentially applies the term "ascending liability" to cases of vicarious liability involving non-commercial entities. Chopko also notes that the concept of charitable immunity is essentially dead. *Id.* at 289 n.1.

¹⁴⁰ *Id.* at 311.

Thus, reference to the actual conduct of the parties can provide a workable and less complex means of determining the existence of an agency relationship.

No courts in California or anywhere else have followed the *Stevens* court in second guessing the Catholic church's own interpretation of whether its own canon law creates an agency relationship.¹⁴¹ However, two courts, one in Kansas and one in Nebraska, have confronted the same question of ascending liability, and they have concluded that canon law does not provide an appropriate means for determining an agency relationship. Dr. Noonan provided an affidavit as an expert witness in canon law in *Ambrosio v. Price*,¹⁴² a diversity action against a priest involved in a car accident. Here too, Noonan argued that canon law created an agency relationship. However, the court asserted that Noonan's definition of agency under canon law exceeded the definition of an agency relationship under Nebraska law:

[T]he implications of his interpretation are that all of a priest's associations with those Catholics if not all persons who reside in his diocese are on behalf of the Bishop. That is, a priest's associations with other Catholics within his diocese are all, by necessity and due to his priestly obligations, business. The law of agency in Nebraska does not reach this far.¹⁴³

Instead the court concentrated on the actual circumstances concerning the purpose of the trip, and concluded without reference to canon law that the priest was not engaged in his employment when he visited a Catholic family.¹⁴⁴

Similarly in *Brillhart v. Scheier*,¹⁴⁵ another case of a priest's car accident, the Kansas court asserted that the *Stevens* court's use of canon law was inapplicable, since a decision based on canon law is contrary to Kansas law.¹⁴⁶ Unlike *Ambrosio*, though, the priest in *Brillhart* was engaged in an activity which could benefit the diocese. Thus, the court conceded that the priest was acting for the diocese, but it asked whether he was acting in a master-servant relationship or whether he was an independent contractor. It concluded that he was an independent contractor. The court concentrated on the manner in which a priest and a bishop

¹⁴¹ Chopko, *supra* note 11, at 314 n.112, asserts that "California courts from the same judicial district have similarly *not* adopted this broad agency theory. *E.g.*, *Marco C. v. Roman Catholic Bishop of Fresno*, 5 Civ. No. F3610 (Cal. Ct. App. filed March 29, 1985) (sexual assault)."

¹⁴² 495 F. Supp. 381 (1979).

¹⁴³ *Id.* at 385.

¹⁴⁴ *Id.* at 384.

¹⁴⁵ 758 P.2d 219 (Kan. 1988).

¹⁴⁶ *Id.* at 223.

actually conduct their affairs. The court's only reference to canon law appeared in a paragraph detailing the myriad ways in which a priest actually has control over his own affairs:

The bishop is clearly the pastor's superior under ecclesiastical law. The evidence shows, however, that a pastor's day-to-day activities are within his own discretion and control. He is authorized under Canon Law to do whatever he feels is necessary to carry out his duties. He sets his own hours and vacation. He makes out his own paycheck, and hires or fires any non-priest/non-deacon employee, such as secretaries and janitors. Such salaries, including his own, come from parish receipts. The pastor has complete discretion in purchasing church supplies and paying the bills from parish funds. The details of daily bookkeeping and accounting of sums received and spent by the parish are not reviewed by the diocese.¹⁴⁷

The court recognized that canon law did provide a definition for the relationship, but it concentrated on how the priest explicitly conducted his affairs. Using the "right to control" test to determine whether this evidence suggested an agency relationship, the court concluded that it did not, since "the diocese has no control over the day-to-day activities of a parish pastor."¹⁴⁸ The court remarked further that the priest's car and insurance were his own; that the diocese did not ask him to make the trip which led to the accident; and that he never requested permission from

¹⁴⁷ *Id.* at 221.

¹⁴⁸ *Id.* at 223. The court also argued that "if the negligence of the pastor may be imputed to the diocese, it logically may be extended to the Pope, as all control over the pastor's employment ultimately stems from Roman Catholic ecclesiastical law, in which the Pope is the highest authority." *Id.* This, however, is false, to the extent that canon law states that every bishop is sovereign in his own diocese. See CODE c. 381 § 1 cmt. Additionally, Chopko, *supra* note 11, at 307 n.75 cites *Package v. Holy See*, No. 86-C-222 (N.H. Super. Ct. Nov. 30, 1988), in which plaintiffs sued for a monk's car accident. But the court concluded that the Holy See (the ruling body of Vatican City of which the Pope is the head) had inadequate control to prevent this harm.

Additionally, in *Roman Catholic Archbishop of San Francisco v. The Superior Court of Alameda County*, 15 Cal. App. 3d 405 (1971), William Sheffield attempted to sue the Archbishop of San Francisco for a complaint which Sheffield had against an order of monks in Switzerland. Sheffield depended heavily on canon law to argue that the Archbishop and the monks were a "mere shell and naked framework which defendants Roman Catholic Church, The Bishop of Rome, and the Holy See, have used and do now use as a mere conduit for the conduit [sic] of their ideas, business, property, and affairs' and that all defendants are 'alter egos' of each other." For reasons unrelated to canon law, the court ordered the Superior Court to grant summary judgment to the Archbishop, since Sheffield provided no real evidence that defendants were alter egos.

the diocese, "as was in keeping with his autonomous position as pastor."¹⁴⁹

The dissent disagreed with the majority's dismissal of *Stevens*, as well as with the use of the "right to control test." However, Justice Lockett's dissent, despite his acceptance of *Stevens*, actually concentrated on the day-to-day realities of the priest's life as pastor of a Catholic Church to reach his contrary decision. He also cited *Malloy v. Fong*¹⁵⁰ favorably to conclude that the hierarchy of a church does generally have control over its clergy. He failed to note, however, that the Presbyterian church in *Malloy* was not typical of Presbyterian churches in that it was not fully autonomous.¹⁵¹ Thus, one cannot simply conclude that hierarchies generally do have control over their churches or clergy.

Cases of sexual abuse have not created similar questions of agency, since, as Chopko notes:

[I]ntentional torts are not a foreseeable incident of employment, and therefore the religious organization should not bear the responsibility. Applying the two step analysis for *respondeat superior*, regardless of whether the person is an agent or an employee, courts have generally held that deliberate sexual misconduct (rape or sexual battery) is far outside the scope of expected duties of the employees, the ministers, or the volunteers.¹⁵²

The Washington Supreme Court in *John Does v. CompCare et al.*,¹⁵³ is an exception to Chopko's assertion. The court found that under canon law, the diocese's relationship with the priest who had sexually abused minors went beyond a normal employer-employee contract, because of the duty of obedience which the priest owed to the diocese, and because the diocese continued to pay living and medical expenses for the priest, even when he was in Spokane, Washington, well beyond the territorial range of the diocese.¹⁵⁴ Additionally, it noted that the diocese was aware of the priest's history of abuse, and thus, that a jury could find the diocese negligent in its supervision of him.¹⁵⁵ The Court's reference to ca-

¹⁴⁹ 758 P.2d at 224.

¹⁵⁰ 37 Cal. 2d 356, 232 P.2d 241 (1951).

¹⁵¹ 758 P.2d at 225-26. Chopko, *supra* note 11, at 305-07 discusses *Malloy*. The California court in *Malloy* held that the hierarchy of the local presbytery was vicariously liable, because it had established a number of non-autonomous mission churches in a rapidly growing area.

¹⁵² Chopko, *supra* note 11, at 317-18.

¹⁵³ 52 Wash. App. 688 (1988).

¹⁵⁴ *Id.* at 695.

¹⁵⁵ *Id.*

non law here is reasonable, as it only cited canon law for its evidentiary value, and it relied primarily on the actual circumstances of the relationship between the diocese and the priest to reach its conclusion.¹⁵⁶

*State v. Zimmer*¹⁵⁷ involved an unusual twist on the agency and canon law problem. A trespasser at a church in Minnesota sought to have entered into evidence at his criminal trial all 1,752 canons in the Code of Canon Law. He contended that the priest who had received a restraining order against him did not really have control over the church property; rather the bishop of the diocese did.¹⁵⁸ The court held that “any potential probative value of the Code was clearly outweighed by the prejudice and confusion which would have ensued.”¹⁵⁹ The court also cited *Jones* when it addressed the problem of the admissibility of canon law:

Defendant apparently intended to call the jury’s attention to certain canons of his own selection, which would have required the jurors to interpret isolated provisions out of context and without any understanding of how they might interact with other canons. Also many of the canons reflect church doctrine, which would be an invitation to the jurors to go beyond the ‘neutral principles of law’ analysis to which civil courts are limited, *Jones v. Wolf*. . . .¹⁶⁰

This use of *Jones* demonstrates its ambiguities. Despite the Minnesota court’s reference to *Jones*, the *Jones* majority would probably condone the use of canon law in this case, as long as canon law only served to resolve the secular question of ownership of church property. The Minnesota court further confused the matter when it held that, if as in *Stevens*, the defendant had brought in an expert to interpret canon law, the evidence “might have been admissible.”¹⁶¹ Such a conclusion contradicts the assertion that admission of canon law would violate the neutral principles of law.

Justice Yetka in dissent recognized the majority’s misrepresentation of *Jones*, but argued that the Code could be admissible to show whether

¹⁵⁶ In another case, *Rita M. v. Roman Catholic Archbishop of Los Angeles*, 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685 (1986), the Court of Appeals held that the bishop could not be held liable under the doctrine of *respondeat superior*, because sexual assault is outside the employment duties of a priest.

¹⁵⁷ 487 N.W.2d 886 (Minn. 1992).

¹⁵⁸ The priest would be an agent in this case, as he would only be holding the property for the principal, the bishop.

¹⁵⁹ 487 N.W.2d at 888.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

the defendant "had a good faith belief based on the canons, that he had a claim of right [as a parishioner] to be on the property."¹⁶²

If the purpose of entering the canon law into evidence was to show the defendant's state of mind, that evidence would be admissible, since it would not involve an interpretation of canon law. However, the addition of expert testimony would certainly not eliminate the problem of allowing a jury to decide the meaning of canon law. Instead of framing the issue as a question whether to admit canon law or not, the court could simply have looked at civil evidence to determine the truth or falsity of the pastor's assertion that he was the "lawful possessor." The most obvious form of this evidence would be the articles of incorporation for the diocese, and the deed to the church. Neither party sought to have such evidence admitted.¹⁶³

The final area of discussion of judicial interpretation of canon law provisions concerns interpretation of religious antenuptial agreements. In 1932 the Holy Office, a part of the Vatican, promulgated regulations for the marriage of Catholics with non-Catholics.¹⁶⁴ Although the Church had opposed unions outside the Church since the early years of Christianity, and although it had had a policy regarding such marriages prior to 1932, it reaffirmed its position on these marriages in 1932. The regulations required that when a Catholic and a non-Catholic marry in the Catholic Church, the non-Catholic must agree to raise their children Catholic. Writing in the Jesuit weekly, *AMERICA*, in April 1932, William I. Longeran asserted:

As for the promises to educate children Catholics, this implies not only that they will be baptized, be taught their prayers, be brought up to attend Mass, be prepared for Confession, Communion, and Confirmation and, in general, learn the rudiments of religion, but that they will be so grounded in their Faith and its practices that it may be anticipated that they will continue steadfast.¹⁶⁵

Longeran states further that canon law requires that in order for the marriage to be valid under canon law, the priest must have a "moral certainty" that the parties intend to abide by the agreement. He contends, though, that failure to abide by the agreement would not render an other-

¹⁶² *Id.* at 890.

¹⁶³ MINN. STAT. ANN. §§ 315.15 and 315.16 (West 1996) concern incorporation of religious associations. According to Legal Department of the NCWC 1954 Supp., *supra* note 34, at 32, these statutes existed in 1954.

¹⁶⁴ William I. Longeran, *Church Laws on Mixed Marriages*, 47 *AMERICA* 59 (1932). The Holy Office's action apparently followed from Pius XI's promulgation of the 1930 encyclical on marriage, *Castii Connubii*.

¹⁶⁵ *Id.* at 60.

wise valid marriage invalid, “[n]or does it obligate those granting dispensations [for the marriage to the non-Catholic] to make the promises legally enforceable, a procedure of very doubtful validity in a country like ours and that might well serve as a boomerang.”¹⁶⁶

Nevertheless, in *Ramon v. Ramon*¹⁶⁷ the New York State Domestic Relations Court held that such an agreement was a legally enforceable contract. It based its holding on several considerations, among them canon law. The court noted that the Roman Catholic father had relied on this promise, and had as a result irrevocably changed his status in marriage as a result of the promise; the court placed “paramount” importance on the religious upbringing of the child; it asserted that § 88 of the Domestic Relations Court Act required it to approve the request of the Catholic parent that the child be raised Catholic; it contended that enforcement of the agreement was “a matter of sound public policy;”¹⁶⁸ and it asserted that “the Court will take judicial notice that the Roman Catholic Church is the only church whose members are bound by its laws even to the penalty of excommunication of the party who permits non-Catholic training and education of their children.”¹⁶⁹ This last aspect is what provides the court with its reason for discussing canon law.

The court begins its discussion of canon law by remarking that canon law antedates even the common law; and by noting that since the days of Biblical Judaism and the early Christian church, Judaism and Christianity have considered marrying outside the faith a grave problem.¹⁷⁰ The court quotes from the Books of Genesis, Deuteronomy, Ezra, Nehemiah, Matthew, Mark, Luke, and Corinthians to advance its position. It also discusses the Council of Elvira of 305 A.D. Additionally, the court quotes from Pope Pius XI’s 1930 encyclical on marriage, *Casti Connubii*:

‘Everywhere and with the greatest strictness the Church forbids marriage between baptized persons one of whom is a Catholic and the other a member of a schismatical or heretical secte,’ declared the Pontiff, ‘And if there is added to this, the danger of falling away of the Catholic party and the [religious] perversion of the children, such a marriage is forbidden also by Divine Law.’ Encyclical Pope Pius XI, on Christian Marriage; 62 Cod. Jur. Can. c. 1060.

¹⁶⁶ *Id.* at 61.

¹⁶⁷ 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942).

¹⁶⁸ *Id.* at 107.

¹⁶⁹ *Id.* at 113.

¹⁷⁰ *Id.* at 108-09.

This dogma enters into the very essence of the antenuptial agreement, for the reason that a Catholic ceremonial marriage binds the Catholic party for life. Matthew XIX, 6; Corinthians VII, 10-27; Mark X, 9; Catholic Encyclopedia—Marriage; Canon Law.¹⁷¹

While all of this indicates a religion's interest in raising children in that religion, it does not prove a legal obligation to enforce an antenuptial agreement. Courts act wrongly when they interpret a religion's doctrine, whether the interpretation favors the religion or not. The court's assertions create a strong suspicion of an establishment of religion, by holding that religious doctrine has legal force in the state.

Ramon v. Ramon was not the last case in New York State to hold that a religious antenuptial agreement is legally enforceable. The New York courts represent an exception among the states in being willing to enforce these agreements, not only for Catholics, but also for Orthodox Jews, and agnostics.¹⁷² However, the New York courts do not enforce these agreements consistently.¹⁷³ Although these decisions may give comfort to the religious (and even the non-religious¹⁷⁴), they constitute an establishment of religion, and they threaten to intrude on the free exercise of religion by giving a government sanctioned meaning to religious doctrine.

CONCLUSION

This note has argued for a consistent deference to religious law in the courts. Aside from the legal constraints which the Free Exercise and Establishment Clauses place on judicial interference with religion, courts should avoid interpreting canon law in order to accord religions respect as distinctive and valuable social institutions; and in order to recognize the sovereignty of religious bodies. Courts should also recognize that they lack the competence to interpret a body of law based on revelation. Additionally, although the Supreme Court's position on judicial interpretation of church law remains clouded as a result of the *Jones* decision, lower courts which review the history of the Supreme Court's encounters with canon law will recognize that the Court has advocated staying away from church law interpretation as much as possible.

¹⁷¹ *Id.* at 109-10.

¹⁷² *Religion as a Factor in Child Custody and Visitation Cases*, 22 A.L.R.4th 971 §16 (1983 & Supp.). See also *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983) (an Orthodox Jewish antenuptial agreement that the husband would appear before a religious tribunal in the event of marital difficulties is legally binding).

¹⁷³ 22 A.L.R.4th 971 §16a.

¹⁷⁴ See *Spring v. Glawon*, 89 A.D.2d 980 (2d Dept. 1982) (mother must conform to agreement with father that the child will have no religious upbringing).

Courts which recognize the importance of avoiding canon law interpretations will look for an alternative source for an understanding of the religion's civil legal position, for example a contract with another party, or the diocese's articles of incorporation. Barring such evidence, factfinders should explore the actual day-to-day conduct of the religious party, rather than turning to religious law to provide meaning for these activities. An understanding of canon law requires a profound understanding of Catholic tradition and scripture, which few courts or juries have. Interpreting canon law without this background will likely lead to a misunderstanding of canon law.

Marianne Perciaccante†

† Several people helped me in my research. Father Gerald Fogarty, University of Virginia, made some remarks about his case, which I discuss in this paper. He also informed me of some sources on ownership of Catholic church property. Mark Chopko, Cornell Law '77, the General Counsel of the U.S. Catholic Conference, pointed me toward several helpful sources, and commented on my topic. Father Kevin O'Brien of the Diocese of Ogdensburg, sent me information on church property ownership, and Eric Mazur, University of California, Santa Barbara, helped me understand the Establishment and Free Exercise Clauses. I am grateful to all of them. However, none of them saw the note before it went to press. Thus, they have no responsibility for any of my errors. Finally, thanks to my brother, Thomas More Perciaccante, who photocopied the Fogarty briefs at the Library of Congress.