ARTICLES

The Dissent of Theology: A Legal Analysis of the *Curran* Case

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Introduction

Curran v. Catholic University of America[1] marks a new challenge for the Roman Catholic Church (the "Church") in the American legal system. In this case, Charles Curran, a Roman Catholic priest, is suing a Catholic institution in civil court over a question of ecclesiastical authority. *Curran* is unusual since, as a rule, the clergy balk at seeking resolution of intrachurch disputes in civil tribunals, where such actions bring scandal to the faith and subject the Church to the judgment of outsiders. Similarly, the judiciary is cautious of becoming involved in church disputes in light of the first amendment prohibition against establishment of religion and interference with the free exercise of religion.[2] Therefore, disputes between Catholic clergy and religious superiors rarely come before a secular tribunal.[3] The *Curran* case is indicative of a raging national debate about the purpose of Catholic universities, the principles of

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1. Curran v. Catholic University of America, No. 1562-87 (D.C. Super. Ct., filed Feb. 27, 1987).

2. The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Even before the First Amendment became applicable to the States, courts respected the pragmatic concern of avoiding entanglement in an area where judges had little competence and where prudent policy counseled against meddling in sensitive "family" relations. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871). For a full discussion of *Watson*, see *infra* notes 22-32 and accompanying text.

3. Courts examine disputes between a priest and his religious superior only when the issue involves cognizable civil or property rights and not ecclesiastical relations. While a priest or minister "can always insist that his civil or property rights as an individual or citizen shall be determined according to the law of the land, his relations, rights and obligations arising from his position as a member of some religious body may be determined according to the laws enacted by that body for such purpose." Baxter v. McDonnell, 155 N.Y. 83, 87, 102, 49 N.E. 667, 671 (1898). *See also* Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983) (holding that a

academic freedom, and the role of the hierarchy in higher education.[4]

In his suit, Curran asks the court whether the Archbishop-Chancellor of the Catholic University of America rightfully may prevent him from teaching moral theology[5] at the school. But *Curran* concerns the much larger issue of what role the judiciary will play in either enforcing or circumventing decisions of the Roman Catholic hierarchy affecting a priest's ability to teach in a Church institution. Whether this question is one of civil contract or free exercise of religion is unclear. The dual status of each of the parties complicates the situation. The University is both a Roman Catholic school and a civilly recognized nonprofit corporation. Curran is both a priest of the Roman Catholic Church and a tenured professor contractually employed by a university.

Curran's claim is narrowly drawn. He contends that the University breached his employment contract in two instances: (1) when the Chancellor suspended him from teaching before the withdrawal of his canonical mission to teach; and (2) when the president subsequently cancelled his scheduled classes. The parties have openly acknowledged that the true controversy concerns the role of the Church hierarchy in supervising who teaches and what is taught in Catholic institutes of higher learning.[6]

The court must decide how to frame the issue and what method of judicial analysis to apply. In three sections, this Article suggests the probable analysis the court will take. Section I presents a brief summary of the controversy and the complaint Curran filed in the Superior Court of the District of Columbia. Section II reviews the relevant case authority, exposing judicial confusion as to which of two lines of case law should be applied to resolve intrachurch disputes. This section also proposes a theory of reconciling the two doctrines based on the structure of the church involved in the suit. Section III predicts the court's analysis

priest's complaint that he did not receive due process in proceedings established by church authorities was not cognizable in civil court).

4. The debate is exemplified by the controversy concerning the regulations of Catholic universities proposed by the Congregation for Catholic Education. *See Proposed Schema for a Pontifical Document on Catholic Universities, reprinted in* 15 ORIGINS 706 (1986). For examples of the debate, see Ass'n of Catholic Colleges and Universities, *Synthesis of Responses from Catholic College and University Presidents, reprinted in* 15 ORIGINS 697 (1986) (opposing the schema); Address by Monsignor George Kelly, President of the Fellowship of Catholic Scholars, Catholic University of America (Mar. 15, 1986), *reprinted in* 15 ORIGINS 704 (1986) (supporting the schema).

5. Moral theology is the academic discipline of ethics.

6. Address by Charles Curran, "Public Dissent in the Church," The Catholic Theology Society (May 1986), *reprinted in* 16 ORIGINS 178 (1986); Letter from Joseph Cardinal Ratzinger to Curran (Sept. 17, 1985), *reprinted in* C. CURRAN, FAITHFUL DISSENT 248 (1986).

of the issues in *Curran*. The Article concludes that the University will prevail.

I. The *Curran* Dispute

Charles Curran is a priest of the Diocese of Rochester, New York, and a tenured professor in the department of theology at the Catholic University of America, in the District of Columbia.[7] In 1986, the Sacred Congregation for the Doctrine of the Faith, the body responsible for maintaining doctrinal orthodoxy throughout the Church, declared Father Charles Curran no longer "suitable nor eligible to exercise the function of a Professor of Catholic Theology" because of his dissent from various church teachings on ethics and on the concept of dissent from the Magisterium.[8] Pope John Paul II approved the Congregation's declaration,[9] and the Chancellor of the University, Archbishop James Hickey of Washington, initiated procedures established in the University's Faculty Handbook, as amended in 1981,[10] to withdraw Curran's canonical mis-

7. C. CURRAN, *supra* note 6, at 41.

8. *Id.* at 270. The Magisterium is the teaching function and office of the Roman Catholic Church.

Curran has been the center of controversy since his first days at the University. Of particular note are two attempts to oust Curran from his teaching position. First, in 1967, the University's decision not to renew his contract to teach met with a campus-wide student and faculty strike. In the face of these protests, the University reevaluated its position, and agreed to retain and promote Curran to Associate Professor. Second, following the release of the papal encyclical *Humana Vitae* condemning artificial contraception in 1968, Pope Paul VI, Encyclical Letter *Humana Vitae*, 12:AAS 60 (1968), Curran led a well-organized, public campaign against the pronouncement. Although the Board of Trustees initially planned to claim that such activity breached the employment contract, the University chose not to press the point. C. CURRAN, *supra* note 6, at 15-20.

9. Letter from Joseph Cardinal Ratzinger to Curran (July 25, 1986), *reprinted in* C. CURRAN, *supra* note 6, at 270.

10. CATHOLIC UNIVERSITY FACULTY HANDBOOK (1980) [hereinafter FACULTY HANDBOOK]. The Faculty Handbook contains the Bylaws governing the University, *Bylaws of the Catholic University of America* (1980), FACULTY HANDBOOK, *supra*, pt. I, § 6 [hereinafter *University Bylaws*], and Canonical Statutes governing the pontifical schools of the University, *Canonical Statutes of the Ecclesiastical Faculties of the Catholic University of America* (Dec. 21, 1981, revised Dec. 23, 1984) [hereinafter *Canonical Statutes*].

The Canonical Statutes specifically enumerate which Church documents bind the University's faculty. Two particularly relevant documents are *Sapientia Christiana*, which is the current Apostolic Constitution on ecclesiastical universities, Pope John Paul II, *Sapientia Christiana, Apostolic Constitution on Ecclesiastical Universities and Faculties* (Apr. 15, 1979) [hereinafter *Sapientia Christiana*], and the *Ordinationes* (Apr. 29, 1979). The Faculty is also bound by the Codex luris Canonici, or Code of Canon Law, which is the official law of the Latin rite of the Roman Catholic Church. *Canonical Statutes*, *supra*, pt. I, § I, para. 7. Part I, § I, para. 8 of the Canonical Statutes states: "Norms affecting ecclesiastical faculties which are found in the ecclesiastical legislation of the Second Vatican Council or the Apostolic See are not repeated in these statutes." The Canonical Statutes "constitute a special chapter of the

sion to teach.[11] Hickey suspended Curran from teaching in the depart-

Faculty Handbook and, when approved by the Board of Trustees, have the same force of law as do the Bylaws of the University." *Canonical Statutes, supra*, pt. I, § I, para. 10.

11. In 1931, Pope Pius XI promulgated *Deus Scientiarum Dominus* which required each teacher of religious subjects to have a canonical mission (missio canonica) from the competent ecclesiastical authority. *Sapientia Christiana* replaced *Deus Scientiarum Dominus* in 1979, but reaffirmed the canonical mission. Article 27.1 of *Sapientia Christiana* states:

> Those who teach disciplines concerning faith or morals must receive, after making their profession of faith, a canonical mission from the Chancellor or his delegate, for they do not teach on their own authority but by virtue of the mission they have received from the Church. The other teachers must receive permission to teach from the Chancellor or his delegate.

This requirement of the apostolic constitution was codified as a law of the Church in a new canon added to the 1983 Codex luris Canonici promulgated by Pope John II. The term canonical mission has been replaced by mandate (mandatum). Canon 812 reads: "Those who teach theological disciplines in any institute of higher learning must have a mandate from the competent ecclesiastical authority." Canon 812 has met with strong opposition in the United States due to its breadth and potential impact on Catholic higher learning. *See generally* Orsy, *The Mandate to Teach Theological Disciplines: Glosses on Canon 812 of the New Code*, in THEOLOGICAL STUDIES 44 (1983); Strynkowsky, *Theological Pluralism and Canonical Mandate*, in THE JURIST 42, 524-33 (1982). For detailed criticism, see Ass'n of Catholic Colleges and Universities, Confidential Report, *The Canons on Catholic Higher Education*, (Aug. 1983) (draft for discussion). For a full historical treatment of the *missio*, see R. Wehage, The Canonical Mission for Teaching: Article 27 of the Apostolic Constitution *Sapientia Christiana* (1983) (unpublished dissertation on file at Catholic University of America). For a brief historical summary, see Daly, *The Needed Mandate To Teach, in* FORTY-SIXTH PROCEEDINGS OF THE CANON LAW SOCIETY OF AMERICA 114 (1984).

The Canonical Statutes include procedures for granting the canonical mission or permission to teach when a faculty member is initially appointed a member of an ecclesiastical faculty. Part I, section V, para. 3 states:

> Upon the completion of procedures for the initial appointment of a member of an Ecclesiastical Faculty, the President of the University forwards to the Chancellor the application and dossier, including all relevant information and expressions of opinion regarding the appropriateness of the candidate's appointment, for the conferral of the canonical mission, in the case of those who teach disciplines pertaining to faith or morals, or for permission to teach, in the case of those who are not Catholics or who teach other disciplines.

(citations omitted). Part I, section V, para. 4 states:

> The Chancellor grants the canonical mission to teach in the name of the Church or the permission to teach. The Chancellor will not deny the canonical mission or permission to teach without prior consultation with the members of the Board of Trustees who are also members of the National Conference of Catholic Bishops, the President of the University, and the cognizant Committee(s) on Appointments and Promotions. The obligation of confidentiality *is to be respected* by all parties."

(citations omitted) (emphasis in original).

The Canonical Statutes also enumerate the procedure for withdrawal of the canonical mission. Part I, section V, para. 8.1 states: "After the grant of the canonical mission or permission to teach, the Chancellor may withdraw the mission or permission only for the most serious reasons and after providing information regarding specific charges and proofs." Part I, section V, para. 8.2 states: "If requested by the member of the Faculty, the procedures of due process shall be employed. *The* procedures *are* for dismissal for cause initiated by the Presi-

ment pending the outcome of the proceedings;[12] subsequently the University President, Father Willian Byron, S.J., cancelled Curran's scheduled classes for the 1987 spring semester.[13]

Curran vigorously protested his suspension and the cancellation of his courses, charging in his February 1987 complaint that both actions breached his employment contract with the University.[14] Since his courses count toward credit in both the ecclesiastical degree program and the civil degree program offered by the theology department,[15] Curran

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dent, which are applicable *mutatis mutandis* to withdrawal of the canonical mission when initiated by the Chancellor." (citations omitted) (emphasis in original).

The procedures for dismissal are set forth in the Faculty Handbook and provide for a detailed process by which an Ad Hoc committee conducts hearings and reports to the President. The final decision rests with the Board of Trustees who must give careful consideration to the committee's recommendation, which includes remanding the matter to the committee if the Board does not agree with the committee's decision. The Board must reserve final judgment until after studying the committee's reconsideration. FACULTY HANDBOOK, *supra* note 10, pt. II, § 4, art. 24.

12. Letter from Hickey to Curran (Jan. 9, 1987), *reprinted in* 16 ORIGINS 573 (1987). Hickey wrote: "Those canonical statutes, which contemplate the withdrawal of the canonical mission for 'most serious reasons,' also provides expressly for suspension in 'more serious or pressing cases.' In my judgment, and in the judgment of the episcopal members of the board, this is such a case." (citations omitted).

Part I, section V, para. 9.1 of the Canonical Statutes states: "For more serious or pressing cases, the Chancellor, with the concurrence of a majority of the episcopal members of the Board, may suspend the member of the Faculty from teaching in an Ecclesiastical Faculty during the period of investigation." Part I, section V, para. 8.1 of the Statutes, governing withdrawal of canonical missions, is set forth *supra* note 11.

13. *See* Letter from Curran to Hickey (Jan. 14, 1987), *reprinted in* 16 ORIGINS 591 (1987). The three scheduled courses were "Social and Political Ethics," "Moral Theology in Practice," and "The Bible and Moral Theology."

14. Plaintiff's Complaint, Curran v. Catholic University of America, No. 1562-87 (D.C. Super. Ct., filed Feb. 27, 1987) [hereinafter Plaintiff's Complaint]. Curran charges that the University breached his contractually guaranteed rights to generally accepted standards of due process as specified in the old and current Faculty Handbook section on suspension. *Id.* at 16. The complaint alleges the University breached guarantees of tenure, repose, security, and peace of mind in his employment contract with the University. As a second cause of action, Curran argues that because he relied on written and oral representations regarding the suspension process made to him by the University, the University is estopped from taking action adverse to his employment status. Curran also contends the University breached the implied covenant of good faith and fair dealing by disregarding the procedures it promulgated for suspension of a tenured faculty member, violating his contractual rights to repose, security, and peace of mind, intentionally preventing him from enjoying his contractually bargained for employment benefits, and discriminating against him because of his views, beliefs and exercise of academic freedom. *Id.* at 18-20.

15. *Id.* at 6. The non-canonical degree programs or civil degrees within the Theology Department are the Master of Arts, Master of Divinity, Doctor of Ministry, and Doctor of Philosophy. These civil degrees are granted by the power given to the University by the District of Columbia and regulated by national accreditation associations. *Id.* at 7. Curran argues that only the pontifical degrees, those awarded by power of the Vatican and carrying canonical effect, come under the authority of the Canonical Statutes. *Id.* at 8.

contends that the Chancellor holds authority only over the faculty teaching in the ecclesiastical degree program and has no power to suspend him from teaching within the civil course of studies.[16] The Chancellor disagrees, arguing that although there are two degree programs, there is only one faculty to teach in both.[17] The dispute centers on the interpretation of the rules and procedures set forth in the official University documents which are permeated with religious terms and references to Vatican documents. Although the University has not explicitly invoked the Free Exercise Clause, a judicial resolution of the dispute will require pitting the University's right to religious self-determination against Curran's right to full court review of his contract claim.

The Superior Court has twice granted the University's requests for continuance. The University has yet to file an answer to the complaint and, by mutual consent, the parties have suspended further litigation in order to pursue a private resolution. During the current 1987-1988 academic year, Curran is teaching at Cornell University as a visiting professor of Catholic studies.[18]

II. The Jurisprudence of Intrachurch Disputes

By couching the complaint in contract terms, Curran seeks to have the court rely on civil law rather than face the deference courts generally accord religious disputes. While the court might accept characterization of the dispute solely in secular contract terms, an inquiry into the issues reveals the possibility of religious questions. Therefore, any analysis of *Curran* triggers the long line of judicial decisions concerning intrachurch disputes.

A. The Hierarchical/Congregational Distinction

Most of the cases in this area involve disputes within churches over real property, but the legal doctrines they set forth provide a framework for judicial analysis of other types of intrachurch disputes. The Supreme

16. Curran argues that for Hickey to invoke Canon 812 to suspend Curran from the civil degree program contradicts Curran's employment contract. *Id.* at 9-10. See *supra* note 11 for a discussion of Canon 812. Since Canon 812 was promulgated by the Roman Catholic Church in 1983, Curran asserts that it is not included in either his contract or the Faculty Handbook. Plaintiff's Complaint, *supra* note 14, at 8, 13-16. Finally, Curran alleges that Hickey's ecclesiastical power as Archbishop of Washington does not transfer to his civil position as Chancellor of the Catholic University. Therefore, Curran charges that the Chancellor has acted *ultra vires* in suspending Curran from teaching in civilly recognized degree programs. *Id.* at 8, 13-16.

17. Letter from Hickey to Curran (Jan. 13, 1987), *reprinted in* 16 ORIGINS 591 (1987). *See infra* notes 182-183 and accompanying text.

18. *Curran "Teaching Moment" to Play in Washington and Ithaca*, Associated Press, May 1, 1987, PM cycle.

Court, based on the type of ecclesiastical structure of the church involved, has developed two different approaches to intrachurch property conflicts. The Court applies neutral principles of law to resolve conflicts within a *congregational* church—one that "by the nature of its organization is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority."[19] In contrast, when the church is *hierarchical*, that is, it "is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization,"[20] courts observe strict deference to the decision of the church judicatory. In some cases, however, the Supreme Court has allowed neutral principles analysis in conflicts within churches that are classified as hierarchical.[21] This Article suggests that the hierarchical category actually encompasses churches with two distinct types of ecclesiastical structures—semi-hierarchical and fully hierarchical—and that this distinction accounts for the different approaches employed by the Court.

The Supreme Court first explored intrachurch disputes in *Watson v. Jones*.[22] Since *Watson* predated the development of federal court restraints in diversity actions[23] and the application of protections under the Bill of Rights to the states,[24] the decision rests solely on general federal common law and does not depend on first amendment considerations. In *Watson*, a minority of the Walnut Street Presbyterian Church separated from the majority and claimed title to the local church property. The minority alleged it constituted the "true church," since it adhered to the doctrines adopted by the church at the congregation's founding.[25] The Supreme Court disagreed, holding that by establishing a separate hierarchy, the minority had withdrawn from the church and abandoned any

19. Watson v. Jones , 80 U.S. (13 Wall.) 679, 734 (1871).

20. *Id.*

21. *See infra* notes 48-59, 73-83 and accompanying text.

22. 80 U.S. (13 Wall.) 679 (1871).

23. In Erie Railroad v. Tompkins, 304 U.S. 64 (1938), the Supreme Court declared that the Federal Judiciary Act of 1789 did not authorize federal courts in diversity actions to disregard state common law in favor of federal common law.

24. In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court first held that the Fourteenth Amendment made the Free Exercise Clause of the First Amendment applicable to the states. The Court applied the same rationale to the Establishment Clause in Everson v. Board of Education, 330 U.S. 1, 15 (1947).

25. For a full discussion of the facts of *Watson*, see Comment, *Judicial Intervention in Disputes over Church Property*, 75 HARV. L. REV. 1142 (1962). For an early treatment of the problem of schism and donor's intent, see Baker v. Fales, 16 Mass. 488 (1820).

property rights.[26]

The Court distinguished between congregational[27] and hierarchical[28] religious bodies. While disputes within congregational churches are to "be determined by the ordinary principles which govern voluntary associations,"[29] *Watson* requires that civil courts defer to the decisions of church superiors in a hierarchical church on matters of faith, doctrine, internal organization, custom and law.[30] *Watson* also imposed an absolute prohibition against examining the religious opinions of church members.[31] Concluding that the Walnut Street Presbyterian Church was hierarchical, the Court deferred to the decision of the General Assembly of the national church which supported the church majority.[32]

In 1872, the Supreme Court affirmed the distinction between the methods of judicial analysis applied to the different classifications of ecclesiastical polity. *Bouldin v. Alexander*[33] involved a congregational Baptist church in the District of Columbia. A minority of the congregation seized control of church property and expelled the majority. The Court utilized ordinary principles of property law, carefully noting that the dispute involved no religious questions.[34] The Court underscored the church's congregational status by stating that there existed no ecclesiastic judicatory for the church.

1. The "Strict Deference" Doctrine

Three concepts work together to form the foundation for the Court's deference rule: contract assent, ban on doctrinal determinations, and narrow scope of review.[35] The contract assent principle presupposes that members who have chosen to join or remain in a church have assented to its system of authority and are accordingly bound by its rules

26. *Watson*, 80 U.S. (13 Wall.) at 734.

27. *Id.* at 722.

28. *Id.* at 722-23.

29. *Id.* at 725.

30. "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727.

31. *Id.* at 725.

32. *Id.* at 726-27.

33. 82 U.S. (15 Wall.) 131 (1872).

34. "It is not to be overlooked that we are not now called upon to decide who were church officers. The case involves no such question. What we have to decide is: where was the legal ownership of the property? The question respects temporalities, and temporalities alone." *Id.* at 137.

35. *See* Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1387-89 (1981).

and judgments.[36] The Court has also forbidden civil tribunals from making substantive decisions on church doctrine, since civil courts have no competence in religious matters,[37] and because attempting such decisions will interfere with religious rights.[38] Finally, the Court has severely limited the scope of the usual judicial contract analysis to the question of assent. In a hierarchical situation, therefore, civil courts must accept the decision of the highest church judicatory that has spoken on the subject, even when the dissenting party claims the church has no jurisdiction or has violated its own procedures.[39]

A short-lived modification of the deference rule occurred in 1929, in *Gonzalez v. Roman Catholic Archbishop*,[40] which concerned a conflict within the Roman Catholic Church. The Archbishop refused to appoint the ten-year-old plaintiff to a collative chaplaincy, by which he would be expected to celebrate masses in order to receive the income therefrom. The Archbishop observed that Canon Law permitted only ordained priests to hold this position. The Court supported the Archbishop, but suggested a limited exception to *Watson* for judicial review of ecclesiastical decisions for fraud, collusion, or arbitrariness.[41]

The Supreme Court reaffirmed the deference rule in *Kedroff v. Saint Nicholas Cathedral*,[42] the first case in which the Court was required to resolve an internal dispute within a hierarchical church following the application of the religion clauses to the states.[43] A group of clergy in the Russian Orthodox Church, acknowledging the authority of the Patriarch of Moscow, challenged the constitutionality of an enactment of the New York legislature[44] that transferred title to their cathedral to local dissident clergy not loyal to the Moscow Patriarch. The Court held that free-

36. "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." *Watson*, 80 U.S. (13 Wall.) at 726-29.

37. "It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so." *Id.* at 729.

38. *Id.* at 728-29.

39. *Id.* at 733-34.

40. 280 U.S. 1 (1929).

41. *Id.* at 16. The arbitrariness suggested by Justice Brandeis has been disavowed by the Court. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 715 (1976); *see also* Ellman, *supra* note 35, at 1389-91; Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1120 (1965).

42. 344 U.S. 94 (1952). *See* Duesenberg, *Jurisdiction of Civil Courts Over Religious Issues*, 20 OHIO ST. L.J. 508, 516-34 (1959).

43. *See supra* note 24 and accompanying text.

44. *Kedroff*, 344 U.S. at 150.

dom to select clergy enjoyed first amendment protection.[45] By passing control of the cathedral from one group of priests to another, the New York legislature had violated free exercise of religion.[46] *Kedroff* reaffirmed the doctrine of strict deference to a church's determinations; however, the Court avoided the question of how to determine the controlling church authority by assuming it to be the Patriarch of Moscow.[47]

2. *Expanding Application of the Neutral Principles Doctrine*

In 1969, the Court took two major steps with regard to intrachurch dispute doctrines in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* ("*Blue Hull Church*").[48] First, the *Watson* prohibition on judicial determination of doctrinal issues took on constitutional significance. Second, the Court suggested a "neutral principles" analysis as a possible legal alternative to strict deference. Two local congregations of the Presbyterian Church in Georgia sought independence from the national church on the grounds that the national church had departed from the doctrines in force when they first affiliated with it.[49] The Georgia Supreme Court affirmed a jury verdict awarding control of property to the local congregations based on a state law which provided an automatic implied trust in favor of the national church[50] so long as the national church continued to profess the same doctrine as it did when the local congregation joined.[51] On appeal, the United States Supreme Court began its opinion by observing that the "local Presbyte-

45. "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." Conditioning the right to clergy selection on proper methods is supported by reference to *Gonzalez*. *Id.* at 116.

46. *Id.* at 107.

47. The Court stated that the right to use the cathedral was "strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America. No one disputes that such power did lie in that Authority prior to the Russian Revolution." *Id.* at 115.

Upon remand, the court of appeals found in favor of the American Russian Orthodox Church on the grounds that the Moscow Patriarch was so under the secular domination of the Soviet Union that his appointee would not be recognized in New York. St. Nicholas Cathederal v. Kreshik, 7 N.Y. 2d 191, 164 N.E. 2d 687, 196 N.Y.S. 2d 655 (1959). On appeal, the United States Supreme Court reversed and, citing *Kendroff*, made clear its adherence to the principle of strict deference. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (per curiam).

48. 393 U.S. 440 (1969). For discussions of the case, see Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347, and Sampen, *Civil Courts, Church Property and Neutral Principles: A Dissenting View*, 1975 ILL. L.F. 543.

49. *Blue Hull Church*, 393 U.S. at 440.

50. *Id.* at 443-44. For a treatment of the historical development of the English implied trust theory from which the Georgia law derives, see Comment, *supra* note 25, at 1147-49.

51. The Georgia test has two parts:

rian churches [are] governed by a hierarchical structure of tribunals."[52] The Supreme Court declared the state law in violation of the First Amendment because it required a civil court to "determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion."[53] While firmly banning judicial inquiry into religious doctrine, the opinion suggests the possibility of allowing civil courts to apply neutral principles to resolve property disputes within a hierarchical church without implicating free exercise rights.[54] On remand, the Georgia Supreme Court attempted a neutral principles analysis by examining church deeds, and again awarded title to the local congregations.[55] The United States Supreme Court denied a petition for certiorari.[56]

One year later, in *Maryland & Virginia Eldership of the Churches of God v. Church of God, Inc.*,[57] the Court approved the neutral principles approach in a dispute involving a hierarchical church. The Court held that the Maryland Court of Appeals, in adjudicating a property dispute between the national church and two seceding congregations, correctly applied a neutral principles analysis.[58] Since the judicial inquiry did not concern doctrinal questions, the appeal involved no substantial federal question and was dismissed.[59]

In his important concurrence in *Virginia Eldership*, Justice Brennan described three possible approaches to the settlement of intrachurch dis-

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> The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated.

393 U.S. at 450.

52. *Id.* at 441-42.

53. *Id.*

54. "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And *there are neutral principles of law*, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Id.* at 449 (emphasis added).

55. Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 261, 167 S.E.2d 658, 660 (1969), *cert. denied*, 396 U.S. 1041 (1970).

56. 396 U.S. 1041 (1970) (denial of certiorari).

57. 396 U.S. 367 (1970) (per curiam).

58. The lower court "relied upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property." *Id.* at 367 (footnote omitted).

59. *Id.* at 368.

putes.[60] First, the State may adopt the strict deference rule of *Watson* and determine only the church authority to which the court must defer.[61] Second, courts may use the neutral principles approach to "determine ownership by studying deeds, reverter clauses, and general state corporation laws."[62] Third, the State could pass laws governing church property arrangements so long as the statutes did not interfere with religious doctrines or take control of church polity from ecclesiastical governing authorities.[63]

Speaking for the Court in *Serbian Eastern Orthodox Diocese v. Milivojevich*,[64] however, Justice Brennan staunchly affirmed the first approach of strict deference,[65] and the *Blue Hull Church* ban on doctrinal inquiry.[66] The Supreme Court reversed the Illinois Supreme Court's determination that the Holy Assembly of Bishops of the Serbian Orthodox Church had both improperly removed the plaintiff as head of the American-Canadian diocese and invalidly divided the diocese into three new dioceses. The Court refused to examine whether the Holy Assembly's actions violated procedures set forth in the constitution and penal code of the Serbian Orthodox Church. The Court acknowledged that *Gonzalez* had raised the possibility of "marginal civil court review" in challenges of "fraud, collusion, or arbitrariness," but foreclosed any civil court inquiry into arbitrariness when reviewing decisions of church tribunals.[67]

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60. Brennan noted that "a state may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* (Brennan, J., dissenting) (emphasis added).

61. *Id.* at 368-69.

62. *Id.* at 370.

63. *Id.*

64. 426 U.S. 696 (1976). *Serbian* is reminiscent of *Kedroff* in that an anti-communist atmosphere surrounds the two cases. *See* Note, *The Role of Civil Courts in Church Disputes*, 1977 WIS. L. REV. 904, 921 n.95.

65. The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes.

426 U.S. at 708.

66. For where resolution of the disputes cannot be made *without extensive inquiry by civil courts into religious law and polity*, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

Id. at 709 (emphasis added).

67. *Id.* at 712, 713.

We have concluded that whether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" and "collusion" when church tribunals act in bad faith for secular purposes, no "arbitrariness" exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical

Such an inquiry, concluded the Court, would necessarily draw the judiciary deeply into doctrinal matters. In its examination of alleged arbitrariness, the Illinois trial court had actually engaged in detailed review of evidence concerning removal proceedings[68] and had evaluated the diocese's reorganization. The Supreme Court sharply disapproved of both inquiries.[69]

Serbian suggests that courts may undertake only a minimal inquiry for purposes of identifying the highest church authority,[70] and may enforce document provisions only when they are "so express" as to involve no searching inquiry into church polity.[71] However, judicial determination of what constitutes controlling church documents and what these documents mean easily can involve religious questions. The mere identification of relevant ecclesiastical authority becomes, therefore, a religious inquiry as well. In *Serbian*, the Court assumed that the Holy Assembly was the church body to which deference was due, but it did not explain how it decided this crucial point without violating *Blue Hull Church*.[72]

Three years after *Serbian*, the Court revitalized the neutral princi-

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church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits.

Id. at 713.

The majority opinion in *Serbian* elaborated on the inappropriateness of arbitrariness analysis in review of chuch decisions due to the fundamentally different nature and rationale of religious judgments:

Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Id. at 714-15.

For a discussion of the elimination of the arbitrariness exception, see Note, Serbian Eastern Orthodox Diocese v. Milivojevich: *The Continuing Crusade for Separation of Church and State*, 18 WM. AND MARY L. REV. 655, 669-74 (1977).

68. 426 U.S. at 718-20.

69. *Id.* at 720, 721. The Court scathingly attacked the lower court's evaluation of witness testimony, interpretation of constitutional and penal provisions, and selective use of the documents and events. It is ironic that the Court engaged in an in-depth review of the documents to demonstrate the lower court's errors.

70. *Id.* at 709.

71. "The constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and, therefore, impermissible inquiry into church polity." *Id.* at 723.

72. Justice Rehnquist, dissenting, argued:

ples approach in *Jones v. Wolf*.[73] However, the strong dissent of four justices committed to strict deference[74] has left its precise meaning and significance in doubt.[75] In *Wolf*, a Georgia trial court employed the neutral principles approach to resolve a dispute between two church factions of a Presbyterian congregation over title to local properties.[76] The Supreme Court vacated and remanded the decision for clarification as to whether a majoritarian presumption existed under Georgia law and whether the identity of local congregations is a matter for the national church to determine.[77]

> Here the underlying question addressed by the Illinois courts is the one assumed in *Watson* et al.: whether the members of the American-Canadian Diocese *had* bound themselves to abide by the decisions of the Mother Church in the matters at issue here. The Illinois courts concluded that in regard to some of these matters, they had agreed to be bound only if certain procedures were followed and that as to others there had been no agreement to submit to the authority of the Belgrade Patriarchate at all.

Id. at 732 (Rehnquist, J., dissenting).

Rehnquist further observed that the lower court did not impose its doctrinal preference, but, at the request of the disputants, determined whether both parties had followed mutually agreed-upon canon law. *Id.* at 726-27 (Rehnquist, J., dissenting). Essentially, Rehnquist supported a conflict of laws analysis and accepted Brandeis' characterization of church groups in *Gonzales* as no different from other voluntary associations. He argued that blind deference is not consistent with the First Amendment and to treat religious groups differently from other voluntary associations could create establishment clause problems. *Id.* at 734 (Rehnquist, J., dissenting).

73. 443 U.S. 595 (1979).

74. Justice Powell, joined by Justices Burger, Stewart, and White, vigorously denounced the neutral principles approach as inconsistent with the First Amendment. The dissenters supported strict deference to the decision of the church authority to whom control was accorded before the schism. *Id.* at 610-12 (Powell, J., dissenting).

75. For a complete discussion of the opinion, see Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980); Note, *Church Property Dispute Resolution: An Expanded Role for Courts After* Jones v. Wolf?, 68 GEO. L.J. 1141 (1980); Comment, *Church Property Disputes: The Trend and the Alternative*, 31 MERCER L. REV. 559 (1980); Comment, Jones v. Wolf: *Church Property Disputes and Judicial Intrusion into Church Governance*, 33 RUTGERS L. REV. 538 (1981).

76. Jones v. Wolf, 241 Ga. 208, 243 S.E.2d 860 (1978), *vacated and remanded*, 443 U.S. 595 (1979). The majority of the local congregations sought to change its affiliation from one national church, Presbyterian Church of the United States ("PCUS"), to another, Presbyterian Church of America ("PCA"). PCUS, at the request of a minority of the congregation opposed to change, determined that the minority was the true church and held title to local properties.

77. 443 U.S. at 607-08. The court did not quarrel with the legal presumption that majority rule controls so long as Georgia in fact had such a presumption. A majority readily can be identified without impermissible religious inquiry, and the presumption is rebuttable by any means which will not impair free exercise of religion or entangle the courts in doctrinal disputes. *Id.* On remand, the Georgia Supreme Court found that the State had indeed adopted a majoritarian presumption and that a neutral principles analysis revealed nothing to rebut the presumption. Jones v. Wolf, 244 Ga. 388, 390, 260 S.E.2d 84, 85 (1979). For a critical discussion of the decision, see Comment, *Church Property Disputes: The Trend and the Alternative*, *supra* note 75, at 578-80.

Reaffirming *Blue Hull Church*, the Court held that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute."[78] The Court also noted that this approach was consistent with the ban on doctrinal inquiries and was an efficient means of resolving intrachurch property disputes.[79] The decision cautioned courts against attempting to interpret church documents when to do so might require reliance on religious precepts or incorporation of religious concepts.[80] Under *Wolf*, courts are bound to give legal effect to the language of church documents, "provided it is embodied in some legally cognizable form."[81]

The caveat as to "legally cognizable form" raises problems in judicial interpretation of church documents.[82] One problem concerns the determination of what constitutes religious language. It is virtually impossible to devise wording which could not be seen as entailing questions of doctrine, polity, faith, church law, or religious custom.[83]

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78. 443 U.S. at 604.

79. The primary advantages of the neutral principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties.

Id. at 603.

80. *Id.* at 604.

81. *Id.* at 605.

82. As the dissent pointed out:

> One effect of the Court's evidentiary rule is to deny to the courts relevant evidence as to religious polity—that is, the form of governance—adopted by [the Church's] members. The constitutional documents of churches tend to be drawn in terms of religious precepts. Attempting to read them 'in pure 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 of that polity cognizable under the neutral-principles rule. Lacking such evidence, presumably a court will impose some rule of church government derived from state law.

Id. at 612-13 (1979) (Powell, J., dissenting).

83. To illustrate the problem, Professor Mansfield poses a hypothetical case of a donor's attempt to contribute funds to the Roman Catholic Church in Chicago:

> He must be careful in making his gift not to use the words 'Roman Catholic.' These are words of religious significance and would clearly be intended by him as such. A dispute may well arise as to which of two groups is the Roman Catholics in Chicago. The donor must not give his property to 'the Roman Catholic Archbishop of Chicago, a corporation sole.' That there is such a corporate entity can be known without addressing religious questions, but determination of the identity of the person who embodies that entity and is entitled to control its assets does involve a religious question and is potentially subject to dispute. *Kedroff* and *Milivojevich* show that disputes about matters of this sort are not imaginary. Nor will it do any good to give money to 'the person determined by the Pope to be the Roman Catholic Arch-

Over the course of more than a century, the Supreme Court has developed a framework for civil court resolution of intrachurch disputes. Although many questions remain, the Court has consistently endorsed as fundamental the *Watson* principles of voluntary contract in joining a religious body, the ban on doctrinal inquiry, and strict deference in hierarchical church disputes. The interpretation and application of these principles, however, is in a state of flux. The direction of the Court, especially in light of changes in its composition since *Wolf*, is uncertain.[84]

3. *Extending the Doctrine to Contract Disputes*

The *Curran* case concerns the applicability of the principles established for intrachurch real property fights to a contract dispute. Although the Court has not yet ruled directly on the issue, some state courts have done so. For example, in 1976, in *Putman v. Vath*,[85] the Supreme Court of Alabama considered the suit of a Catholic priest against his bishop. The Bishop of Birmingham suspended Putman when he refused to accept a reassignment. At Putman's request, the bishop began ecclesiastical appeal procedures which resulted in the Vatican's affirmation of the bishop's decision.[86] Putman then sought monetary damages and a declaratory judgment that the bishop could not deprive him of "a benefice, office or salary sufficient for his proper support, and [could] not suspend him from his priestly duties," unless he received a due pro-

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bishop of Chicago,' for who is the Pope is itself a religious question under the *Hull* rule. There was a time when three persons claimed to be Pope.

Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 866-67 (1984).

84. The Court recently denied certiorari in a case concerning an employment dispute between a pastor and his Baptist congregation. Little v. Baptist Church, 106 S. Ct. 1802 (1986) (denial of certiorari). The church was self-governing and autonomous rather than hierarchical. One faction claiming to represent the church filed suit to have the pastor enjoined from entering the church premises on the grounds that, at a duly held meeting, a majority of the congregation had voted to terminate the pastor's employment contract. *Id.* at 1803. The pastor denied the faction's authority to undertake this action. The trial court ordered a vote of the congregation, and then ceritified that a majority elected to terminate the employment contract. Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari. The dissent argued that:

> The court in this case should have limited its inquiry to the terms of petitioner's employment contract and to whether the Church had taken the actions requisite to terminating the contract. If the authorized body had indeed terminated petitioner's employment, then the court could validly have taken steps to enforce the Church's right to keep petitioner off Church property. Until respondents, who bore the burden of proof, demonstrated that such termination had taken place, the court's only proper response was to do nothing.

Id. at 1804 (Marshall, J., dissenting).

85. 340 So.2d 26 (Ala. 1976).

86. *Id.* at 27.

cess hearing before a Church tribunal.[87] The Alabama Supreme Court ruled that the dispute concerned ecclesiastical matters and thus could not be resolved by a civil court. The opinion analogized the case to *Serbian Eastern Orthodox Diocese v. Milivojevich*[88] and reaffirmed the prohibition against civil court adjudication of religious controversies.[89]

In *Reardon v. Lemoyne*,[90] a case involving a contract dispute between four nuns who challenged the refusal of the Diocese of Manchester to renew their teaching contracts,[91] the New Hampshire Supreme Court expanded the neutral principles approach and rejected the Diocese's contention that strict deference was required. The court stated that the nuns had a right of access to the courts to resolve nondoctrinal questions relating to civil contracts into which they had voluntarily entered.[92] The court ruled that the suit was not prohibited by the First Amendment and ordered the trial court to interpret the meaning of the contract provisions according to accepted contract principles, reviewing the Diocese's dismissal practices and evaluating the sufficiency of any secular reasons for the Diocese's refusal to renew.[93]

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87. *Id.*

88. 426 U.S. 696 (1976). *See supra* notes 64-72 and accompanying text.

89. 340 So.2d at 30. Similarly, the Eight Circuit in Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983), dismissed a priest's suit for defamation, conspiracy and deprivation of canonical due process against his bishop.

> In the instant case, however, Kaufmann's claims relate to his status and employment as a priest, and possibly to other matters of concern with the church and its hierarchy, and go to the heart of internal church discipline, faith and church organization, all involved with ecclesiastical rule, custom and law. *While there may be some secular aspects to employment and conceivably even to the priesthood or clergy, it is apparent that the priest or other member of the clergy occupies a particularly sensitive role in any church organization.* Significant responsibility in matters of the faith and direct contact with members of the church body with respect to matters of the faith and exercise of religion characterize such positions.

Id. at 358-59 (emphasis added).

90. 122 N.H. 1042, 454 A.2d 428 (1982).

91. The employment contract incorporated the Diocesan School handbook which contained an ambiguous term relating to when certain procedural safeguards would be triggered. Note, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM L. REV. 2007, 2017-19 (1983).

92. 122 N.H. at 1047, 454 A.2d at 431-32.

93. *Id.* at 1047-49, 454 A.2d at 432. The opinion warned the trial court of the "distinction between non-doctrinal matters, wherein jurisdiction lies, and matters involving doctrine, faith, or internal organization, which are insulated from juducial inquiry." *Id.* at 1050, 454 A.2d at 433.

Similarly, New York's highest court held in Avitzur v. Avitzur, 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 464 U.S. 817 (1983), that the First Amendment does not forbid judicial recognition and enforcement of the secular terms of the Jewish marriage agreement, the Ketubah. In order to divorce under Jewish law, the couple must appear before a rabbinic tribunal. The wife in *Avitzur* asked the court to compel her husband to appear as allegedly agreed to in the marriage agreement. The court found that the wife merely sought to compel her husband "to perform a secular obligation to which he contractually

Putman demonstrates a judicial wariness of reviewing disputes between priests and bishops concerning the duties or status of the former. *Reardon* illustrates a judicial desire to afford all people, including those involved in religious organizations, access to courts for the adjudication of their claims. Reaching opposite results, these decisions exemplify the difficulties courts encounter in applying the principles enunciated by the Supreme Court.[94] Even if its application is problematic, it is well-settled that the First Amendment forbids civil court resolution of questions of religious doctrine, faith, and polity as well as ecclesiastical law.[95] To comply with this precept, courts imply a contractual relationship between the individual members and the church. The court then need only determine the proper authority and that authority's action. Strict deference is a pragmatic rule of judicial construction. In balancing the detriments of not fully investigating the claims of church members against the dangers of interfering with the self-determination of religious bodies, the Supreme Court has chosen to risk constricting an individual's rights on the grounds that he voluntarily enrolled and remained in the church.

Strict deference applies to all intrachurch disputes that require a determination of religious questions. Only in those conflicts that do not involve religious matters do courts have the option to apply neutral principles of law. By carving out an exception to strict deference, the Court has attempted to fashion a method of resolving internal church disputes without interfering in religious issues.[96] Courts may not dispense with the laws of property and contract merely because the parties share a religious affiliation. The difficulty arises in determining if the claims, arguments, and documents before the bench can be analyzed without referring to, or requiring an examination of, *res religiosae*.

B. Reconciling Strict Deference and Neutral Principles Cases

In attempting to harmonize the strict deference and neutral principles analyses used for deciding religious disputes, various points must be kept in mind. The first step in reconciling the cases is to acknowledge that judicial framing of the legal question and facts generally is determi-

bound himself. In this regard, no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result." *Id.* at 115, 446 N.E.2d at 139, 459 N.Y.S.2d at 575. The dissent argued that ordering specific performance of a religious obligation in which the meaning of religiously pregnant terms is disputed lies beyond the competence of a civil court. Furthermore, according to the dissent, the State had no interest in the status of the marriage since the court had granted a civil divorce in 1978. *Id.* at 116, 446 N.E.2d at 142, 459 N.Y.S.2d at 578 (Jones, J., dissenting).

94. *See supra* notes 85-93 and accompanying text.

95. *See supra* notes 48-56 and accompanying text.

96. *See supra* notes 33-63 and accompanying text.

native of the analysis. The denial of certiorari to petitions following the decisions of the Georgia court on remand in *Blue Hull Church* and *Wolf*, and the per curiam dismissal in *Virginia Eldership*, bolster the view that the Court gives wide latitude to the decisions of lower courts so long as the latter employ the "correct" constitutional language.[97] *Kedroff* and *Serbian* suggest, however, that the Court is committed to strict deference[98] and only in the most secular controversies will it countenance neutral principles.[99] Even when, in *Serbian*, the Illinois Supreme Court couched its inquiry in the language of neutral principles, the Supreme Court independently reevaluated the dispute, determined it involved doctrinal controversy, extolled strict deference, and reversed.

As an approach to reconciling the Supreme Court cases, it is necessary to evaluate the nature of the churches involved. Although the church in each case came within the *Watson*[100] rubric of "hierarchical," in reality there are two distinct groups of hierarchical churches. The two types can be categorized as semi-hierarchical and fully hierarchical churches.[101]

Semi-hierarchical churches, although not autonomous, rely fundamentally on a structural connection to an ascending order of authority outside the local church. Rather than each congregation envisioning itself as indispensibly part of a larger, comprehensive church that possesses full power over it, the congregations of a semi-hierarchical church regard themselves as members of a religious affiliation. The local church may define itself without reference to the Mother Church. For example, a local Presbyterian congregation could sever its affiliation with one national Presbyterian association and join another while still considering itself Presbyterian and continuing in virtually the same manner as before the withdrawal.[102]

97. "Correct" constitutional lanquage means crafting the analysis in such a way as to create the impression that only secular terms are being construed, thereby avoiding the appearance of governmental intrusion into religious self-governance. *See supra* notes 48-59 and accompanying text.

98. *See supra* notes 42-47, 64-72 and accompanying text.

99. As used in text "most secular" refers to those disputes that do not involve issues of polity, doctrine, faith, church law, or custom, in which the religious status of the parties has no bearing on the case. This, of course, is at the discretion of the courts and arguably has led to the variance of opinions between the Supreme Court and lower courts.

100. *See supra* notes 19-39 and accompanying text.

101. Virtually all churches, of course, are hierarchical to some degree, but the term is used more strictly here to describe the degree of control one level of church government exerts over "subordinate" people or groups in a particular religious structure.

102. The national church association from which the congregation withdrew might consider the action schismatic, but the local congregation is still capable of continuing its same essential polity, doctrine, and customs alone or with another association.

In contrast, local congregations of fully hierarchical churches are not self-defining. Each individual congregation views itself as a cell of the Mother Church and its existence is defined by an ecclesiastical structure apart from which it would cease to exist. For example, a Roman Catholic congregation would no longer remain *Roman* Catholic if it severed its ties to the Holy See. Even if the local congregation continued to exist as a religious body that professed adherence to most of the tenets of Catholic Christianity, it would not be Roman Catholic.[103]

Viewed from this perspective, the contradictory Supreme Court decisions appear more consistent. The Court applied strict deference in *Gonzalez*, involving the Roman Catholic Church,[104] *Kedroff*, pertaining to the Russian Orthodox Church,[105] and *Serbian*, which concerned the Serbian Orthodox Church.[106] It permitted a neutral principles approach in *Bouldin*, which concerned the Baptist Church and which is the only congregational case,[107] *Blue Hull Church* and *Wolf*,[108] both of which involved the Presbyterian Church,[109] and *Virginia Eldership*, a case concerning the Church of God.[110]

Four possible reasons may explain why the Court acted in this manner. First, the Roman Catholic,[111] Russian Orthodox,[112] and Serbian Orthodox Churches[113] are well-structured, international, episcopal polities with easily identifiable central administrations.[114] Second, hierarchi-

103. As another illustration, the Church of England considers itself Catholic, but not Roman Catholic, since severing its union with the Pope.

104. *See supra* notes 40-41 and accompanying text.

105. *See supra* notes 42-47 and accompanying text.

106. *See supra* notes 64-72 and accompanying text.

107. *See supra* notes 33-34 and accompanying text.

108. *See supra* notes 48-56, 73-81 and accompanying text.

109. *See supra* notes 48-56 and accompanying text.

110. *See supra* notes 57-63 and accompanying text.

111. For an exposition of Roman Catholic polity, see THE TEACHING OF CHRIST: A CATHOLIC CATECHISM FOR ADULTS 200-08 (R. Lawler, D. Wuerl & T. Lawler, eds. 1976). A documentary presentation may be found in THE TEACHING OF THE CATHOLIC CHURCH AS CONTAINED IN HER DOCUMENTS 197-252 (J. Neuner, H. Roos & K. Rahner, eds. 1967).

112. For an explanation of the Russian Orthodox doctrine and ecclesiastical structure, see G. MASTRANTONIS, A NEW STYLE CATHECHISM ON THE EASTERN ORTHODOX FAITH FOR ADULTS 108-10 (1969) and J. ELLIS, THE RUSSIAN ORTHODOX CHURCH: A CONTEMPORARY HISTORY 202-50 (1986).

113. For a description of the Serbian Orthodox Church polity, see G. MALONEY, A HISTORY OF ORTHODOX THEOLOGY SINCE 1453, at 245-70 (1976) and M. PUPIN, SERBIAN ORTHODOX CHURCH (1918).

114. Perhaps there is something more characteristically "American" about the semi-hierarchical churches, since they are not governed by authority outside the United States. The Roman Catholic Church is identified with Rome, the Russian Othodox Church with Moscow, the Serbian Orthodox Church with Belgrade. This international element may color the Court's perspective, especially in light of the long histories and traditional understanding of

cal authority is fundamental to these churches.[115] Since the three churches view the episcopal structure as divinely derived, any interference with the use of such authority would constitute a severe intrusion on religious free exercise.[116] Third, the authoritarian nature of the ecclesiastical bodies in question is longstanding and commonly known by both the faithful and the lay public. Fourth, these churches historically have maintained separate, internal procedures for dealing with intrachurch disputes.[117] Therefore, resort to civil courts is unnecessary except when errors are alleged in the proceedings.[118] In sum, judicial examination of internal church conflicts appears to intrude on first amendment rights of fully hierarchical churches and thus strict deference is appropriate.

The semi-hierarchical Presbyterian Church,[119] Baptist Church,[120] and Church of God[121] do not have the same style of polity as the fully hierarchical churches. These churches do not emphasize global levels of authority or allegiance to a particular religious office. The bonds between the local church and the national church are less tightly woven than those in the fully hierarchical churches.[122] The nature of the semi-hierarchical structure is more like a religious affiliation than a *sine qua non* of the faith.

The Court has justified applying strict deference by stressing that the complaining parties agreed to accept the authority of the hierarchical system by virtue of their membership in the church. While strict defer-

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these churches. *See supra* notes 111-113 and accompanying text. The current unrest among some American Roman Catholics stems in part from the American character imbued with democratic principles, individualism, and freedom to question authority.

115. *See supra* notes 111-113.

116. For the divine basis of the episcopacy, see CATECHISM OF CHRISTIAN DOCTRINE 18-22 (E. Kevane trans. 1980). *See also supra* notes 111-113 and accompanying text.

117. Codex Iuris Canonici governs internal procedures for the Roman Catholic Church. *See supra* note 10. For a discussion of Russian Orthodox internal organization, see THE RUSSIAN ORTHODOX CHURCH: ORGANIZATION, SITUATION, ACTIVITY 31-38 (1959); for Serbian Orthodox canon law, see *Constitution of the Serbian Orthodox Diocese of the United States of America and Canada, approved by the Holy Assembly of Bishops* (1928), and the *Revised Penal Code for Ecclesiastical Courts, adopted by the Holy Assembly of Bishops* (1961) (copies may be obtained at the monastery of St. Sava, Libertyville, Pennsylvania).

118. *See supra* note 41.

119. For a description of Presbyterian ecclesiastical structure, see H. WITHERSPOON & J. KIRKPATRICK, A MANUAL OF CHURCH DOCTRINE (1960) and J. MACKAY, THE PRESBYTERIAN WAY OF LIFE 68-71 (1965). *See also supra* notes 48-51 and accompanying text.

120. For a presentation of Presbyterian ecclesiastical structure, see H. WITHERSPOON & J. KIRKPATRICK, A SHORT BAPTIST MANUAL OF POLITY AND PRACTICE (1965) and D. GAINES, BELIEFS OF BAPTISTS 68-71 (1952).

121. For information on the structure of the Church of God, see F. MEAD, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES 21, 83-86 (1985). *See also supra* notes 57-59 and accompanying text.

122. *See supra notes* 111-118 and accompanying text.

ence seems constitutionally mandated in a fully hierarchical church, the Court has the option of applying strict deference or neutral principles to semi-hierarchical churches because they are midway between a congregational polity and a fully hierarchical polity. In a balance of the right of access to the civil justice system against the right of religious self-determination, a semi-hierarchical church tips the scales differently than does a fully hierarchical church. Since the four reasons previously mentioned are not clearly applicable to semi-hierarchical churches, adopting a judicial rule granting total power to the highest authority in a semi-hierarchical polity is less justifiable than doing so in the case of an ancient, episcopal system connected to a central administration in a foreign country.

The Court bases its strict deference rule on the consensual nature of the association, which by definition includes acceptance of the institutional structure of authority. The rule states that if A acknowledges that B has any control over A, the Court will regard B as having complete authority over A.[123] Fully hierarchical churches have a more persuasive case for such a rule; the court may be more aware that it is applying a fictive rule in actions involving semi-hierarchical churches in which questions of authority and scope of power cannot be passed over so easily. In consequence, a court may prefer to proceed with the neutral principles approach rather than countenance strict deference.

Perhaps this distinction only masks a glorified method of determining the proper church authority to whom deference is due. The depth of the relationship between a local church and the larger church may be difficult for the courts to discern in semi-hierarchical churches. The courts may therefore engage in a neutral principles analysis to avoid having to decide if the larger church actually has authority over the local church. The semi-hierarchical/fully hierarchical distinction, however, may help explain previous Supreme Court decisions in the area of intrachurch disputes.

III. The *Curran* Case

The issue in *Curran* is precise: did Curran's suspension from teaching and the subsequent cancellation of his classes constitute a breach of his employment contract with Catholic University? This section argues that in spite of—or perhaps because of—the complexity of the issues, the

123. The author is indebted to Professor John Mansfield of the Harvard Law School for this insight.

court will most likely apply a strict deference approach and rule in favor of the University.

A. Characterizing the Parties and the Dispute

1. The Parties

In order to decide the threshold question of whether this is in fact an intrachurch dispute, the court must first characterize the parties and their relationship to each other. Charles Curran is both an ordained Roman Catholic priest and a tenured university professor. Catholic University is both a Roman Catholic institution and a nonprofit corporation subject to the laws of the District of Columbia. The dual civil-religious character of each of the parties raises doubts as to whether the controversy will be regarded as an intrachurch fight.

a. Catholic University

In the 1976 case of *Granfield v. Catholic University of America*,[124] the District of Columbia Circuit Court of Appeals found the University to be a sectarian institution with undeniable ties to the Roman Catholic Church.[125] Recently, the ruling of the Court of Appeals for the District of Columbia in *Gay Rights Coalition v. Georgetown University*,[126] and the Seventh Circuit's rulings in *Pime v. Loyola University of Chicago*[127] and *Maguire v. Marquette University*,[128] found the defendant universities to have sufficient relations with the Roman Catholic Church to be considered religious employers. Because of its explicit identification with the institutional church and because it is directly controlled by the national hierarchy, Catholic University appears to have an even stronger claim to sectarian status than Georgetown, Loyola, or Marquette Universities.

The University's structure, philosophy, and history afford public notice to all connected with it that the University is intimately intertwined with the Roman Catholic Church. University Bylaws require that half of the members of the Board of Trustees be clerics.[129] Three-quarters of

124. 530 F.2d 1035 (D.C. Cir. 1976).

125. *Id.* at 1043 n.19 (upholding the University's use of a pay scale for priests lower than that for lay faculty).

126. 496 A.2d 547, 574 n.12, *vacated per curiam*, 496 A.2d 587 (D.C. App. 1985).

127. 803 F.2d 351 (7th Cir. 1986). For a discussion of the case, see *infra* note 193 and accompanying text.

128. 814 F.2d 1213 (7th Cir. 1987). For a discussion of the case, see *infra* note 194 and accompanying text.

129. *University Bylaws*, *supra* note 10, § II, para. 1. For an official history of the founding of the University, see J. ELLIS, THE FORMATIVE YEARS OF THE CATHOLIC UNIVERSITY OF AMERICA (1946).

these clerics must be members of the National Conference of Catholic Bishops.[130] The Archbishop of Washington is the Chancellor *ex officio*.[131] Clergy, seminarians, and religious sisters and brothers frequently teach and study at the University. As the flagship educational center of the American Catholic hierarchy, many priests and other Catholics are sent to the University for preparatory and graduate studies as well as for professional degrees. Special provisions are made for religious teachers both in the conditions of their employment and in their treatment.[132] Proposed amendments to statutes governing the pontifical schools require confirmation by the Holy See.[133] Catholic University receives financial support from American Catholic congregations through an annual collection at church services throughout the country.[134] The University shares its campus with the National Shrine of the Immaculate Conception, and its students, the majority of whom are Catholic, must take theology and philosophy classes.[135] The University's mission statements and goals consistently acknowledge its status as a Roman Catholic institution, peculiarly attached to the national hierarchy and the Vactican.[136]

The Roman Catholic Bishops of the United States, under the leadership of James Cardinal Gibbons, proposed the establishment of the Catholic University of America in 1884. Pope Leo XIII approved the project in 1887[137] and "canonically erected" the University in 1889.[138] Due to its pontifical nature, the University explicitly recognized the Apostolic Constitution *Deus Scientiarum Dominus*, promulgated in 1931, and the accompanying *Ordinationes*.[139] When Pope John Paul II promulgated the new Apostolic Constitution, *Sapientia Christiana* and its *Ordinationes*, to take into account the teachings of Vatican II, the University

130. *University Bylaws, supra* note 10, § II, para. 1.

131. *Id.* § VII, para. 1.

132. *Clerics and Religious: Supplementary Provisions*, FACULTY HANDBOOK, *supra* note 10, pt. III.

133. *Special Statutes for the Pontifical Schools*, art. IX, FACULTY HANDBOOK, *supra* note 10, pt. I, § 7, [hereinafter *Special Statutes*]. The Special Statutes were approved at the same time as the University Bylaws and define the relationship to the Holy See of schools and departments offering ecclesiastical studies. FACULTY HANDBOOK, *supra* note 10, pt. I, § 7, at 25.

134. *Preface to the Bylaws*, art. II, FACULTY HANDBOOK, *supra* note 10, pt. I, § 10.

135. 1986-1988 CATALOG OF THE CATHOLIC UNIVERSITY OF AMERICA 72.

136. *See Preface to the Bylaws, supra* note 134; *Goals of the Catholic University of America*, FACULTY HANDBOOK, *supra* note 10, pt. I, § 11.

137. FACULTY HANDBOOK, *supra* note 10, pt. I, § 2, at 4-7.

138. Letter from Pope Leo XIII, *Magni nobis gaudi* (Mar. 7, 1889), *reprinted in* FACULTY HANDBOOK, *supra* note 10, pt. I, § 2, at 7-9. "Canonically erected" means established in accordance with and subject to the authority of Church law.

139. FACULTY HANDBOOK, *supra* note 10, pt I, § 1, at 3.

adopted it in place of *Deus Scientiarum Dominus* to govern canonical studies.[140]

In addition to its ecclesiastical status, the University has civil links to the state. The University's Certificate of Incorporation, received in 1887, was amended by an Act of Congress in 1928.[141] The Board of Trustees elected to become a nonprofit corporation in 1964, converting the University Statutes into Bylaws.[142]

This history underscores the continuous public understanding of the University as specially connected to the institutional Church. It supports the University's contention that Father Curran and all those professionally associated with the pontifical schools have clear notice as to the ultimate authority of the Roman Catholic hierarchy.

b. Charles Curran

Charles Curran freely joined the ministry and remains an ordained cleric in the Church. Curran began his professional career teaching moral theology to seminarians and, except for sabbaticals and visiting professorships, has always taught moral theology at Catholic University.[143] When he was hired to teach in the pontifically-created Department of Theology at the University, the University followed the special procedures required to make clerical appointments. These procedures included obtaining permission for the appointment from Curran's bishop and ensuring that he was granted a canonical mission.[144] The University granted Curran tenure in the Department of Theology in 1971.

2. The Dispute

Ecclesiastical issues permeate the Curran controversy. The principal actors named in the complaint—Curran, Hickey, and Byron—not only share a common religion, but are priests with a clear understanding of the polity of the Church. The University is a Roman Catholic institution with particularly clear links to the American hierarchy. The controversy results from the Vatican decision as to Curran's competence to teach in the Department of Theology. In fact, the major point of debate concerns the interpretation of the Canonical Statutes[145] of the University. Each

140. *Id.*

141. *Id.*

142. The election is made under the District of Columbia Non-Profit Corporation Act, D.C. CODE ANN. §§ 29.501-29.599.14 (1981 & Supp. 1987). FACULTY HANDBOOK, *supra* note 10, pt. I, § 1, at 3, 10-16.

143. C. CURRAN, *supra* note 6, at 1-12.

144. *See supra* note 11 and accompanying text.

145. *See supra* note 10 and accompanying text.

party can be characterized as either religious or secular. The University is both a nationally accredited institution of higher education incorporated under the laws of the District of Columbia and a Roman Catholic establishment papally erected and actually controlled by the American hierarchy. Similarly, Curran is both a tenured professor of moral theology at a private university and a priest-theologian teaching in a canonical faculty of the Roman Catholic Bishop's national center of higher learning. The dual character of each of the parties raises doubts as to whether the controversy will be regarded as an intrachurch fight.

B. Judicial Analysis

A finding that the *Curran* case involves an intrachurch dispute does not preclude a court from scrutinizing the suit. As long as the dispute arises from civilly-based rather than ecclesiastically-based claims, the court can still adjudicate the matter. It appears that *Curran* falls somewhere between *Putman* and *Reardon*. It is neither clearly an ecclesiastical nor strictly a civil employment issue. This hybrid posture makes a judicial decision difficult. This Article predicts, however, that the court will perceive the controversy as a dispute between a priest and his religious superiors over an interpretation of religiously based documents and will therefore apply a *Serbian* strict deference analysis. On the other hand, if the court views the issue as primarily a controversy over a secular teaching contract, couched in "legally cognizable language"—not fatally pervaded with religious references—the court may employ a *Reardon* approach, using neutral principles to resolve the conflict. This section analyzes *Curran* under both approaches.[146]

Under the strict deference approach, the court's sole function is to determine the proper church authority and then defer to it. As University Chancellor and representative of the Holy See, Hickey is empowered to oversee the pontifical schools. Therefore, under this approach, the court probably would defer to Hickey's judgment and permit the suspension and course cancellation without further inquiry.

146. A third possibility is that the court will refuse to review the case for fear of excessive entanglement and lack of qualifications to decide the matter. *See* Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (1981). Recently, courts have rejected non-intervention in favor of either a strict deference or neutral principles analysis. *See, e.g.*, Jones v. Wolf, 221 U.S. 595 (1979); Reardon v. Lemoyne, 122 N.H. 1042, 454 A.2d 428 (1982); *see generally* Note, *supra* note 91. Strict deference can be viewed as a Supreme Court-approved method of resolving the civil dispute while at the same time avoiding these dangers. The strict deference approach is arguably superior to the non-interventionist approach since it gives the parties some, albeit limited, form of access to the courts.

A neutral principles analysis requires a more thorough scrutiny of the issues. The dispute centers on the scope of the Chancellor's power. Curran's complaint deftly attempts to prove that only the president has the authority to suspend him, and that the University did not follow proper procedures for this action.[147] Byron, however, cancelled Curran's classes only after Hickey suspended Curran. The cancellation followed as a logical consequence of Hickey's decision not to permit Curran to teach any courses in the Department of Theology.[148] Curran's charges against Byron are predicated on his belief that Hickey's action constitutes a breach of contract. Therefore, if the court applies neutral principles, it must tackle four questions. First, are the Canonical Statutes binding on Curran even though they were adopted after he received tenure? Second, do the Statutes violate Curran's academic freedom? Third, what is the role and authority of the Chancellor? Finally, what interpretation will the court accept on the scope of the Canonical Statutes and the Chancellor's power?

1. Binding Character of the Canonical Statutes

Curran claims that the Canonical Statutes do not apply to him because the Statutes came into effect ten years after he accepted tenure in 1971.[149] In 1982, when the Statutes were being adopted, Curran sent a letter to the University stating that the Statutes did not apply to him since his employment contract predated their adoption.[150] However, the Board of Trustees approved the Bylaws in 1969. After the Holy See approved the statement of objectives, historical prefaces, and Bylaws, the President of the University promulgated them in 1970.[151] The Bylaws contain several pertinent provisions concerning the pontifical schools, the Faculty Handbook, and the amendment and revision process. The University may argue that before Curran accepted tenure, he had notice of these authorizations and of the University's power to promulgate the Canonical Statutes according to set procedures by which he would be bound.

In section II, paragraph 8 of the Bylaws, the Board of Trustees authorizes the existence of pontifical schools and the creation of special statutes for their governance in accordance with ecclesiastical require-

147. Plaintiff's Complaint, *supra* note 14, at 15-16. *See supra* notes 14 & 16.

148. *See supra* notes 12-13 and accompanying text.

149. *See supra* notes 10, 14-16 and accompanying text.

150. Press Statement by Charles Curran (Aug. 20, 1986), *reprinted in* 16 ORIGINS 205, 206 (1986).

151. FACULTY HANDBOOK, *supra* note 10, pt. I, § 6, at 16.

ments.[152] The Special Statutes for Pontifical Schools ("Special Statutes") were approved at the same time as the Bylaws.[153] Article III of the Special Statutes allows the Board of Trustees to promulgate statutes and regulations governing the Pontifical Schools[154] and Article IX permits revision or amendment of the Special Statutes by the Board of Trustees, subject to confirmation by the Holy See.[155] Additionally, section II, paragraph 9 of the Bylaws specifies that the Faculty Handbook, which is required to contain a special chapter on the Faculty of the Pontifical Schools, would have the same force as the Bylaws.[156] In accordance with these provisions, the University adopted the Canonical Statutes in 1981 and revised them in 1984.[157] Therefore, since the Bylaws promulgated prior to Curran's tenure make clear the power and intention of the Board of Trustees to create and amend statutes governing the Pontifical Schools in accord with Vatican direction, doubt is cast on Curran's argument that he is not subject to the Canonical Statutes.

2. *Academic Freedom*

Curran claims that application of the Canonical Statutes violates his academic freedom by allowing Church powers to sanction him for exercising his right to teach and write as he sees fit.[158] This contention, however, is weak. Catholic University is a private religious educational center. The Supreme Court has never recognized a constitutional right to academic freedom in a private, sectarian university.[159] In a private

152. The Board of Trustees does hereby authorize the existence and operation of Pontifical Schools of the University. The Academic Senate, in consultation with the Faculties of these Schools, and observing appropriate ecclesiastical requirements, shall adopt statutes for these Schools, which shall be subject to the approval of the Board of Trustees in conformity with articles II and IV of the Special Statute for the Pontifical Schools.

University Bylaws, supra note 10, § II, para. 8.

153. *See supra* note 133.

154. *Special Statutes, supra* note 133, art. III.

155. "The revision or amendment of these Statutes may be made by the Board of Trustees, after consultation with the Academic Senate, and in accord with the Bylaws of the University. Such revisions or amendments may be initiated either by the Board of Trustees or the Academic Senate. Before becoming effective, however, they require confirmation by the Holy See." *Id.* art. IX.

156. *University Bylaws, supra* note 10, § II, para. 9.

157. *See supra* note 10.

158. Text of Fr. Curran's statement, Long Island Catholic, Aug. 28, 1986 at 8, col.1. In this statement, Curran noted that the 1967 Land O'Lakes statement signed by the president of Catholic University championed the right of Roman Catholic institutions of higher learning to be free from lay or clerical control outside the academic community.

159. For the position that academic freedom should not be viewed as a constitutional right, see R. KIRK, ACADEMIC FREEDOM: AN ESSAY IN DEFINITION 4-6 (1977); for the contrary view, see O'Neil, *Academic Freedom and the Constitution*, 11 J. OF C. & U. L. 275 (1984).

school, the contractual relationship defines the scope of academic freedom for tenured and non-tenured faculty.[160] The University's Faculty Handbook defines tenure as the right to continuous employment subject to termination only under specified conditions and in accordance with detailed procedures.[161] The Handbook does not include academic freedom as a right associated with academic tenure. Yet, while there is no grant of unrestricted academic freedom, tenure may only be revoked for adequate reasons, such as cessation of ecclesiastical obligations[162] or for cause.[163]

It is likely that the court will look beyond the definition of tenure and will examine the official publications of the University, its past practices with regard to academic freedom, and the common understanding in the academic community.[164] Curran may argue that the University prides itself on freedom of scholarship and expression of ideas, and that this is an explicit policy of the University.[165] The court must then decide

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Although academic freedom is not recognized as a constitutional right, faculty, of course, retain first amendment rights of free speech and association. An excellent discussion of the historical evolution of tenure and academic freedom is contained in R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955).

For a discussion of the public-private dichotomy and the doctrine of state action, see W. KAPLIN, THE LAW OF HIGHER EDUCATION 16-24 (1985). The leading case on the issue of state action in private education is Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (no state action when a private school received 99% of its funding from the state, followed specific state regulations, and had a student body composed almost completely of public school students).

160. W. KAPLIN, *supra* note 159, at 24-27, 180.

161. "A tenured appointment is subject to termination only as set forth below, for cause established and sustained by academic due process or for financial exigency." FACULTY HANDBOOK, *supra* note 10, pt. II, § 3, art. 11.

162. "The University's contractual obligations will become void if the appointee resigns from the priesthood without seeking laicization or is laicized under any canonical condition that requires his resignation from the University." *Id.* pt. II, § 3, art. 23.

163. *Id.* pt. II, § 3, art. 24. Cause includes "demonstrable incompetence or dishonesty in teaching or research, . . . manifest neglect of duty, or . . . other adequate cause." *Id.* It might be argued that the Vatican's determination that Curran is unsuitable to teach Catholic theology is tantamount to a state medical association's revocation of a doctor's medical license or a state bar association disbarring an attorney. The University could contend that Curran is "incompetent" and sever his tenure.

164. W. KAPLAN, *supra* note 159, at 91-93. *See also* Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975), where the court looked to standards established by the American Association of University Professors as indicia of the common practice of the academic community in upholding the legitimacy of the University's dismissal of an engineering professor for financial exigency.

165. For example, the preface to the Bylaws states:

> As a university, it is essentially a free and autonomous center of study and agency serving the needs of human society. It welcomes the collaboration of all scholars of goodwill who, through the process of study and reflection contribute to these aims in an atmosphere of academic competence where freedom is fostered and where the only constraint upon truth is truth itself.

whether the Statutes impermissibly constrict the scope of academic freedom the University had previously allowed. First, the University might contend that the Statutes do not infringe on academic freedom because the Bylaws, which predate Curran's tenure and merely codify historic practice, authorize their creation.[166] The Faculty Handbook makes clear that ecclesiastical norms govern in ecclesiastical matters; for example, the Handbook stipulates that, as a condition of employment, priests retain primary obligations to ecclesiastical superiors and must observe Canon Law and all directives of the Holy See and the National Conference of Catholic Bishops.[167] Arguably, this provision of the Handbook restricted the parameters of academic freedom before Curran's tenure.

The University may further contend that rather than infringing on academic freedom, the Statutes actually grant greater protection to teachers by establishing procedures which the University must follow before imposing sanctions.[168] This codification imposes limits on the University's power to retaliate against a faculty member. In light of the fact that the statutory procedural safeguards appear to provide greater academic freedom than existed before their adoption, Curran's charge that the Statutes violate his academic freedom is less persuasive. In addition, Curran is well-versed in institutional practice and the policies of the Holy See. Thus, his claim to extensive academic freedom appears unconvincing in an educational atmosphere heavily influenced by the University's long-standing observation of normative declarations of the Holy See.

Moreover, if the court examines the Statutes to determine whether they infringe on academic freedom, it may run into religious determinations forbidden by *Blue Hull Church*. Since the Statutes specifically refer to documents of the Second Vatican Council, papal pronouncements,

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Preface to the Bylaws, supra note 134, art. I.

166. *See supra* note 152.

167. In issuing an appointment to a cleric of the Roman Catholic Church, the University recognizes not only the professional qualifications of the appointee but also the public effects of the appointee's status as an ordained priest, which includes primary obligations to ecclesiastical superiors and observance of the provisions of canon law and all directives of the Holy See and the National conference of Catholic Bishops.

Faculty Handbook, *supra* note 10, pt. II, § 4, art. 23.

168. The Canonical Statutes, while according the Chancellor wide latitude in ecclesiastical matters, establishes various steps or requirements to force the Chancellor to take into account a variety of opinions and not to move too quickly, except in grave emergencies. Checks on the Chancellor's powers include required consultation with the episcopal trustees, the University President, and pertinent faculty committees before denying a canonical mission. *Canonical Statutes, supra* note 10, pt. I, § V, para. 4. Similarly, the process for suspension and termination has required steps which include mandatory consultations and gives the faculty member in question the right to invoke procedures specified in the Faculty Handbook. *Id.* pt. I, § V, paras. 7-9. *See supra* notes 10-12 and accompanying text.

and church directives,[169] an evaluation of the impact of the Statutes on the scope of academic freedom would raise serious *Blue Hull Church* problems. In order to decide what level of academic freedom the University has granted to its faculty, the court must determine what academic freedom means in the Catholic system of higher learning, and particularly within the theology department of Catholic University. This determination would require examining church documents incorporated into the Bylaws and Statutes to see what definitions and parameters have been established. The religious origin, language, and purpose of the documents seem to preclude judicial consideration of this evidence and testimony from experts on Catholic education would occasion the same *Blue Hull Church* problems.

3. *Role of the Chancellor*

Since Hickey claims to have acted in his capacity as Chancellor when he suspended Curran, the court must determine what the powers of the Chancellor are. Section VII of the Bylaws states that the Archbishop of Washington is *ex officio* Chancellor of the University and serves "as a liason between the University and the National Conference of Catholic Bishops, as well as between the University and the Holy See."[170] Section 13 of the Faculty Handbook further describes the Chancellor's role: "His rights and duties with respect to the Schools and Departments offering ecclesiastical studies and degrees are based upon the Apostolic Constitution *Sapientia Christiana* and the accompanying Norms of Application."[171]

The Canonical Statutes incorporate *Sapientia Christiana*, its *Ordinationes*, the decisions of the Second Vatican Council affecting higher education, and canons 815 to 821 of the Code of Canon Law governing Ecclesiastical Universities and Faculties.[172] The Statutes expressly acknowledge the authority of the Holy See to determine the standards for administering the pontifical schools.[173] The Statutes elaborate on the Chancellor's duties, which include the duty to "promote the progress of

169. *See supra* note 10.

170. *University Bylaws*, *supra* note 10, § VIII, paras. 1, 2. *See also* FACULTY HANDBOOK, *supra* note 10, pt. I, § 13, at 37.

171. FACULTY HANDBOOK, *supra* note 10, pt. I, § 13, at 37.

172. *See supra* note 10. Additionally, the Statutes accept all declarations of the Holy See which are not specified in the Statutes. "Norms affecting ecclesiastical faculties which are found in the ecclesiastical legislation of the Second Vatican Council or the Apostolic See are not repeated in these Statutes." *Canonical Statutes*, *supra* note 10, § I, para. 8.

173. One example of this is found in *Canonical Statutes*, *supra* note 10, pt. I, § V, para. 11 (emphasis in original): "*These norms and practices concerning appointments to the* Faculties are intended to assure fidelity to the revealing Word of God as it is transmitted by tradition

the Faculties, in themselves and in relation to the other Schools of the University, to advance learning and scholarship, and to see that Catholic doctrine is integrally taught and that the statutes and ecclesiastical norms are implemented."[174] The Chancellor is also charged to "protect the doctrine and discipline of the Church" in collaboration with the University.[175]

Since the Department of Theology was established as a church-approved center of Catholic theological studies, the Chancellor must certify that each faculty member is qualified to teach Catholic theology. The Church requires that every person appointed to a pontifical faculty must receive a "canonical mission to teach in the name of the Church,"[176] if he or she teaches disciplines pertaining to faith or morals. The requirement can be viewed as a matter of "truth-in-advertising." The University holds out the department as a Church-certified institution for Catholic religious studies. The Chancellor must ensure that what is taught accurately reflects Catholic teaching as defined by the certifying authority, the Magisterium.

In limited circumstances the Chancellor is also empowered to withdraw the canonical mission.[177] He may suspend the faculty member during withdrawal proceedings in "more serious and pressing cases," using certain special procedures.[178]

4. Interpretation of the Canonical Statutes

Assuming that the Chancellor had the power to suspend Curran, the court could apply neutral principles to examine the Chancellor's actions to see if they complied with the procedures set forth for suspension. Curran, however, does not contend that Hickey failed to follow the required procedural steps.[179] Rather, Curran disagrees with Hickey's determination that the matter is a "more serious or pressing" case warranting sus-

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and interpreted and safeguarded by the magisterium of the Church and to safeguard academic freedom."

174. *Id.* pt. I, § III, para. 7(a).

175. *Id.* pt. I, § III, para. 7(g).

176. *Id.* pt. I, § V, para. 4.

177. "After the grant of the canonical mission of permission to teach, the Chancellor may withdraw the mission or permission only for the most serious reasons and after providing information regarding specific charges and proofs." *Id.* pt I, § V, para. 8.1. The statutes also provide that the Chancellor may suspend a member of the ecclesiastical faculty in an emergency when the member's continued employment threatens himself or others. *Id.* pt. I, § V, para. 10.

178. *Id.* pt. I, § V, para. 9.

179. Nowhere does Curran claim Hickey did not follow set procedures. In fact, Curran relates Hickey's compliance and the results of his consultations in a press statement. The Canonical Statutes provide that the Chancellor must explain his reasons for suspension and

pension. Curran also rejects Hickey's interpretation that the Chancellor, under the Canonical Statutes and Bylaws, exercises authority over the entire Department of Theology.

It seems doubtful that the court will substitute its own interpretation of what is a "more serious or pressing" case for that of the Chancellor. As long as Hickey followed the procedures set forth in the Bylaws, the court no doubt will defer to the Chancellor's decision as to the seriousness of the matter, which is essentially a religious issue. Furthermore, inquiring into the reasonableness of Hickey's determination would force the court to decide the value of the Vatican declaration regarding Curran's ability to teach Catholic theology.

More problematic, however, is Curran's argument concerning the limits of the Canonical Statutes. As discussed in Section I, the crux of the dispute centers on whether the Canonical Statutes and the Chancellor may govern those who teach in non-canonical degree granting programs within the Department of Theology.[180] Curran claims that the plain wording of the Canonical Statutes indicates that they apply only to those teaching ecclesiastical degree courses. Curran teaches courses which satisfy the civil as well as canonical degree requirements, and he contends that the Chancellor's power does not extend to his civil degree classes.[181]

On the other hand, Hickey notes that Curran holds tenure subject to the norms of the Holy See and observes that although "there are non-ecclesiastical programs in the Department of Theology, . . . there are no non-ecclesiastical teachers."[182] The Chancellor may defend his interpretation by noting that as a condition of employment, Curran was granted a canonical mission by the Church. He voluntarily accepted tenure with full knowledge of the long-standing special relationship of the department to the Holy See, the historic practice of obedience to the directives of the Vatican, and the traditional exercise of power by the Chancellor over the entire department. Furthermore, the department emphasizes its commitment to the institutional Church in providing a center for Catholic studies and professional training for Catholic ministry.[183]

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seek the advice of the University President, Dean, and Department Chairman, as well as that of the professor concerned.

Id. pt. I, § V, para. 9.3. The Chancellor complied with these requirements on Dec. 19, 1986. Press Statement of Charles Curran (Jan. 12, 1987), *reprinted in* 16 ORIGINS 574 (1987).

180. *See supra* notes 14-17 and accompanying text.

181. *Id.*

182. Letter from Hickey to Curran (Jan. 13, 1987), *reprinted in* 16 ORIGINS 591 (1987).

183. In keeping with the aims of the The Catholic University of America, the Department of Theology seeks to serve the Christian community and the American public by providing academic and ministerial programs rooted in the Catholic-Christian

Nevertheless, the court might follow *Reardon* and treat the issue as strictly one of contract interpretation, which does not require examination of religious matters.[184] The Faculty Handbook and the Canonical Statutes contain language supporting both Curran's and Hickey's interpretation.[185] Some form of distinction exists between the civil and ecclesiastical degree programs and the canonically-recognized course of study expressly governed by the Statutes.[186] The issue revolves around whether the distinction affects the status of the faculty members teaching those classes.

The court could plausibly read the Statutes as assuming an essential distinction between the ecclesiastical and civil programs and then extend this distinction to the teachers themselves. After deciding that the Statutes deal only with the ecclesiastical degrees and that the faculty wear both pontifical and civil hats, the court might determine that the Chancellor's power is limited to issues involving matters affecting the canonical degree program alone. Under this reasoning, Hickey's suspension of Curran would be valid only as to those courses within the canonical portion of the program. Curran's three classes satisfied both civil and canonical requirements. If a course may count for credit under both programs, is it deemed civil or canonical? Rather than adopt an interpretation which contradicts the Chancellor's decision on a close question, the court will likely accept Hickey's judgment.

> tradition and experience. It is committed to Catholic teaching, found in Scripture and Tradition and served by the living Magisterium in its faithful and authentic interpretation. In order to fulfill this responsibility, the Department of Theology has as its twofold purpose: (1) the pursuit of graduate theological study and research in the Roman Catholic tradition and (2) the professional training for the ministry in the Roman Catholic Church.

Canonical Statutes, supra note 10, pt. IV, § I, para. 1.

184. *See supra* notes 90-93 and accompanying text.

185. The court might even apply *contra proferentem* analysis and construe the provisions in favor of the non-drafting party to find in Curran's favor. E. FARNSWORTH, CONTRACTS 499 (1982).

186. In support of the different interpretations of the Preamble to the Canonical Statutes, see *Special Statutes, supra* note 134, art. II ("These Schools are called Pontifical by virtue of accreditation by the Holy See; consequently those courses, programs, and degrees having canonical effects shall be conducted according to norms and regulations promulgated by the Holy See."); *see also id.* art. IV ("These academic policies shall conform to the accepted standards of the American academic community. Those programs having canonical effects shall, as noted, conform to the norms established by the Holy See."); *Canonical Statutes, supra* note 10, pt. IV, § I, para. 3 ("In accord with its two fold purpose, the Department offers several different degree programs as well as a wide variety of courses so that students will have the opportunity to develop theologically in view of their personal goals. Of these programs, [some] are ecclesiastical or pontifical in nature and are governed by these Statutes."); *id.* pt VI, § I, para. 5 ("The *ecclesiastical* degree programs of the Department, besides being subject to the approval of the Holy See, are subject to accreditation by the Association of Theological Schools." (emphasis in original)).

5. Probable Judicial Result

Finally, the analysis returns to the initial and most important question of whether *Curran* constitutes an internal church controversy over a matter sufficiently imbued with religious elements to trigger strict deference rather than neutral principles analysis. Although the court might refuse to regard the case as an intrachurch dispute, such a characterization seems difficult to justify because of the nature of the parties, the history and context of the dispute, and the language of the documents. Regardless of whether the court applies strict deference, neutral principles, or straight contract law, the outcome should be the same. Essentially there is no distinction between neutral principles and straight contract law because under either, *Blue Hull Church* prohibits the court from construing religious terms.[187]

If the court views the issue of the Chancellor's power to suspend as turning on the interpretation of religious-based issues and writings, it either will invoke the doctrine of strict deference to accept the Chancellor's decision or will comply with the ban on religious inquiry, which would lead to the same result. *Blue Hull Church* prevents the court from delving into the controlling documents sufficiently to resolve the dispute over interpretation. In addition to the Canonical Statutes which incorporate by reference the ecclesiastical authority of the Vatican, the Faculty Handbook expressly notes that the University requires ordained clerics to observe their obligations to ecclesiastical superiors, the provisions of the Code of Canon Law, and the directives of the Holy See and American Bishops' Conference.[188] The Faculty Handbook and Canonical Statutes recognize the Chancellor as the chief representative of the Church in the University.[189] He is charged with ensuring that the directives of the Holy See are faithfully followed.[190] Under a *Kedroff/Serbian* rationale, this duty includes the power to determine what those directives mean.[191] Hickey's determination that he has the power to suspend Curran appears reasonable in light of these provisions, the nature of the controversy, and the relationship of the parties.

The Seventh Circuit's recent rulings in cases regarding hiring in two Jesuit universities support the proposition that the Chancellor, as representative of the Bishops and the Holy See, has authority over Curran's

187. *See supra* notes 48-56 and accompanying text.

188. *See supra* note 167 and accompanying text.

189. *See supra* notes 170-177 and accompanying text.

190. *Id.*

191. *See supra* notes 42-47, 64-72 and accompanying text; *see also infra* note 196 and accompanying text.

teaching in the Department of Theology.[192] *Pime v. Loyola University of Chicago*[193] and *Maguire v. Marquette University*[194] illustrate at least one circuit's willingness to give Roman Catholic universities broad discretion to restrict access to teaching positions to those who share a particular religious outlook. The opinions suggest the Seventh Circuit's strong sympathy with the right of sectarian institutions to ensure that their faculty impart doctrine consistent with their religious mission. The court in *Curran* could follow similar sympathies. Employing neutral contract principles, the court may read University documents as specifying that the Chancellor is empowered to decide matters of interpretation concerning the pontifical schools.[195] Under this approach, the court would find

192. *See supra* notes 127-128 and accompanying text.

193. 803 F.2d 351 (7th Cir. 1986). In *Pime*, the Seventh Circuit found that Loyola had not impermissibly discriminated against a Jewish applicant for a tenure track position in the philosophy department. The faculty, concerned with the dwindling Jesuit presence within the department, resolved that seven positions would be reserved for Jesuit philosophers. Although no hint of invidious discrimination was present, the court assumed "that because Pime's faith would prevent his being a Jesuit, he has a claim of discrimination on account of religion." *Id.* at 353. The court found that requiring a certain number of teachers to be Jesuits fell within the bona fide occupational qualification exemption (BFOQ) to Title VII of the Civil Rights Acts, 42 U.S.C. §§ 2000e (1984), and upheld the importance of Loyola's ability to protect its Jesuit presence by controlling who taught in the philosophy department.

> The BFOQ involved in this case is membership in a religious order of a particular faith. There is evidence of the relationship of the order to Loyola, and that Jesuit 'presence' is important to the successful operation of the university. It appears significant to the tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus. It requires more to be Jesuit than adherence to the Catholic faith, and it seems wholly reasonable to believe that the educational experience at Loyola would be different if Jesuit presence were not maintained.

803 F.2d at 353-54.

Judge Posner, concurring, rejected the contention that Loyola had discriminated at all against Pime on account of his religion. Pime was turned down "not because he is a Jew, not because he is not a Catholic, but because he is not a member of the Jesuit order." *Id.* at 354 (Posner, J., concurring).

194. No. 86-1412 slip op. (7th Cir. Mar. 20, 1987) (available on LEXIS). In *Maguire*, the Seventh Circuit ruled that Marquette University did not discriminate on the basis of gender in refusing to hire a female professor for a teaching position in the theology department. In rejecting Maguire's claim that her sex was a substantial motivating factor in her denial of a job, the court found that the University validly could have refused to hire her—even if she had otherwise been competent—based on her position on abortion and a "perceived hostility to the institutional church and its teachings." *Id.* The court indicated its approval of the Jesuit school's prerogative to screen out those applicants who disagree with the school's Roman Catholic view point. Additionally, the court upheld the policy of preferential hiring for Jesuits, particularly in the theology department, where the courses "are taught in the perspective of the Roman Catholic tradition and do emphasize the religious and intitutional values of that tradition." *Id.*

195. The court might also view the complaint as prematurely brought. Curran has not exhausted his appeals within the university or within the Church. The court might dismiss the

that the University deferred to the Chancellor's authoritative ruling, recognized his suspension of Curran, and cancelled the classes as a result of the suspension. The court would thereby enforce the decision of the contractually "stipulated" tribunal, the Chancellor, even though he is defining the extent of his own authority.[196] It is doubtful that the court would review the reasonableness of this determination for, in doing so, the court would have to skirt *Serbian*'s disavowal of the arbitrariness exception.[197]

If the court finds that *Curran* is an intrachurch dispute—a legal conflict between the Archbishop/Chancellor and a priest/professor who has been judged by his self-acknowledged superiors as neither suitable nor eligible to exercise the function of a professor of Catholic theology—it could apply strict deference, especially in light of the fully hierarchical nature of the Roman Catholic Church. Under such an analysis, the court would note that minimal inquiry reveals that the Chancellor is the Church authority charged with the special responsibility to protect the doctrines and disciplines of the Church within the pontifical schools. Consequently, Hickey's judgment would be enforced. If the court employed neutral principles, the *Blue Hull Church* strictures on what evidence may be considered severely limits the issues the court may consider in this case. Deciding that the Chancellor's interpretation is incorrect would probably require too searching an inquiry. Therefore, the judicial result—upholding the University's actions—should be the same whether the court applies strict deference or adopts a neutral principles analysis.

Conclusion

Curran's suit presents an unusual case for the Church and the American legal system precisely because it does not fit neatly into either the ecclesiastical or civil law. Curran opposes his suspension, but he does so in his capacity as a university professor challenging the action of the Chancellor. In turn, Hickey is exercising his power as Chancellor, not his religious authority as Archbishop. However, the contours of the civilly recognized power of the Chancellor are defined by Church documents and Catholic principles which overlap with his religious authority.

suit until Curran has attempted these avenues. In response to Curran's charge that harm has already occurred and continues to occur due to the alleged breach of contract, the court could note that the damages may be assessed cumulatively after the appeals are exhausted and if a breach is found.

196. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 733-34 (1871); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976).

197. *See supra* note 67 and accompanying text.

Curran pits two fundamental principles against each other: the right of religious free exercise and the right to judicial review of contractual agreements. The case raises the issue of the place of theological dissent within the Roman Catholic Church. Curran has invoked the apparatus of the state in his fight to force Church toleration of positions on moral questions that are incompatible with the teachings of the Magisterium. Presenting the dispute to the court as a matter of contractual interpretation does not veil the true nature of what is at stake. *Curran* represents the recurring conflict over religious power: who determines what is Roman Catholic theology and who may teach that theology. Rather than scrutinizing the religiously-based documents and the practices of the University, the court would be wise to leave this quintessentially religious matter for resolution within the Church. Caesar's tribunal is no place for internal Roman Catholic disputes; it is imprudent for the state and dangerous for the Church.