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CHURCHES, MEMBERS, AND THE ROLE OF THE COURTS: TOWARD A CONTRACTUAL ANALYSIS

Kent S. Bernard*

I. Introduction

Much has been written on the relation between church and state, particularly in regard to education, an area of litigation in which members and their organizations unite in seeking civil aid.¹ Little critical work has been done, however, on the problem of how the state should react when an individual invokes the civil courts against his religious organization.² This problem arises in the context of various disputes between religious organizations and their members: when members are expelled from the group, when a clergyman is fired, or when one group of members feels that another is taking control of the organization illegitimately. In these situations, it is not uncommon for the aggrieved parties to seek help from a court of law. The cases often are highly emotional, and are made yet more delicate by their involvement of the basic first amendment religious guarantees. When faced with these challenges, courts have reacted in various ways.

For example, let us assume a not unusual set of facts. A member of a religious organization is expelled from the group. He feels that the expulsion was wrongful, and brings suit in civil court to compel his reinstatement. How should the court handle such a case? Some courts have simply refused to get involved,³ reasoning that church membership is not an interest which they would protect. Other courts have looked to state corporation law (in cases where the organization has incorporated) to determine only whether the state law requirements

* Associate, Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa.; J. D., University of Pennsylvania, 1975; B.A., Colgate University, 1972.

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1 See, e.g., W. GELHORN & R. KENT GREENAWALT, *THE SECTARIAN COLLEGE AND THE PUBLIC PURSE* (1970); V. LANNIE, *PUBLIC MONEY AND PAROCHIAL EDUCATION* (1968); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968); Haskell, *Prospects for Public Aid to Parochial Schools*, 56 MINN. L. REV. 159 (1971); Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 1973 SUP. CT. REV. 57; Valente, *Aid to Church Related Education—New Directions Without Dogma*, 55 VA. L. REV. 579 (1969); Comment, *Constitutionality of Tax Credits as a Means of Providing Financial Assistance to Parochial Schools*, 52 B.U.L. REV. 871 (1972); Comment, *New Trends in Education and the Future of Parochial Schools*, 57 CORNELL L. REV. 256 (1972); Comment, *Voucher Systems of Public Education after Nyquist and Sloan: Can a Constitutional System Be Devised?* 72 MICH. L. REV. 895 (1974).

2 See W. STRONG, *TWO LECTURES UPON THE RELATIONS OF CIVIL LAW TO CHURCH POLITY, DISCIPLINE, AND PROPERTY* (1875); C. ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* (1917) [hereinafter cited as ZOLLMANN], (while Zollman did write another edition in 1933, *American Church Law*, the older version is more pointed and pungent); Dusenberg, *Jurisdiction of Civil Courts over Religious Issues*, 20 OHIO ST. L.J. 508 (1959) [hereinafter cited as Dusenberg]; Patton, *The Civil Courts and the Churches*, 54 U. PA. L. REV. 391 (1906).

3 See, e.g., *Mount Olive Primitive Baptist Church v. Patrick*, 252 Ala. 672, 42 So.2d 617 (1949).

have been fulfilled,⁴ even if this required splitting the church into "civil" and "religious" parts for analytical purposes.⁵ And some courts have gone directly into the fray, and have tried to determine which side was correct as a matter of religious law.⁶

While each of these approaches may have certain features which commend it, the courts using them have not developed any coherent analytic structure which would enable them to balance the policy interests at stake. This article proposes such a structure, premised on a contractual view of the legal effect of religious group membership, a view which has several advantages. A contract approach is consistent with traditional judicial practice; and, indeed, the roots of such an approach can be found in partial form in some of the many existing theories for judicial treatment of church-member conflicts.⁷ This contract theory, then, would not require a court to grasp a radically new or difficult conceptual structure. Also, current constitutional law and theory, as drawn from both church-member and aid to sectarian school cases, support the contract theory.

Both the constitutional and nonconstitutional cases in this area seem to reflect two basic policy concerns. They are not articulated as such, but without them the mass of opinions makes little, if any, sense. First, the courts do not want to become enmeshed in issues and disputes over the interpretation of religious law. Even where no constitutional block is perceived, this fear of entanglement runs strongly through the approaches termed here "noninterventionist."⁸ It is seldom entirely absent from any decision. Second, a comprehensive reading of the cases leads one to a firm feeling that courts recognize that members of religious organizations have certain reasonable expectations about how they will be treated in their relationship with the organizations, and that these should be protected in some way. The contract theory set forth herein is proposed as an analytic structure which can best accommodate both concerns. While the important policy concerns, however, are often not apparent in the decisions, the important legal questions are easily identified:

- 1) Recognizing that an individual gives up some of his "civil" freedom when he affiliates with a religious organization,⁹ over what disputes, if any, should civil courts take jurisdiction in this area?
- 2) What criteria should the courts apply to decide those cases?

4 Cf. *Hayes v. Brantley*, 50 Misc. 2d 1040, 280 N.Y.S.2d 291 (1967).

5 See *Walker Memorial Baptist Church v. Saunders*, 285 N.Y. 462, 35 N.E.2d 42 (1941).

6 Cf. *Lutheran Free Church v. Lutheran Free Church (not merged)*, 273 Minn. 332, 141 N.W.2d 827 (1966).

7 Determination of the extent of an individual's submission to his religious organization and the jurisdiction of religious tribunals are part of the two-entity theory, see text accompanying notes 50-57 *infra*, as well as a moderate interventionist approach, see text accompanying note 64 *infra*. Questions of procedural regularity are raised, in embryonic form, even in a minimal intervention approach, see text accompanying notes 42-45 *infra*. A specific contractual approach has been suggested in many theories, including some noninterventionist ones, see text accompanying notes 20-21 *infra*.

8 See text accompanying notes 14-37, *infra*.

9 This is possibly most explicit in regard to the Roman Catholic Church, which has a substantial body of its own law governing the actions of people subject to the Church. See generally T. BOUSCAREN, A. ELLIS & F. KORTH, *CANON LAW: A TEXT AND COMMENTARY* (4th rev. ed. 1966) (setting forth and describing the official collection, the *CORPUS IURIS CANONICUM*).

These central legal questions are nonconstitutional. While there are serious constitutional questions lurking at the outer edges of the field,¹⁰ the seminal case in the area¹¹ was nonconstitutional and much of the law continues to develop along nonconstitutional lines.¹² And as should become evident, to say that an approach is constitutional is not to say that it is desirable or practicable. But, in fact, when those latter two concerns are resolved, the constitutional issues can be seen to have been met too. A significant number of cases have arisen in the area of church property disputes, and have been treated elsewhere.¹³ While the contract approach is completely applicable to such cases, the primary concern will be with the individual and the legal structure of his relation with a religious organization.

The advantages of the contract approach to church-member conflicts are most apparent when viewed against the background of other approaches that courts have employed. These other approaches, nonintervention and various forms of intervention, are examined, therefore, prior to a detailed exposition of the proposed contract approach. In analyzing each of these approaches the two policy concerns, entanglement and reasonable expectation of members, will be specifically examined in light of the legal questions posed above.

II. The Nonintervention Approach

As noted, some courts basically refuse to handle church-member conflict cases at all. This nonintervention approach to intrachurch disputes has a long history. The Pandora's box of civil-church jurisdiction was opened officially by the Supreme Court in *Watson v. Jones*,¹⁴ a venerable case involving the Presbyterian Church amidst the pains of post-Civil War reconstruction. A split devel-

10 Most of the concern arises over the second question, the criteria and methods which a court should use in this area. See, e.g., Gilkey, *The Judicial Role in Intra-Church Disputes Under the Constitutional Guarantees Relating to Religion*, 75 W. VA. L. REV. 105 (1972); Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347; Comment, *Constitutional Law—Freedom of Religion—Limitation on Civil Courts in Intra-Church Property Disputes*, 21 S.C.L. REV. 441 (1969); Comment, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113 (1965).

11 *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). The nonconstitutional status of *Watson v. Jones* was explicitly acknowledged by the Court in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115-16 (1952), where it was noted that *Watson* was decided well before the first amendment was applied to the states via the fourteenth. Hence the case presented no constitutional issue to the early Court. The complex factual machinations of *Kedroff* are discussed in detail in Dusenberg, *supra* note 2, at 516-24. Constitutional considerations set the outer limit beyond which a court may not move, but, as will be demonstrated, within the field so delimited the analysis is of a nonconstitutional character. See text accompanying notes 31-37 *infra*.

12 See *Gorodetzer v. Kraft*, 277 N.E.2d 685 (1972); *Mitchell v. Albanian Orthodox Diocese*, 355 Mass. 278, 244 N.E.2d 276 (1969); *Polen v. Cox*, 259 Md. 25, 267 A.2d 201 (1970); *Western Pa. Conf. of United Methodist Church v. Everson Evangelical Church of North America*, 454 Pa. 434, 312 A.2d 35 (1973); *Olston v. Hallock*, 55 Wis.2d 687, 201 N.W.2d 35 (1972).

13 See, e.g., Casad, *Church Property Litigation: A Comment on the Hull Church Case*, 27 WASH. & LEE L. REV. 44 (1970); Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142 (1962); Comment, *Constitutional Law—Church Property Disputes—First Amendment Prohibits Judicial Examination of Ecclesiastical Matters*, 54 IA. L. REV. 899 (1969); and sources cited in note 10 *supra*.

14 80 U.S. (13 Wall.) 679 (1871).

oped between the national church organization and the Louisville, Kentucky, congregation. At issue was whether Christian social responsibility should be defined to include loyalty to the federal government and abhorrence of slavery. The local body sought control over the local church property alleging that the national group, which remained loyal to the Union, had lost the true faith and that it (the local church) was the true presbytery.¹⁵ The Court, in holding for the national church, offered a rationale of uncompromising character which has had an enduring, and unfortunate, impact on later courts.

[W]henver 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.¹⁶

A year later the Court retreated somewhat from that absolute position in *Boudin v. Alexander*,¹⁷ a case in which the application of the *Watson* rule would have led to a palpable injustice. A small faction of a Baptist congregation, along with the minister, had purported to depose the trustees of the congregation and elect new ones. These new trustees promptly expelled the majority of the congregation and seized control of the church property. The Court, in affirming a decree restoring possession of the church to the majority, tempered the *Watson* rule, saying:

[W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. . . . But we may inquire whether the resolution of expulsion was the act of the church or of persons who were not the church. . . . In a congregational church, the majority, if they adhere to the organization and doctrines, represent the church.¹⁸

Had the rule of *Watson* been rigorously applied, the internal actions of the church body would have been beyond scrutiny, irrespective of whether that body adhered to its doctrines or organization. The question surely involved ecclesiasti-

15 A more detailed analysis of the factual interplay can be found in many church property articles. See, e.g., Comment, *Judicial Intervention in Disputes over Church Property*, 75 HARV. L. REV. 1142 (1962); Comment, *Constitutional Law—Freedom of Religion—Limitation on Civil Courts in Intra-Church Property Disputes*, 21 S.C. L. REV. 441 (1969).

16 80 U.S. (13 Wall.) at 727. The result of such reasoning was castigated by Zollmann: [A] denial of the right of civil tribunals in a proper case to construe the constitution, canons, or rules of the church and revise its trials and proceedings of its governing bodies, instead of preserving religious liberty, destroys it *pro tanto*. If a person who connects himself with a religious association is to be placed completely at its mercy irrespective of the agreement which he has made with it, the conception of religious liberty as applied to such a case becomes a farce, a delusion and a snare. ZOLLMANN, *supra* note 2, at 205.

17 82 U.S. (15 Wall.) 131 (1872).

18 *Id.* at 139-140 (emphasis supplied). There is a basic distinction between congregational organizations and hierarchical ones. In the former, majority rules. In the latter, the decision of the highest tribunal is deemed dispositive and final. This distinction was emphasized in *Krecker v. Shirey* where the court said:

An independent congregation may be governed by a majority of its own membership, but a congregation connected with any given denomination must submit to the system of discipline peculiar to the body to which it is connected (citations omitted). 163 Pa. 534, 551, 30 A. 440, 443 (1894).

cal law, rule, or custom, and by its terms *Watson* should have applied. Yet this seemed quite wrong, and the Court was willing to temper the precedent. Why, after all, should a small group be permitted to take property and escape review simply because it cloaks itself with the mantle "religious organization"? The *Watson* test proved to be too blunt an analytic tool. It responded well to fears of entanglement, but completely ignored the legitimate expectations of the members.

In 1876, a milder theory of nonintervention was expressed by Judge Redfield, an important legal commentator of the time, when he noted:

[T]he courts will not interfere with the internal policy and discipline of churches . . . so long as they keep within their own rules, which were known to the members, or might have been learned by them upon reasonable inquiry at the time of connecting themselves with . . . the church.¹⁹

Had the courts followed this approach, the course of civil-church judicial relations would have been much smoother than what actually occurred. But courts often took the first clause to heart and refused to intervene, without considering whether the church had followed its own rules or whether those rules should have been known by the members.

The primary tension engendered by the *Watson* rule between the principles of religious freedom for organizations and those of simple justice to the individual were later confronted by Justice Brandeis. *Gonzalez v. Archbishop*²⁰ involved a claim by Gonzalez that he had a right to be a Catholic chaplain under the terms of the will which endowed the chaplaincy. The Archbishop refused to so appoint him, on the ground that he was unqualified under canon law. The Court upheld the Archbishop's actions and Brandeis, for the Court, tempered *Watson* yet further, saying:

*In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest have made them so by contract or otherwise.*²¹

Watson commanded complete and unqualified deference by civil courts to religious tribunals on ecclesiastical questions. *Boudin* required that the tribunals adhere to the organization and doctrines they professed before such conclusive effect attached to their judgments. *Gonzalez* extended the scope of review such that the decisions of even a properly constituted tribunal, adhering to church doctrine, could be reviewed if the decision was arbitrary or fraudulent. While the scope of review expanded, none of the early cases required a religious organization to follow its own procedural rules. Later courts tended to ignore Brandeis' caveat

19 Redfield, *Commentary*, 24 U. PA. L. REV. 264, 278 (1876). An inquiry into why this is the case leads one to some version of the contract theory discussed in text accompanying notes 73-156 *infra*.

20 280 U.S. 1 (1929).

21 *Id.* at 16 (emphasis supplied).

of fairness and Redfield's note about keeping religious tribunals within bounds.²² Yet this next step, seen by Redfield, seems implicit in the early decisions. Unless religious organizations are bound to abide by their own rules and limitations, it is hard to justify moving beyond the straight *Watson* rule except on an *ad hoc* "shocks the conscience" basis.

Some modern courts are unwilling to face the cumulative result of the line of early cases. These courts leave the aggrieved member with little or no protection at all. In *Wolozyn v. Begarek*²³ members of a church corporation sought a court order to allow them to examine the corporation's records. The court refused, holding that state law allowed inspection for any "proper purpose," and because the information sought had to do with acts of the corporation in influencing or changing concepts of the church which involved dogma and doctrine,²⁴ there was no "proper purpose" behind the plea. The court based its reading of the statute upon a holding that it would not review actions of a religious corporation relating to ecclesiastical affairs for the purpose of ascertaining whether those actions were in accord with the policy, discipline, or usages of the church.²⁵ The *non sequitur* is breathtaking. The only action which the court was asked to review was the withholding of corporate records. Plaintiffs sought only inspection rights, they did not ask for judicial determination of any ecclesiastical questions at all. The court gave no reason for treating the corporate aspects of the religious corporation differently from the way it would treat those same aspects were a civil corporation involved. Given the facts of the case and the plaintiff's plea, it is hard to see what principled reasons the court could have advanced to support its action. Plaintiffs advanced the purpose that they were inquiring into possible mismanagement of the organization. The court did not deny that this was a "proper purpose" for inspection, but it went further. It considered the merits of a future mismanagement action and decided that because it would not take the possible later suit, it would not grant relief here. Thus the religious organization was allowed to claim the benefits of corporate existence and yet to avoid at least some of its burdens simply because it was a *religious* organization. This veers dangerously close to the constitutional safeguard against the establishment of religion, and there seems no principled reason for the court to have gone this far. To refuse intervention here was to retreat well behind the *Gonzalez* theory, and even exceeds the deference paid to religious organizations in *Watson* itself. Here there was no question of ecclesiastical rule or custom, nor was the plaintiff claiming anything at all to do with church discipline.

In terms of the two root policy concerns, courts following this nonintervention approach ignore the reasonable expectations of the members that the organization will treat them in the manner set out in the organization's rules (including any applicable state law, which would be incorporated implicitly into the rules). To enforce such a limitation would still preserve the main

22 *Brown v. Mount Olive Baptist Church*, 255 Iowa 857, 124 N.W.2d 445 (1963) is a typical example of a more modern court still hewing to the old theory. See also cases collected in Annot. 20 A.L.R.2d 421 (1951).

23 378 P.2d 1007 (Okla. 1963).

24 *Id.* at 1011.

25 *Id.*

attraction of the noninterventionist theory—its freedom from entanglement in questions of religious law.

While adhering to a noninterventionist approach generally, some courts have refused to shut their doors so completely. They have developed the theory that civil courts can decide issues which primarily involve "civil" or "property" rights, while still eschewing purely ecclesiastical questions.²⁶ *Mount Olive Primitive Baptist Church v. Patrick*²⁷ took this approach to its standard conclusion. Plaintiffs had been ousted from membership in the church without notice, and sought reinstatement. The court dismissed the suit, on the ground that it would not intervene to settle disputes over the right to church membership. Taking the court's theory and conclusion²⁸ together leads to some puzzlement about the legal status of the membership right. What is clear, however, is that for courts following this line of analysis, an individual's membership in a religious organization is held at the pleasure of that organization, with no civil safeguards whatever. It is true that *Gonzalez* permitted review if the organization acted arbitrarily,²⁹ but in light of the extreme deference exhibited by courts using this theory,³⁰ such permission would seldom be utilized.

One primary problem with this approach is the lack of agreement as to what rights fall under the protected headings. For example, in contrast to the *Mount Olive* decision, another court simply stated that "the right to share in the government of a [religious] corporation is a civil right which the law will protect. . . ."³¹ The case law provides little or no analysis on *why* such a right will, or will not, be protected, and this seems to highlight the problem with the distinction between "civil" and "ecclesiastical" questions.³²

Courts have tried to justify nonintervention on the ground that they "lack the qualifications" to decide certain classes of cases.³³ The Supreme Judicial Court of Massachusetts took this route in denying an action by an association of kosher butchers which sought to enjoin the defendant, Associated Synagogues, from interfering with business, and to have the defendant certify a given butcher as being "kosher." The Court held itself not qualified to determine whether a given method of meat preparation qualified under Jewish law, refused the other

26 Some courts still adhere to this dichotomy today. See *Ogden St. Church of God in Christ v. Gospel Temple Church of God in Christ*, 522 P.2d 757 (Colo. App. 1974); *Lowe v. First Presbyterian Church of Forest Park*, 56 Ill. 2d 404, 308 N.E.2d 801 (1974). Interestingly enough, *Watson* itself was a church property case, yet courts have tended to ignore the rule of that case in property contexts while invoking it with due solemnity in nonproperty cases.

27 252 Ala. 672, 42 So. 2d 617 (1949).

28 This conclusion is a common one. See, e.g., *Stewart v. Jarriel*, 206 Ga. 855, 59 S.E.2d 368 (1950).

29 280 U.S. 1, 16 (1929), discussed in text accompanying notes 20-21 *supra*.

30 See, e.g., *Wolozyn v. Begarek*, *supra*, at notes 23-25.

31 *Trustees of E. Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson*, 42 Minn. 502, 508, 44 N.W. 663, 665-66 (1890).

32 The contract approach avoids this problem by not having the court make any independent characterization of the right claimed. It looks instead to the question of who had the power to classify the right, and whether that body followed its own rules. The advantages of the civil/ecclesiastical dichotomy in terms of avoiding entanglement in religious law are preserved, but the reasonable expectations of the members are also taken into account. See text accompanying notes 96-97 *infra*.

33 See, e.g., *United Kosher Butchers v. Associated Synagogues*, 349 Mass. 595, 211 N.E.2d 332 (1965) (discussed below).

issue, and dismissed the suit.³⁴ Perhaps the result was correct, but it was not required by the rationale which the court offered. The concern which impels a court to evade a case for lack of qualifications seems, at base, a legitimate fear that the case will drag the court into interpreting and deciding questions of ecclesiastical law. And it is quite true that civil courts may not be qualified to do this. But this does not necessarily mean that the cases should be dismissed. If the court were willing to consider whether church procedure had been observed, as suggested by Judge Redfield, the dispute might be resolved without resort to ecclesiastical law. In the rare case where both sides ask that the court decide a question of religious law, the court could treat that law exactly the way it treats the law of any other foreign body when that law becomes involved in a suit before it.³⁵

While some courts were, and still are, reluctant to hear the claims of an individual member aggrieved by the actions of his religious organization, they generally are willing to require the individual member to obey the rules of the organization.³⁶ These cases are implicitly grounded on contractual principles. Consistency would require similar enforcement of the obligations of the organizations to their members.³⁷

It is difficult to derive any uniform principles from the actions of noninterventionist courts. In general, such courts will answer the two legal questions posed previously as follows:

- 1) Civil courts should take jurisdiction over *some* nonecclesiastical, property-related issues.
- 2) The issues should be decided on standard legal criteria, irrespective of the religious character of the parties.

The lack of a coherent conceptual framework for handling these disputes has severely hampered any reasoned policy analysis by the courts. Their approach to the first question reflects a legitimate fear of entanglement, but is otherwise incoherent.

III. Types of Interventionist Approaches

At the same time as many courts were professing allegiance to the nonintervention doctrine, a second category of more activist judicial thought was evolving. Although it began much earlier,³⁸ this activist approach is a natural outgrowth of the *Gonzalez* dictum authorizing courts to intervene in cases of fraud,

34 *Id.* The court's actions seem strained because under the state's kosher food law, Mass. ANN. LAWS ch. 94, § 156 (1967), this would seem to be exactly the kind of decision the court had to make. It should, however, be noted that this same court later explicitly adopted a contract framework for handling such questions, *see* text accompanying notes 141-151 *infra*.

35 *See* ZOLLMANN, *supra* note 2, at 208.

36 *See, e.g.,* Rector, Church of Holy Trinity v. Melish, 3 N.Y.2d 476, 146 N.E.2d 685, 168 N.Y.S.2d 952 (1957); Darret v. Church of God in Christ No. 1, 381 S.W.2d 720 (Tex. Civ. App. 1964).

37 *See* ZOLLMANN, *supra* note 2, at 225-6 and the cases cited therein.

38 *See, e.g.,* Deaderick v. Lampson, 58 Tenn. (11 Heisk.) 523 (1872). *See also* Bear v. Heasley, 98 Mich. 279, 57 N.W. 270 (1893).

collusion, or arbitrariness.³⁹ To determine whether a religious organization has acted arbitrarily, a court has to take some positive steps beyond nonintervention. But at this point any semblance of a consistent approach vanishes, and courts pursue numerous paths ranging from merely upholding state laws which serve to regulate religious corporations,⁴⁰ to determining substantive church doctrine and identifying the faction which is preserving it.⁴¹

Minimal intervention is well illustrated by *Hayes v. Brantley*.⁴² The pastor of a Baptist church sued the deacons and trustees, claiming to have been wrongfully dismissed from his job. The court looked only as far as the state's religious corporation laws to decide in the pastor's favor.⁴³ Under the applicable statute, notice of a dismissal meeting had to be publicly read by the minister or a trustee of the church.⁴⁴ In this instance, the only readings had been done by a secretary of the organization. Since the readings were void, a properly called meeting had not taken place, and, therefore, the dismissal was inoperative.⁴⁵ There is a deceptive ease to this logic which masks several questions. Why, conceding that the membership had actual notice of the meeting, should the religious corporation be held to such minute compliance with the statute? After all, it was a general meeting which dismissed the pastor, not some secret caucus of the trustees.⁴⁶ No one contended that prejudice resulted from having the secretary, rather than a trustee, read the notice. And the action could hardly be called fraudulent, collusive or arbitrary. While the court did not address these questions, the most plausible answer to them is that the pastor was held to have "contracted" for such procedural rectitude as part of his relationship with the corporation. But, in any event, the court intervened minimally, inquiring no further than compliance with state law.

This approach looks to state law, rather than the agreement of the parties, to determine which bodies have authority and how they are to exercise it. Insofar as state law is, perforce, incorporated into the organizations' governing rules, this approach is contractual. But most, if not all, organizations go beyond positive state law in setting up their internal procedures. The state law theory will not enforce these supplementary rules. It thus defeats the expectations of the members to the extent that such expectations go beyond the limited reach of positive state law. The policy supporting this self-imposed limit on the court is the fear of entanglement in religious law should the court venture beyond those areas clearly delineated in state statutes.

A less timorous approach takes to heart the adage that in framing the question one determines what the answer will be. A kosher caterer sued the Associated Synagogues, alleging libel.⁴⁷ The court took jurisdiction because it found that

39 280 U.S. at 16 (1929); see also text accompanying note 21 *supra*.

40 *Hayes v. Brantley*, discussed in text accompanying notes 42-45 *infra*.

41 See, e.g., *Holiman v. Dovers*, 236 Ark. 211, 366 S.W.2d 197 (1963) and text accompanying note 66 *infra*.

42 53 Misc. 2d 1040, 280 N.Y.S.2d 291 (1967).

43 N.Y. RELIG. CORP. LAW § 130 *et seq.* (McKinney 1952).

44 *Id.* § 133.

45 53 Misc. 2d at 1040-41, 280 N.Y.S.2d at 292-93.

46 In fact the trustees would have no power to dismiss a pastor; see text accompanying note 53 *infra*.

47 *Gorodetzer v. Kraft*, 277 N.E.2d 685 (Mass. 1972).

the alleged libel could reasonably be understood as an accusation of larceny and embezzlement, and thus the issue could be decided without reference to any religious questions.⁴⁸ Had the issue been framed in terms of a charge that plaintiff had violated kosher preparation methods, the court would not have allowed the suit, since it then would have required proof (in the court's eyes) as to what was, or was not, in accord with Jewish law.⁴⁹ There is nothing objectionable in a court's seeking to view a case from the least complicated perspective. The danger is that the court simply may retire from the field when no such perspective can be found, as this same court did in *United Kosher Butchers*.

The third major interventionist approach can be called the two-entity theory, and is illustrated by *Walker Memorial Baptist Church v. Saunders*.⁵⁰ The issue was whether the minister of a Baptist church had been illegitimately removed from his pastorate and certain members of the church wrongfully expelled from membership in the church corporation.⁵¹ The court bifurcated the church organization into corporate and religious entities, and held that:

The sphere of legal activity of a religious corporation in so far as its corporate activities can be separated from its ecclesiastical activities, is governed and limited by the Religious Corporation Law. . . .⁵²

The court reasoned that the minister of a Baptist church is an officer of the *religious* body of the church, and, consequently, the *corporate* body had no power over the issue of his discharge.⁵³ The court found that under state⁵⁴ law all members of the religious body were ipso facto voting members of the corporate body as well.⁵⁵ Since the expelled individuals were all members of the religious body, the corporation could not expel them from voting participation in the corporate body.⁵⁶ Only if a member died, moved, or was expelled from the religious body could he be denied voting rights in the corporation.⁵⁷

Courts following this approach intervene farther than those applying a minimal intervention theory. Rather than treating the religious organization as a unitary but special group, the two-entity approach requires a court to discriminate between the respective jurisdictions of two different bodies, governed by different sets of rules, within the same organization. A consequence of constructing such a framework is that suits against the corporate body, if properly brought, do not raise any "religious" questions at all, and hence fall neatly within the purview of civil courts. A court can treat the action as it would any other suit against a

48 *Id.* at 686-87.

49 *See* *United Kosher Butchers v. Associated Synagogues*, 349 Mass. 595, 211 N.E.2d 332 (1965) (discussed in text accompanying note 34 *supra*).

50 285 N.Y. 462, 35 N.E.2d 42 (1941). This approach is still used by some courts. *See* *Gospel Tabernacle Body of Christ Church v. Peace Publishers & Co.*, 506 P.2d 1135 (Kan. 1973).

51 285 N.Y. at 465, 35 N.E.2d at 43.

52 *Id.* at 467, 35 N.E.2d at 44.

53 *Id.* at 472, 35 N.E.2d at 46. Of course this root question of the jurisdiction of a religious organization (or part thereof) to act is a prime focus of any judicial intervention. It is included in the contract theory.

54 N.Y. RELIG. CORP. LAW § 134 (McKinney 1952).

55 285 N.Y. at 473, 35 N.E.2d at 46.

56 *Id.* at 474, 35 N.E.2d at 47.

57 *Id.* at 473, 35 N.E.2d 47.

corporation, and adjudicate it in accordance with normal state law.⁵⁸

This approach has some surface logic. But it still makes positive state law the parameter of its protection of member expectations. And if the issue at stake is controlled by the "religious" body (such as the question of membership in that body), there is no structure by which the court can evaluate and handle the dispute.

There is one rather unusual approach which defies classification. An individual sued for a declaration that he was a member of a religious organization. The court held that an expelled member must exhaust his remedies within the religious organizations before seeking redress in the civil courts.⁵⁹ The fascinating part of this approach is the ambiguous threat which it carries for both sides. Had the court simply refused to intervene and said no more, we would be back in the noninterventionist camp.⁶⁰ But the court said more, it encouraged an inference that it *would* intervene, at the proper point of ripeness. What it would do then, no one knows.⁶¹ As frequently happens, the court gave no explanation for its actions. One plausible suggestion would be that while a court could review the decision of a religious tribunal,⁶² it would not act until that decision had been made final. This would be to apply the theory of review of administrative agencies to the field of religious tribunals.⁶³ So long as the decision could be reversed by the organization's procedures themselves, there was nothing (on this view) that required the court to act.

The last major interventionist approach shuns the delicate conceptual surgery required by the two-entity approach, and examines the acts of a religious organization regardless of their substantive content. One branch of this approach maintains that courts should make only the threshold determination of whether the religious body had jurisdiction over the particular topic.⁶⁴ If the organization acted within its authority, the inquiry is ended. Courts taking this line do consider the limits of the members' submission to the organization, but do not consider issues of procedural regularity.

The other branch of this approach is the most active of all. Procedural regularity of the church as well as other questions is within its ambit. This approach is most common in church property disputes, where the court seeks to determine which faction of a church abides by original doctrine and hence deserves to get the church property. Property is perceived as a trust fund for the use of the group which still adheres to the beliefs and practices employed at the

58 See, e.g., *Kupperman v. Congregation Nusach Sfar of the Bronx*, 39 Misc. 2d 107, 240 N.Y.S.2d 315 (1963).

59 *Rodyk v. Ukrainian Autocephalic Orthodox Church*, 31 App. Div. 2d 659, 296 N.Y.S.2d 496 (1968), *aff'd*, 29 N.Y.2d 898, 328 N.Y.S.2d 685 (1972).

60 See text accompanying note 23 *supra*.

61 See, e.g., *Horosym v. St. John's Greek Catholic Church*, 239A.D. 563, 267 N.Y.S. 906 (1933).

62 This review could be by the arbitral standard suggested *infra*, text accompanying notes 74-75 *et seq.*, or by some other standard.

63 See generally K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 20.01-20.10 (1958).

64 See, e.g., *Denton v. Bennett*, 364 S.W.2d 857 (Tex. Civ. App. 1963). This approach blends with the two-entity theory in that both seek to determine the jurisdiction of the *acting* body. The two approaches differ in method, however, and it is fruitful to treat them as distinct.

time the property was given to the organization.⁶⁵ In applying this "departure from the doctrine" test, courts found themselves determining what is, or is not, a major deviation from doctrinal principles.⁶⁶ Obviously, this can involve rather fine points of theology; and courts, not being particularly adept theologians as a rule, produced some amazing results.⁶⁷ Fortunately for all concerned, the Supreme Court put an end to such fun by holding the "departure from the doctrine" test unconstitutional.⁶⁸

Even putting aside constitutional questions, the departure from doctrine approach epitomizes the fear of entanglement in religious law which motivated the noninterventionist courts. When a civil court attempts to set dogma for a religious organization, it violates the premises upon which legitimate court intervention is based.⁶⁹ Intervention is justified on grounds of *protecting* free exercise and the reasonable expectations of members. By attempting to freeze, in some way, the original doctrines of a religious organization, "departure from the doctrine" courts have *limited* the groups' free exercise rights rather severely. The group majority is constrained from modifying its beliefs or practice for fear that a minority group which objects to the modification can retain control of church property and exclude the majority. Of course, the trust fund theory, upon which many of these cases rely, responds to the reasonable expectations of givers of property to religious organizations. It pays little notice, however, to possible problems of entanglement, and requires courts to make an independent, external determination of religious doctrine which threatened the free-exercise rights both of present members and of the organizations themselves.

In addition, the analysis rests on an *a priori* judgment that every grantor is presumed to have expected the doctrines and usages of his religious organization not to change, and that such an expectation was reasonable and deserving of protection. Whatever validity such assumptions may have in certain cases, it seems a strong oversimplification to claim that they apply to all grants and grantors. Yet it must be conceded that the trust fund theory had a superficially appealing contractual slant to it; the grantor "contracted" that his gift be used only by a group with certain doctrines. By focussing on the supposed doctrinal substance of that contract, however, the courts ignored the anterior question

65 See *Mills v. Yount*, 393 S.W.2d 96 (Mo. Ct. App. 1965); see generally Annot. 15 A.L.R.3d 297, 320 (1967). For a more detailed discussion of the implied trust fund theory which made these disputes possible, see Note, *Judicial Intervention over the Use of Church Property*, 75 HARV. L. REV. 1142, 1151-54 (1962). See also Comment, *Enforcing Conditions Placed On Gifts to Religious Institutions—Judicial Interference with the Free Exercise of Religion*, 49 B.U.L. REV. 742 (1969).

66 See *Lutheran Free Church v. Lutheran Free Church* (not merged), 273 Minn. 332, 141 N.W.2d 827 (1966).

67 One court, in struggling to decide a case using this criterion, was driven to state:

But is this doctrine of the Virgin Birth so fundamentally different from the belief in the "Fatherhood of God," "that Jesus is the Son of God and the Savior," and "that the Bible is the Word of God?" Is it basically a violation of the dictum or tenet "no Creed but Christ, no rule of faith and conduct but the Bible?" There may be some theological distinction, but there is none to the ordinary lay person. To most people trinitarian belief imputes divine origin to Jesus, stemming from the New Testament account of his birth.

Ragsdall v. Church of Christ in Eldora, 244 Iowa 474, 55 N.W.2d 539 (1952).

68 This is a result of the *Hull Church* case discussed in notes 98-204 *infra*. Some of the literature surrounding the decision is catalogued in notes 10-13 *supra*.

69 See note 111, *infra*, where these premises are discussed more fully.

whether the original parties also agreed that the contract be modifiable. It is reasonable to suppose that at least some grantors recognized that doctrine can evolve. When this factor is taken into account, the court's examination should shift to whether the organization had the power to modify the contract, and whether it exercised that power in accordance with the agreement.

Since to assume nonmodifiability limits the range of choice, and, concomitantly, the free exercise rights both of the organization and of the grantor, it would seem (in the absence of explicit evidence to the contrary) that the trust fund theory should have started with a presumption that the original contract with the grantor was modifiable. Had it done so, it would not have had to interpret dogma at all. And, in the rare case of a nonmodifiable contract, the court would still have to ask only what person or group of persons had the power to interpret the agreement. If some religious tribunal had that power, an arbitral matrix can be applied.⁷⁰ If the power is expressly granted to the courts, no first amendment problems would arise. In no instance has a court held that the act of interpreting an agreement which specifically vests the court with such a power of interpretation is in any way illegitimate simply because one of the parties is a religious organization.⁷¹ On constitutional principle, the court, in interpreting such an agreement, treats the parties in the same way that it treats parties to any other (nonreligious) agreement. Nothing is being forced upon an unwilling religious group. On the contrary, refusal to interpret such an agreement, where agreements of nonreligious groups would be interpreted, could raise severe free exercise problems. The court, in effect, would be denying the use of its facilities to *consenting* parties because the parties were religious.⁷²

This analysis of the radically interventionist departure from the doctrine approach points toward another possibility, a middle ground between intervention and nonintervention. By applying contract principles in the manner suggested, a court could arguably uphold the expectations of church members to a considerable extent while avoiding the pitfalls of entanglement.

IV. The Contract Approach

As illustrated by the foregoing discussion, courts in general have reached disparate results and have not carefully analyzed the relationship of the member to his religious group. Some courts, however, even early in the development of church-member conflict law, found that contractual analysis provided a valuable framework for resolution of church-member issues. In 1890 the Supreme Court of Minnesota made an extended examination of the relationship of a member to his religious group, and found that it could be construed as a contract between the organization and member. This made it possible for the court to determine whether the organization had acted "wrongfully" without having to evaluate competing arguments as to the substantive content of the religious law.

70 See text accompanying note 125, *infra*.

71 See text accompanying notes 123-131, *infra*.

72 See note 125, *infra*.

[W]here the contract provides, or by implication contemplates, that the question . . . shall be determined by some church judicatory, the decision of such judicatory, duly made, when the matter has been properly brought before it, will be conclusive upon the civil courts. And this is so, not because the law recognizes any authority in such bodies to make any decision touching civil rights, but because the parties, by their contract, have made the right of property to depend on adherence to or the teaching of, the particular doctrines as they may be defined by such judicatory. In other words, they have made it the arbiter⁷³

Two strands appear in the court's decision. First, the powers of an ecclesiastical tribunal do not derive merely from any supposed lack of expertise in the civil courts,⁷⁴ but rather they derive in main from the contract between the organization and the member who is before the tribunal. Second, the tribunal itself is viewed as fulfilling the function of an arbitrator (arbiter) rather than that of a court. This second point should not be underestimated, as it suggests a useful criterion for judicial scrutiny of such tribunals. The general rule is that the award of an arbitrator will be upheld if the parties had agreed to arbitrate that particular dispute and the arbitrator stayed within the limits of the authority provided for him in the contract.⁷⁵

It is this arbitral approach based on contract analysis which this article proposes as a framework for the review of actions by religious organizations. Applying this framework, it also becomes the duty of courts to examine whether the organization stayed within the limits of its contractual authority by following its own prescribed procedures and rules in dealing with the aggrieved member. It should be emphasized that this contract framework does not presume to realistically reflect an individual's relation to his church.⁷⁶ It is suggested only

⁷³ East Norway Lake Church v. Halvorson, 42 Minn. 503, 507-08, 44 N.W. 663, 665 (1890).

⁷⁴ On the constitutional level there is another argument for civil court deference, based on the "entanglement" rationale. It will be treated later. See text accompanying notes 105-122, *infra*.

⁷⁵ See, e.g., United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960); Note, *Judicial Review of Labor Arbitration Awards After the Trilogy*, 53 CORNELL L. REV. 136 (1967). See also Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A. L. REV. 360 (1962).

⁷⁶ The theory may, however, be factually valid for some. An example of a highly formal contractual provision in a church membership rule is found in *Slaughter v. New St. John's Missionary Baptist Church*, 8 La. App. 430 (1920). In suggesting the general applicability of this framework, one remains cognizant that such a contractual relationship would often seem odd as a matter of factual description; see Dusenberg, *supra* note 2, at 535. The common practice of many religious organizations is to grant membership at infancy, which is slightly below the age of legal consent. Although this situation could conceivably cause difficulty if a parent attempted to contract away a child's future property, the important thing to realize is that the question would then be arising under a coherent conceptual framework of contract theory. Duress, lack of capacity, etc., are all terms within the contract framework. So although the framework cannot answer the question, it can provide a court with the conceptual tools with which to attack it. A related problem for a contract theorist in this area is whether a person can ever contract away *too many* of his civil rights to a religious organization. While one approach would seem to say that there is no practical limit to what an individual should be allowed to contract away, another view could plausibly assert that some bargains in this realm should not be enforceable in court because they give away too many of a person's "inalienable rights." While the problem is distressing in the abstract, and courts have not had much occasion to rule upon it, it is possible to infer what the likely result of such an attack would be. We are not talking here about a claim of duress, that the contract was in any way the result of any illegitimate pressure. That situation is well-known to the

that, by using a conceptual framework of contract theory, civil courts can develop a coherent policy for the resolution of disputes between members and religious organizations, within present constitutional parameters, and without sacrificing either the reasonable expectations of the individual members or becoming enmeshed in issues of theology and the internal operations of religious groups.

A. *The Contract Framework and Private Association Law*

A substantial body of law governs the rights and obligations of members vis-à-vis private associations. As religious associations are a subclass of this more general group,⁷⁷ it seems natural to look to the body of law in this field to guide us.

Often the formal rules of a private association have been used as standards for judging the propriety of that association's actions.⁷⁸ Courts, emphasizing the consensual nature and basis of the group, have treated the group's rules as terms of a contract, and have enforced them against both the organization and the members in accordance with ordinary contract law and doctrine.⁷⁹ Many contract law doctrines have been applied to private associations,⁸⁰ but two doctrines in particular are of interest with regard to religious organizations. These are the doctrines of express and implied conditions. These two doctrines explain theoretically why a religious organization should be bound to its own rules. If the parties explicitly agreed that the authority of the organization depended on obedience to its own rules, the result is obvious. If the organization fails to perform its contractual obligation, the member should be released from his.⁸¹ This follows from the application of principles totally unrelated to the religious nature of the organization in question.

But few cases will contain an express condition that the organization abide by its own rules. Contract law allows for implied conditions when reasonable under the circumstances:

A fact or event may be a condition of a contractual right or duty, even though the parties had no intention that it should so operate, said nothing about it in words, and did nothing from which an inference or intention can be drawn.⁸²

courts, and would be handled as a standard problem regarding the enforceability of *any* contract. The narrow question raised is whether some bargains are just inherently unfair because they surrender too much, they give up too many of the rights of a citizen, such that a court should not enforce them. The answer would seem to be that there is no practical limit on what an individual can agree to give up. Individuals have become monks and nuns, taken vows of chastity and poverty, given up their freedom of travel such that a superior ecclesiastical official can place them anywhere in the world, and no court we have found has seen fit to intervene because of it. So although a contract with a religious group or organization should be vulnerable to all the traditional contract defenses, there seems to be little chance of courts refusing to enforce them because they surrender too much. In any event, this article is concerned primarily with establishing the legal framework which best can handle the general run of cases.

⁷⁷ See, e.g., *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 991-2 (1963) [hereinafter cited as *Developments*].

⁷⁸ *Id.* at 995.

⁷⁹ *Id.* at 1001.

⁸⁰ See A. CORBIN, CORBIN ON CONTRACTS §§ 132, 628, 632, 637, 1252, 1257 (1962).

⁸¹ *Id.* at §§ 631, 1257-1259.

⁸² *Id.* at § 632.

Such a fact or event is a constructive condition.⁸³ Applying this doctrine, a court could hold that procedural rectitude on the part of the organization is a 'constructive condition upon the individual's consent to be bound by the decisions and tribunals of the organization. The doctrine seeks to do justice by reading into contracts those things which the court feels the parties would have said, had they thought of it. But in many cases this rationale is quite patently strained, and the court is constructing the condition because, subject to express denial by the parties, the court feels that justice requires it.⁸⁴ Here again, the principles are neutral as between religious and other organizations.

While the contract theory has been criticized on several grounds,⁸⁵ these criticisms apply to the application of the theory as regards *any* private association, not merely its application in the religious context. Most importantly, courts *have* enforced association rules on a contract basis. Recasting a bit, the objections have no greater force against applying contract theory to religious organizations than they do against applying it to any other association, and the courts have found that the benefits outweigh the objections as regards those other types of organizations. Thus the arguments against the contract approach need not deter a court from applying the theory in the religious context.

Several arguments have been put forth in favor of requiring an organization to abide by its rules. First, by enforcing an organization's own rules against it, a court helps to ensure that the governing body acts legitimately on behalf of the organization; there simply is no other viable way to determine the authority of the organization and its parts.⁸⁶ Second, knowledge that courts will seek to determine the agreed upon rights of members may well lead the organization to more consciously determine those rights,⁸⁷ thus settling in advance areas which otherwise could produce disputes. These arguments cannot be dismissed lightly, and they have no less force when the organization in question is religious.⁸⁸ The problems of tracing authority within an organization are no simpler in religious groups than in others. And, in view of the tendency of courts to avoid religious cases, the desire to eliminate disputes by encouraging the organization to make explicit the rights and responsibilities of members may have added force when the organization is a religious one. Based on these grounds, then, a court would be justified on policy in utilizing this general body of contract law to resolve litigation between a member and his religious organization.

There is another objection, however, to applying contract law to church-member disputes. Membership in a religious organization may entail a duty to God imposed on the member, the organization, or both. This realm of the rela-

⁸³ *Id.*

⁸⁴ *Id.* Similar reasoning underlies the doctrine of impossibility of performance. *Id.* §§ 1320-1333.

⁸⁵ See Chaffee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1001-07 (1930). It has been argued that such an approach entails a multiplicity of contracts among all members, *id.* at 1002-03. Moreover, the theory does not explain certain features unique to private association law, *id.* at 1004-05. These features are not relevant to the present inquiry.

⁸⁶ See *Developments*, *supra* note 77, at 1021.

⁸⁷ *Id.*

⁸⁸ Constitutional arguments for disparate treatment are possible, but they are not ultimately valid. See text accompanying notes 98-122, *infra*.

tionship between man and God is usually considered to be outside the scope of a court's inquiry, and, as will be shown, this view is correct. The doctrine of constructive conditions, it may be argued, does not inherently except such cases from its reach; and courts are not always wise.⁸⁹ Thus, this argument criticizes the theory as inappropriate since it extends judicial scrutiny beyond the area where it legitimately should operate. This objection can be parried, still staying on the nonconstitutional plane. Indeed, there are reasons consonant with contractual theory which counsel against interference with the man-God relation.⁹⁰ Suppose, for example, that a member claims that the organization is obligated by its rules to pray for his health. The organization does not deny the obligation, but refuses to fulfill it. What relief could a court both order and enforce? Clearly it could order individuals to say certain words, but prayer—whatever its true nature may be—seems to mean more than this.⁹¹ Whatever this "something more" may be, it clearly seems beyond the powers of a civil court to detect and require.⁹²

Since it is axiomatic that a court, in exercising its equitable jurisdiction,⁹³ will not order specific performance unless it is able to enforce that order,⁹⁴ the court should stay its hand here. From another perspective, the court could rely on the doctrine that equity will not order specific performance where such performance depends on the *will* of the performer.⁹⁵ Under either theory, a court applying the contract approach would not intervene in the man-God relation and the theory itself, when supplemented in this manner, is not rendered inappropriate.

A court has power to enforce its decrees only in the sphere of interpersonal relationships. In the present context, this would include questions of organization, membership, expulsion, the employment of clerics and other officials, disposition of the church property, and an almost infinite number of other issues. It should not be overly difficult for a court to determine which cases fall outside its enforcement power. This criterion for exercise of equitable jurisdiction is different from the civil/ecclesiastical dichotomy which has been employed by some non-interventionist courts.⁹⁶ The two sets of criteria deal with the same universe of facts, and as a factual matter, many of the issues which are considered "ecclesiastical" are beyond the enforcement power of a civil court. But this factual overlap is not an analytic identity. For example, questions regarding membership in the religious organization generally are within the court's enforcement

89 See notes 64-67, *supra*, and accompanying text.

90 See Comment, *Enforceability of Religious Law in Secular Courts—It's Kosher, But Is It Constitutional?*, 71 MICH. L. REV. 1641 (1973), where the man-God and man-man relationships are laid out and discussed.

91 The nature and meaning of prayer is well beyond the scope of this article. For those interested in the matter, see D. Z. PHILLIPS, *THE CONCEPT OF PRAYER* (1966).

92 I avoid here the problems which may arise when a member claims that God owes him a duty, but that the religious organization (in violation of its rules) has interfered with performance. If the problem in the text is unenforceable then, *a fortiori* this one is also. Cf. *United States ex rel. Mayo v. Satan and His Staff*, 54 F.R.D. 282 (W.D. Pa. 1971).

93 A court clearly is acting in an equitable capacity when considering a suit for specific performance such as the one being discussed here.

94 POMEROY, *EQUITY JURISPRUDENCE* § 1405 b, at 1048-9 (5th ed. S. Symons 1941).

95 *Id.* (emphasis in original).

96 See text accompanying note 26, *supra*, and note 32, *supra*.

powers—it can order reinstatement, it can order further or new proceedings before the religious tribunals, etc. Yet on the civil/ecclesiastical dichotomy, such questions have been held to be ecclesiastical,⁹⁷ and therefore not fit subjects for judicial action. What is suggested here is not simply a change of terms, as the above example should make evident, but rather a change in perspectives. Instead of struggling with a test applicable only to so-called “religious” cases (*i.e.*, is this an ecclesiastical question?), the jurisdictional criterion should be the one applied to the whole range of equitable relief cases (*i.e.*, is this case within the court’s enforcement power?).

B. *The Constitutional Ground*

Although the discussion thus far has been at a nonconstitutional level, the first amendment cannot be neglected in formulating any general approach to cases in this area.⁹⁸ The prevailing law was set by the Supreme Court’s decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.⁹⁹ The case involved a dispute over church property, and the Supreme Court held that the first amendment barred civil courts from applying a test to resolve the dispute which gave the property to the group which had departed least (or not at all) from the original doctrines of the church. In a situation where at least one of the parties had not consented to having the civil court decide questions of doctrine, the Supreme Court held that such courts may not resolve disputes by making such a decision of religious doctrine.¹⁰⁰ But by remanding, the Court made it clear that some state law could be applied.¹⁰¹ The law which met the Court’s test was comprised of “neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.”¹⁰² The contractual approach constitutes just such a body of “neutral principles of law,” a fact which a few post-*Hull Church* cases have recognized.¹⁰³ This conclusion is compelled by the fact that if the Court were to hold that contract principles were not “neutral” within the meaning of *Hull Church*, the entire original line of Supreme Court cases discussed earlier was incorrect.¹⁰⁴ Given the Court’s extensive quotation from those early cases in *Hull Church*, this seems unlikely.

Additional support for the constitutionality and desirability of the contract approach comes from another line of first amendment cases, those dealing with public financing of sectarian schools. The recent cases propose a threefold test to ascertain when state intervention and involvement is permissible under the constitution. The test is phrased in terms of state statutes, but it applies as well for

97 See notes 26-28, *supra*, and accompanying text.

98 For work in this area, see sources cited in notes 10 and 13, *supra*.

99 393 U.S. 440 (1969).

100 *Id.* at 451.

101 *Id.*

102 *Id.* at 449.

103 See, e.g., *Polen v. Cox*, 259 Md. 25, 267 A.2d 201 (1970). See also note 125 *infra*, and Kauper, *supra* note 10, at 373.

104 See text accompanying notes 17-22 *supra*.

analytical purposes to common law doctrine. First, the statute in question must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and, third, the statute must not foster an excessive entanglement with religion.¹⁰⁵ The current approach was stated by Mr. Justice Powell in *Committee for Public Education v. Nyquist*:¹⁰⁶ the main criterion is whether a primary effect of the challenged statute is to advance religion.¹⁰⁷ As one commentator notes, for Powell an effect is primary if it substantially advances religious activity, and this is true regardless of whether the effect comes second in the chronological sequence of effects from the same grant.¹⁰⁸ A New York plan to reimburse tuition paid to certain nonpublic schools fell under this standard in *Nyquist*, as did a Pennsylvania system in *Sloan v. Lemon*.¹⁰⁹ The Court looked to the substance of the programs and made its own judgment as to their effects.

From our point of view, then, the "neutral principles of law" required by *Hull Church* must also pass the gauntlets of (1) not having a primary effect of advancing religion, and (2) not fostering an excessive entanglement with religion.¹¹⁰ As far as the first test is concerned, the contract theory passes under any reasonable construction. As noted earlier, the jurisprudence of contract law is applicable to all spheres and organizations. It is hard to see how the enforcement of intrachurch contractual arrangements could be claimed to advance religion. It may be suggested that to require an organization to follow its own rules in some sense interferes with its free exercise rights, but this is met with the argument that to *not* enforce such rules violates the free exercise rights of the members. People generally have the right to define the terms under which they will exercise their religious choice. To let an organization ignore its rules serves effectively to deny that right, and hence limit the members' free exercise potential.¹¹¹ Similarly, one

105 See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

106 413 U.S. 756 (1973).

107 *Id.* at 774-80.

108 See Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 1973 Sup. Ct. Rev. 57, 78.

109 413 U.S. 825, 832 (1973). This is especially explicit in *Sloan*.

110 By definition, a "neutral principle" cannot be one which has behind it the *purpose* of advancing religion.

111 This free exercise right seems, to me, to rest on a still more basic principle: the right to choose. We *choose* whether or not to associate with a given religious group, and the free exercise clause stands to protect that right of choice. In its baldest form, such a right to choose does not even entail the right to limit the depth of one's commitment to that choice. Yet surely there is no *a priori* reason to disallow such a right of limitation. The question is one of determining which alternative is preferable. In one sense, to say that one can choose, but not limit the effects of that choice is to limit the freedom to choose itself. And in the context before us here, there seems no good reason to impose such a limit.

Choice may be viewed as having at least two dimensions: breadth and depth. The breadth of choice refers to the number of alternatives presented, and it must also take account of the time factor. Two individuals may each have a universe of ten choice objects (in our context, ten possible religious groups to which he may belong), out of which each may choose one (they are only permitted to belong to one religion at a given time). At this point, their breadth of choice is the same. But if, when the first individual makes his selection, he is then barred from further choosing (either he cannot leave the group, or, if he leaves he cannot join any other group), his *entire* breadth of choice is ten. If the second individual can make his selection, and later change his mind, his breadth of choice is much larger. At t_1 he has ten choice objects. When he changes his mind at t_2 he can go back to the universe and select among the remaining nine objects. Whereas I_1 has a total of one choice and ten choice objects, I_2 has ten choices and fifty-five choice objects (ten at t_1 , nine at t_2 , . . . one at t_{10}).

could suggest that to enforce the organization's rules against its members "establishes" the organization and hence "advances" religion. Yet to *not* enforce those rules simply because the organization is a religious one, where the rules of ordinary voluntary associations are enforced, seems just the sort of discrimination against religious groups which the free exercise clause is meant to bar.¹¹²

What this seems to highlight is that the "primary effect of advancing" test really has little application to the present case. The enforceability of contracts is not some special benefit which the state confers upon certain organizations. Rather, it is a part of the legal framework under which we all live. It is one of the "givens" of our society.

The constitutionality of the contract approach under the school finance

Given this, we can deal with the question of allowing individuals to limit the depth of their commitment to a given choice. For the sake of simplicity, imagine that depth of commitment can be measured in terms of the number of hours devoted to the chosen activity. In the first instance, let us assume that I_1 must devote twenty-four hours per day to the activity which he has chosen, but that I_2 need only devote a minimum of two hours per day to his chosen activity and in fact has chosen to give it just that minimum amount of time. It is obvious that I_1 , in spite of his potential breadth of choice, cannot make another choice; there are only twenty-four hours in a day. And it seems equally obvious that I_2 can choose up to twenty-one more choice objects. Thus, in this simplified situation, it makes sense to say that I_2 has a greater freedom of choice than I_1 .

To apply this conclusion to our actual situation requires only minor adjustment. Instead of being compelled to spend twenty-four hours per day on his choice, suppose that I_1 has to spend "as long as necessary" on each choice he makes. All other conditions remain as above. Thus I_2 still has an absolute ability to take on twenty-one more choice objects. I_1 now also can take on more choice objects, and he certainly cannot take on no more than twenty-one (the two-hour minimum now applies to him, too); but his freedom is limited by another variable—the amount of time each choice will require. If *any one* of his choices requires more than the minimal two hours per day, he has fewer choices available than I_2 . His freedom is lessened because he is not allowed to limit the depth of his commitment.

The second premise necessary to legitimate court intervention is that our society protects, to some degree, the right to have one's agreements enforced. Perhaps it is sufficient just to note that this is a basic part of contract law, and is accepted as a premise underlying our idea of an organized and civilized society. But the protection can also be derived from the choice propositions discussed above. The maximal freedom of choice requires that the individual be able to limit the depth of his commitment to a choice. How could this freedom be ensured? What is to prevent a strong individual from compelling a weaker one to commit more deeply than he would have liked, or from breaking off a commitment already made and relied upon by the weaker party? It seems clear that the state must intervene here, or the freedom to choose is simply an empty phrase written large. But if the state is to intervene, it must have some standards upon which to use its force. Without some such guide, one or both sides plausibly may claim that their freedom has been diminished. It is to avoid this charge that we look to the "agreement" of the parties: what did they choose to do together? It is this agreement, this mutual choice, which will be enforced.

It may be suggested that such a "locking in" of an individual to his agreements is also a limit on his freedom. On analysis, I do not feel that this claim holds up. Our earlier examples involved first-order choices: he chose the saw; she chose to be a doctor. But this does not exhaust the universe. We can also choose at a second level: he chose to agree with her. What characterizes this level is the entrance of a second choosing party and a choice object which can only be attained by joint action. To allow both parties access to this second level of choice objects, the state must enforce interpersonal agreements. Without such state intervention, the "nonbreaching" party will be substantially deterred from selecting that set of choice objects which require the cooperation of another. Such deterrence is, I would argue, a real limitation on the innocent party's freedom of choice.

The conclusions of this brief excursion into theory can be quickly stated: from the principles of free choice underlying the free exercise clause, it follows that both an individual and a religious organization have the right to determine the conditions upon which they will interact, and that the state will enforce whatever agreement they make regarding that interaction (ignoring, for the moment, considerations of public policy which might modify so sweeping a conclusion).

112 See note 125 *infra*.

cases does not rest on the "primary effect" test alone. It is buttressed by the Court's third test: the state must not foster an excessive entanglement with religion.¹¹³ This was the foundation of *Lemon v. Kurtzman*¹¹⁴ and may be the key to understanding the Court's approach. In *Lemon*, the Court struck down Pennsylvania and Rhode Island plans to aid nonpublic schools. The Rhode Island plan involved a salary supplement to teachers in nonpublic schools given on condition that they not teach religion, but only courses offered (and employ materials used) in the public schools. The Pennsylvania statute authorized the state Superintendent of Public Education to reimburse nonpublic schools for teachers' salaries, textbooks, and materials for courses in particular secular subjects not expressing any religious teaching, morals, or forms of worship.

Both statutes were held unconstitutional as fostering excessive entanglement between government and religion. The Rhode Island program was found to necessitate some surveillance of teachers in the nonpublic schools and the auditing of school records to ensure compliance with the statutory conditions upon which the aid was to be granted. These required state actions would, in the Court's view, involve excessive entanglement between state and church.¹¹⁵ The Pennsylvania program fell for the same reason.¹¹⁶

These cases, therefore, hold that entanglement is constitutionally excessive when the state must intrude to ensure that the religious organization is obeying external limitations on its internal functioning. While this result is based on the establishment clause, there is a respectable argument that such state intrusion is a form of government control over the internal affairs of the organization that violates the free exercise proscription as well.¹¹⁷ It must be stressed that the constitutional infirmity arises from *external* limitations on the organization. The Court in no way intimates that it would be impermissible for a state court to ensure that *internally imposed* rules (made by the organization) are followed.

Policy reasons support this interpretation of the Court's entanglement test. The basis of the test is avoidance of religiopolitical strife.¹¹⁸ Justice Powell made this explicit in *Lemon*.

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs . . . Partisans of parochial schools . . . will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid [to parochial schools] . . . will inevitably respond and employ all of the usual political campaign techniques to prevail.

. . . The potential divisiveness of such a conflict is a threat to the normal political process.¹¹⁹

113 See also *Walz v. Tax Commission*, 397 U.S. 664 (1970).

114 403 U.S. 602 (1971).

115 *Id.* at 619.

116 *Id.* at 621-22.

117 See *Lemon v. Kurtzman*, 403 U.S. 602, 650-51 (Brennan, J.) (1971). The organization itself may not raise such a claim, but some of its members might. And if we are to say that the organization spoke "for" the members, we have moved into a contractual realm by "binding" the members to their organizational choice.

118 See, e.g., *Walz v. Tax Commission*, 397 U.S. 664, 676 (1970).

119 *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

This fear of promoting political strife was reiterated in *Nyquist*,¹²⁰ and seems to trouble the Court rather deeply. Although the limits of permissible entanglement have not yet been set, it seems safe to say that an approach which engenders a lesser risk of political strife while still resolving the dispute at hand is to be preferred to one which carries greater risks.

On this constitutional basis, and on the premise that courts should protect the reasonable expectations of members of religious organizations, the contract approach is acceptable. The theory in no way imposes external limitations on an organization's internal affairs. It does not, in other words, tell the organization what it can or cannot make rules about, but requires only that the organization abide by whatever rules it does make. Taking into account the free exercise interest of the member, which is also involved in formulating a conceptual structure for this class of cases, the minimal intervention involved in requiring a group to abide by its own rules should not be deemed "excessive entanglement."

The contract approach also responds sympathetically to fears of the strife-producing tendencies of state involvement. Admittedly, if the state closed its doors to all cases involving religious groups, any strife so caused could be claimed not to be the result of state "entanglement." But this would be to totally ignore both the reasonable expectations and free exercise interests of the members. And short of such a "let the parties fight it out" approach, the contract rationale seems to entail the least risk of producing religio-political strife. It does not place the state in a position of either favoring or opposing the organization on any general basis, but simply enforces whatever arrangement the members and the organization have made among themselves.

Although the Court did not advert to it, the entanglement argument may have a negative bite. Perhaps the Court's analysis means that the state is obligated to intervene, to become somewhat entangled, in order to *prevent* possibly greater strife. If, in fact, strife prevention is the underlying value to be protected, as the Court says, then state intervention may be necessary if the absence of such intervention would promote strife to a greater degree than would the intervention itself. By this analysis, the minimal degree of entanglement entailed by the contract approach may well be constitutionally required, not just allowed.

But even under the positive entanglement argument, the contract approach passes muster. It avoids causing strife because, fundamentally, it provides an organized and peaceful outlet for dispute settlement. And, for several reasons, this is not an irritant in itself. First, the approach does not require the court to deal with the substance of the dispute at all.¹²¹ Second, as noted above, the approach itself does not prohibit or encourage the organization to make any particular internal rule.¹²² It only enforces whatever rules are made. Third, the knowledge that the courts will look to the rules and promises of the organization to determine the rights of members could stimulate the organization to more explicitly determine just what the rights of members will be. Such action by the

¹²⁰ *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973).

¹²¹ See text accompanying notes 123-129 *infra*.

¹²² Public policy sets some limits here, but these would seem to apply irrespective of whether the contract approach is used. See note 125 *infra*.

organization could prevent misunderstandings and disputes from arising, and, thus, from ever reaching court. All else being equal, the fewer disputes that reach the courts, the fewer the opportunities for court intervention and "entanglement." It seems reasonable to take, at least as a working hypothesis, that the court approach which minimizes both the number of times a court must act and the depth of its intervention when action is taken, also minimizes the chance of a constitutionally impermissible "entanglement." Finally, the contract approach does not require the political process to enter the picture at all, avoiding as completely as possible the potential of political strife.

Thus, on various grounds the contract approach seems to be acceptable under the first amendment. It not only meets the criteria which the Supreme Court has articulated, but it also lessens the chance of religio-political strife upon which those criteria are rooted.

C. How to Apply the Theory

Under the contract framework as discussed herein, when an aggrieved member seeks civil aid against some action of his religious organization, the court will construe the relationship between the disputants as a contract. From this contract, it will determine: (1) whether the parties agreed to submit the issue in controversy to the religious tribunal, (2) whether the tribunal was faithful to its own procedures and practices, and (3) whether the decision rendered was within the tribunal's authority. If these conditions are met, the religious organization has met its contractual obligations and the court will take no further action. For judicial purposes, the individual's submission to the authority of such religious tribunals is conditioned on the organization acting as it promised.¹²³ Under this approach, when the organization made its own rules, it promised to each of its members that these rules had meaning, that they could be used to predict how the organization would behave. The contract theory protects that expectation interest of the members.¹²⁴ By the same token, though, if the organization *has* kept its end of the agreement, a court will protect the organization's legitimate expectation interest by holding the member to his side of the agreement.

If the court finds that the organization has conformed to its agreement with the member, it will treat the judgment of the religious tribunal as conclusive. Except insofar as it is necessary to chart the broad limits of public policy,¹²⁵ courts

123 If the organization has incorporated under state law, compliance with those laws is necessarily part of the organization's obligation to its members. *See Hayes v. Brantley*, 53 Misc. 2d 1040, 280 N.Y.S.2d 291 (1967) (discussed in text accompanying notes 42-46, *supra*).

124 For a discussion of the principles which a court could apply in this context, see text accompanying notes 80-84, *supra*.

125 Public policy may override private choice here. An example of an overriding state policy would be *Reynolds v. United States*, 98 U.S. 145 (1878), upholding laws prohibiting polygamy against the claim that the Mormon Church approved of the practice as part of the internal workings of the faith. This leaves open the problem of whether some contracts in this area should be held unenforceable on other grounds. This could easily arise regarding members of the current religious movement who are loosely termed "Jesus freaks." A plausible claim of unconscionability or duress might be raised by the parents of children joining such sects. The strong dissatisfaction with the present state of the law to handle this situation has been manifested in the recent abducting of young people away from the religious groups they have joined. *See TIME*, Aug. 20, 1973, at 83. *See generally* Note, *Abduction*,

adopting this approach will not struggle with the merits of any individual case. This is simply an extension of the idea of treating the religious tribunal as an arbitrator. Had the approach required treating the religious tribunal as some kind of court, we would then have to work out possible standards of review. For example, would it make sense for a civil court to hold that a religious body's determination about what the faith requires is "clearly erroneous"? A standard which treats the religious tribunal as a court cannot escape becoming entangled in the merits to some extent. The arbitral approach avoids that entanglement.

The arbitral approach also eliminates the immense task of defining the point at which a question becomes "ecclesiastical" such that a civil court should decline jurisdiction over it.¹²⁶ The court need only decide whether the parties agreed that *this* issue, whatever its substantive content, was to be handled within the religious organization. This threshold question is common in contract and arbitration law, and is in no way beyond the court's enforcement powers.¹²⁷ The power of the religious body would extend exactly as far as the parties contracted,¹²⁸ and the only function for the court would be to interpret that contract.¹²⁹

With freedom of contract enforced by the courts religious groups might fear that individuals would attempt to condition membership on some sort of immunity from control. This fear seems idle. It confuses the legal structure with the psychological reality that impels a person to join a religious organization. In any case, the contract of membership almost certainly will have a provision for necessary discipline, either express or implied, because without some kind of discipline no organization can exist as such. The concept of organization entails

Religious Sects, and the Free Exercise Guarantee, 25 SYRA. L. REV. 623 (1974). While there is no instant solution to this problem, it can be attacked within the established parameters of contract law; see note 76, *supra*.

If a court enforced a contract of a religious group when a nonreligious contract would not have been enforced, it would be open to the charge of "establishing" that religion. Of course, if a religious contract were *not* enforced in a situation where a nonreligious one would be, the claim would be that the religious organization was being penalized in derogation of its rights to free exercise. One clear solution would be for the courts to ignore the religious nature of the contract entirely: "[R]eligion may not be used as a basis for classification for the purposes of governmental action. . . ." Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961). This seems the most reasonable way to comply with the Supreme Court's recent command in *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969), to apply "neutral principles of law" in areas of church-civil interaction. See text accompanying notes 32-38, *supra*. See also *Everson v. Bd. of Education*, 330 U.S. 1, 18 (1947); *Welsh v. United States*, 398 U.S. 333, 356-7 (1970) (Harlan, J. concurring).

126 See note 26, *supra* and accompanying text.

127 See notes 144-151, *infra* and accompanying text.

128 See ZOLLMANN, *supra* note 2, at 226. It is interesting to note that in cases where a non-Catholic seeks to marry a Catholic, and is compelled to sign an antenuptial agreement that all children will be raised Catholics, courts will void the agreement if the marriage ends in divorce and the non-Catholic spouse gets custody of the children. See Pfeffer, *Religion in the Upbringing of Children*, 35 B.U. L. REV. 333, 360 (1955). See also *Boerger v. Boerger*, 26 N.J. Super. 90, 97 A.2d 419 (1953). While the usual explanation given is concern for the welfare of the child, it is not unreasonable to assume that courts have realized that such antenuptial agreements are often the result of severe mental and emotional duress; however, the use of duress as a tool to void the oppressive impact of other religious contracts does not appear widespread, or even visible.

129 At least one court has applied just this approach, and has held that where the parties voluntarily submit *civil* matters to a church tribunal (here, a civil libel action), the court will treat the result exactly as it would any other consensual arbitration. *Berman v. Shatnes Laboratory*, 350 N.Y.S.2d 703 (N.Y.A.D. 1973). To recast this into constitutional terms, the law of review of arbitration awards is made up of principles which are neutral as between religious and civil arbitrators.

the idea that the individuals give up some measure of autonomy for the good of the whole.¹³⁰

Adoption of a contract framework would be beneficial to all sides. Religious organizations will be assured of complete internal autonomy, subject only to their own rules. Members will be protected by having their reasonable expectations, as embodied in the organization's rules, upheld.¹³¹ And the courts will be able to avoid entanglement in religious issues, thus avoiding the conceptual swamp which this entire area of church-member conflicts has become.

D. *The Theory Applied*

A few modern courts are moving toward a contract approach. Some have applied bits and pieces, while some have articulated a whole version of the theory. In *Baugh v. Thomas*,¹³² plaintiff sued for reinstatement as a member of the local Baptist church. He alleged that the vote of the church which denied his request for reinstatement was not conducted or counted as the constitution of the church demanded. "In short, he contends that a tabulation of the votes which comported with Church procedure would result in his reinstatement."¹³³ The lower court dismissed the complaint, asserting lack of jurisdiction over questions of church membership.¹³⁴ The New Jersey Supreme Court unanimously reversed, holding that plaintiff's complaint stated a cause of action which the courts could hear in that it alleged that his nonreinstatement was the result of a violation of the church's own rules.¹³⁵

[E]xpulsion from a church or other religious organization can constitute a serious emotional deprivation which, when compared to some losses of property or contract rights, can be far more damaging to the individual. The loss of the opportunity to worship in familiar surroundings is a valuable right which deserves the protection of the law. . . .

. . . The status of membership in a voluntary [religious] association is sufficient to warrant at least limited judicial examination of the reason for expulsion.¹³⁶

While the court did not invoke the contract framework explicitly, it utilized some of the basic premises previously outlined. The court accepted the idea that jurisdiction over religious organizations should include treating the right of membership as a protected interest. Yet, while the court extended the scope of its super-

130 See ZOLLMANN, *supra* note 2, at 224-25 and cases cited therein. See also text accompanying note 142 *infra*. The problem created by a religious organization demanding too much compliance is discussed in note 76 *supra*.

131 ZOLLMANN, at 232.

132 56 N.J. 203, 265 A.2d 675 (1970).

133 *Id.* at 209, 265 A.2d at 678.

134 *Id.* at 205, 265 A.2d at 676.

135 *Id.* at 210, 265 A.2d at 678.

136 *Id.* at 208, 265 A.2d at 677. Professor Chaffee stated the same idea in language a bit more colorful:

Excommunication from a church means the loss of the opportunity to worship God in familiar surroundings with a cherished ritual, and inflicts upon the devout believer loneliness of spirit and perhaps the dread of eternal damnation. In comparison with such emotional deprivations, mere losses of property often appear trivial.

Chaffee, *supra* note 85, at 998.

vision, it limited its depth by restricting review to whether the organization has followed its own accepted procedures. The most plausible reason why this procedural rectitude should matter at all is that the power of the religious organization is conditioned upon the exercise of that power in accordance with the organization's rules.¹³⁷ By holding that Baugh had made out a cause of action, the court necessarily implied that if he could prove the procedural miscarriage which he alleged, it would void the nonreinstatement (*i.e.*, it would require a new vote or order him reinstated on the basis of the original ballot count).

Pennsylvania recently has come completely into the contract camp.¹³⁸ In *Western Pennsylvania Conference of United Methodist Church v. Everson Evangelical Church of North America*,¹³⁹ a church conference sued to establish ownership of the local church property. The lower court held for the conference (the parent group) in a judgment on the pleadings, and the Pennsylvania supreme court affirmed without dissent. The case centered around the *Book of Discipline* and the Constitution of the United Methodist Church. The local organization sought both to withdraw from the parent group and to keep the local church property. But in its answer to the complaint, the local group admitted that it was subject to the control of the church hierarchy through the *Book of Discipline*, and that the *Book of Discipline* governed the use of church property. The Pennsylvania supreme court rested firmly on the contract theory: "The Book of Discipline of the United Methodist Church is a contractual agreement between the parent denomination and its members."¹⁴⁰

Since there was no allegation that the parent did not follow its own procedures, the only question under the contract approach was whether the issue between the parties had been confided to the decision of the church hierarchy. When the local group admitted this fact, the court's inquiry ended. The case is a model of how the contract approach allows a court to resolve a dispute involving religious groups without itself becoming entangled in religious questions.

As of this writing, two other state supreme courts have explicitly adopted the contract framework as their preferred analytic tool to determine the extent of, and the criteria for, civil court intervention in these types of cases. The decisions of both courts are tightly reasoned, and show graphically how flexible the contract approach can be.

In Massachusetts, members of a religious corporation¹⁴¹ (the Albanian Orthodox Diocese in America, Inc.) sued the corporation and four of its officers, alleging that the Diocese and its officers had devised a scheme to deprive plaintiffs of their right to vote in the Diocese and "[to] foist upon The Diocese as Bishop,

137 See note 80 and accompanying text *supra*.

138 Compare *Western Pennsylvania Conference of United Methodist Church v. Everson Evangelical Church of North America*, 454 Pa. 434, 312 A.2d 35 (1973), with *Kaminski v. Hoynak*, 373 Pa. 194, 95 A.2d 548 (1953).

139 454 Pa. 434, 312 A.2d 35 (1973).

140 454 Pa. at 439, 312 A.2d at 38.

141 Religious groups are permitted to incorporate under MASS. ANN. LAWS ch. 180, § 3 (Supp. 1974). Most states have similar provisions. See, e.g., N.Y. RELIG. CORP. LAW §§ 1-414 (McKinney Supp. 1975), which includes various and sundry provisions which have been especially tailored to the needs of certain specific denominations.

the defendant, Stephen Lasko, all in derogation of the by-laws of the Diocese.¹⁴² Plaintiffs prevailed in the lower court, and obtained a decree ordering a new meeting of the Diocesan Council to reconsider the actions in question.¹⁴³ The Supreme Judicial Court affirmed, grounding its judgment on contract analysis. The court found that the Diocese had adopted a code of bylaws which both defined membership and detailed the procedures required to qualify for such status.¹⁴⁴ The bylaws also provided for the election of a "permanently acting bishop." The dispute arose when Lasko went to Albania, and returned claiming to have been consecrated bishop there under canon law. The other defendants called an annual meeting of the membership, but 115 persons who were members in good standing under the bylaws, including the plaintiffs, were never notified. The meeting apparently ratified Lasko as bishop. The defendants contended that the selection of the bishop was purely an ecclesiastical matter to be governed by canon law, and that once a bishop had been consecrated there was no need to elect a "permanently acting bishop" as provided under the bylaws.¹⁴⁵ The court rejected that argument, and set its analytic framework explicitly:

We perceive the dispute now before us not as one of church law . . . but [as] one of contract law We only interpret the by-laws of a Massachusetts corporation *which constitute a contract between the members and the Diocese*. . . .¹⁴⁶

The court declined to consider whether Lasko was a bishop,¹⁴⁷ and confined itself to determining whether proper action had been taken under the bylaws.¹⁴⁸ Because the bylaws constituted a contract between the members and the Diocese,¹⁴⁹ the Diocese had power over the members only to the extent that it operated under that contract. Taking this reasoning one step further, the court held that the bishop of the Diocese had to be selected in accordance with the bylaws.¹⁵⁰ It was from those bylaws that the bishop derived his authority. Because the organization failed to abide by its side of the contract (by not following its own rules), Lasko had no authority in the Diocese, and the lower court was correct in ordering a new meeting.¹⁵¹

Another modern leading case applying the contract framework is the 1972 decision of the Wisconsin supreme court in *Olston v. Hallock*.¹⁵² Olston sued to be

142 *Mitchell v. Albanian Orthodox Diocese in America, Inc.*, 355 Mass. 278, 279, 244 N.E.2d 276, 277 (1969).

143 *Id.*

144 *Id.* at 280, 244 N.E.2d at 278.

145 *Id.* at 282, 244 N.E.2d at 279.

146 *Id.* (emphasis supplied).

147 *Id.* In *Polen v. Cox*, 259 Md. 25, 267 A.2d 201 (1970) the Maryland court of appeals noted that: "The relevant inquiry must be whether the court can resolve the property dispute on the basis of neutral principles of law which do not involve the resolution *by the court* of ecclesiastical issues." 259 Md. at 30, 267 A.2d at 204 (emphasis in the original). In the present case, the court scrupulously avoided passing judgment on the validity of Lasko's claim to have been consecrated.

148 355 Mass. at 282, 244 N.E.2d at 279.

149 See note 84 *supra*.

150 355 Mass. at 283, 244 N.E.2d at 279.

151 *Id.*

152 55 Wis. 687, 201 N.W.2d 35 (1972).

reinstated as minister of St. Paul's Episcopal Church. The lower court granted summary judgment for the defendant Episcopal Bishop of Milwaukee, and Olston appealed. The facts underlying the case are both complex and, in light of the court's disposition of the case on jurisdictional grounds, unimportant.

[T]he trial court was correct in determining that it had no jurisdiction to review the merits of the determination of the ecclesiastical tribunal . . . [t]he "call" of Olston was not temporal in nature and civil court review is limited to determining *whether the ecclesiastical tribunal had authority to proceed, and whether it proceeded according to its rules and procedures.*¹⁵³

The first issue was whether the tribunal had authority in the case. The court held that it did, saying, "[W]hen Olston accepted the 'call' to St. Paul's, all the canons of both the local Diocese and the national Church became a part of his pastoral contract."¹⁵⁴ One of the canons so incorporated set forth the procedures for the dismissal of a minister. The same contract which gave Olston his rights as a minister also gave the bishop the right to remove him. The court next found that the church had followed its own prescribed procedures,¹⁵⁵ and ended the inquiry.

The scope of review paralleled that which would have been given to the decision of an arbitrator, and is the one commended here as a general policy. Since Olston could not show any grounds which would have warranted setting aside an arbitration award,¹⁵⁶ the court was correct in finding no grounds warranting setting aside the decision of the church.

V. Conclusion

At the start of this article, two questions were posed:

- 1) Over what disputes, if any, should civil courts take jurisdiction in this area?
- 2) What criteria should courts apply to decide those cases?

The contract framework provides specific answers to both questions. First, all disputes which are resolvable by the power of the civil courts should be cognizable in those courts, regardless of any religious overtones which they might have. Issues which were once called "ecclesiastical" will generally be beyond the court's power, or will have been reserved to the power of the religious organization and its tribunals under the membership contract.¹⁵⁷ Remaining issues should cause no problems for the court: if it is found that the issue in question has been confided to the religious organization, a court can move to the second question.¹⁵⁸ The

153 *Id.* at 696, 201 N.W.2d at 39 (emphasis supplied).

154 *Id.* at 699, 201 N.W.2d at 41.

155 *Id.* at 700, 201 N.W.2d at 41.

156 See text accompanying note 75 *supra*; see also ZOLLMANN, *supra* note 2, at 233.

157 See, e.g., Mitchell v. Albanian Orthodox Diocese, *supra* note 142; see also Carter v. Papineau, 222 Mass. 464, 111 N.E. 358 (1916).

158 Of course, if the issue was *not* one which the parties confided in the religious tribunal, then any decision made by such a tribunal would be a nullity and the court would take jurisdiction by default.

criteria by which courts should review decisions and actions of religious organizations and tribunals are the criteria used to decide whether to set aside an arbitrator's award.¹⁵⁹ Since the parties confided the power of decision to the religious body, the only remaining questions are whether that body followed its own rules and procedures and whether the "award" was within its power to make.

The framework incorporates both major policy concerns found in the area. The reasonable expectations of members that they will be treated by the organization in accordance with its rules are protected both by the initial inquiry as to which body had the contractual authority to decide the issue and by the second inquiry as to whether that body followed its own rules. The concern over becoming entangled in questions of theology and religious law is met by the limitation of the depth of the court's inquiry to the above two topics, which should succeed in keeping all but the most impetuous of courts outside the sphere of religious law. By consciously adopting and applying such a framework, courts can dispel much of the murkiness, arbitrariness, and seeming legerdemain which surround the interventionist and noninterventionist approaches.

In essence, the contract approach can best be viewed as an ordering principle. It would enable a court to extend a familiar legal matrix over a new area of fact and focus on the most important policy questions. The contract approach holds the prospect of simplicity and order for this particularly thorny segment of the judicial landscape.

159 See text accompanying note 75 *supra*.