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Left with No Name: How Government Action in Intra-Church Trademark Disputes Violates the Free Exercise Clause of the First Amendment

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I. Introduction

A church is made up of "many members, yet [is] one body."[1] Unfortunately, the "members" do not always agree on how best to direct the "body."[2] Churches have an illustrious history of internal

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1. 1 *Corinthians* 12:12 (New King James Version).

2. *See infra* Part II (detailing church polity disagreements leading to church

disagreements over religious doctrine.[3] In recent decades, the disputes shifted towards emerging social issues, such as the ordination of women and same-sex sex marriage.[4] As society shifts its opinions on such issues, so do members of church congregations.

In February 2019, the United Methodist Church—the second largest Protestant church in the United States—voted to reject a proposal that would allow the ordination and marriage of LGBTQ individuals.[5] The same debate occurred in the Presbyterian and Episcopalian churches and led to countless lawsuits when the churches approved inclusive measures concerning the LGBTQ population.[6] In a national church with millions of members, such social polity decisions can fracture a church beyond repair.[7]

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property disputes).

3. *See* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 100–04 (1952) (seeing a church split from its "mother" church in Russia over political and religious differences); *see also* HENRY GARLAND & MARY GARLAND, THE OXFORD COMPANION TO GERMAN LITERATURE 271 (2005) (describing the 95 Theses nailed to Wittenberg Church in 1517 by Martin Luther in protest over the church's indulgences practice); *Acts* 15:1–21 (New King James Version) (providing an account of an early religious dispute between the Pharisees and Gentiles).

4. *See* Joe Carter, *How to Tell the Difference Between the PCA and PCUSA*, GOSPEL COALITION (June 23, 2014), https://www.thegospelcoalition.org/article/how-to-tell-the-difference-between-the-pca-and-pcusa/ (last visited Sept. 23, 2019) (detailing PCA's objection to ordaining women for ministry that led to its separation from PCUSA) (on file with the Washington and Lee Law Review).

5. *See* Timothy Williams and Elizabeth Dias, *United Methodists Tighten Ban on Same-Sex Marriage and Gay Clergy*, N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/2019/02/26/us/united-methodists-vote.html?smid=fb-nytimes&smtyp=cur&fbclid=IwAR0i8OvPo7XzJ8WEtfk-i97D3z4udrurVH5DCpDPFdS1VFG39tPshgS-SzE (last visited Sept. 23, 2019) (rejecting a proposal that would see the seven million members of the United Methodist Church allowing gay marriage and LGBTQ clergy) (on file with the Washington and Lee Law Review).

6. *See id.* (noting that Presbyterian and Episcopalian churches lost conservative members over the approval of same-sex marriage).

7. *See* Sarah Pulliam Bailey, *Presbyterian Church (USA) Changes Its Constitution to Include Gay Marriage*, WASH. POST (Mar. 17, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/03/17/presbyterian-church-changes-constitution-to-include-gay-marriage/?utm_term=.bc3a459cdb63 (last visited Sept. 23, 2019) (stating that the PCUSA has lost 37% of its national membership since 1992 over social issue disputes) (on file with the Washington and Lee Law Review).

A church divided over social issues often sees an outflux of members and the creation of complex property disputes.[8] When churches are divided, congregations often split along polity lines, with one sect remaining loyal to the national church, and one sect leaving the denomination.[9] Almost immediately, disputes arise over ownership of church property—most commonly the building.[10]

Just as important to a congregation, however, is the church's name. As organizations dependent on congregant tithes and community reputation, churches often trademark their names and symbols to safeguard their goodwill.[11] The fight over exclusive use to a church's name is complex and full of uncertainty. This complexity is illustrated through a 2017 lawsuit involving a schism in the Episcopal Church.[12]

The Episcopal Church's presence in South Carolina dates back to 1789.[13] The current form of the Lower Diocese of South Carolina was incorporated in 1973 with the purpose "to continue an Episcopal Diocese under the Constitution and Canons of [t]he Episcopal Church."[14] The national Episcopal Church's move to ordain those identifying as LGBTQ caused a nationwide schism,[15]

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8. *See* Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 90 (S.C. 2017) (detailing a property dispute resulting from a church decision over LGBTQ clergy and same-sex marriage).

9. *See* Bailey, *supra* note 7 (finding the Presbyterian Church U.S.A. split over same-sex marriage).

10. *See* Jones v. Wolf, 443 U.S. 595, 598 (1979) (arguing over exclusive ownership of real property that stemmed from a doctrinal disagreement); Watson v. Jones, 80 U.S. 679, 721 (1872) (disputing real property ownership after the church's split over slavery).

11. *See* Purcell v. Summers, 145 F.2d 979, 987 (4th Cir. 1944) (noting the goodwill imbedded in a church's name).

12. *See Protestant Episcopal Church*, 806 S.E.2d at 91 (finding the severed church seeking exclusive ownership over real and intellectual property). The Episcopal Church will be noted as "TEC" in various quotations from court opinions throughout this Note.

13. *See id.* at 85 (describing the church's formation in South Carolina).

14. *See id.* at 85–86 ("TEC is an unincorporated association comprised of subunits known as dioceses. Each diocese is, in turn, comprised of congregations known as parishes or missions.").

15. *See id.* at 90 n.8 (noting the dispute began when the General Convention confirmed the first openly homosexual bishop); *see also* Rev. Canon Dr. Kendall S. Harmon, *Diocese Releases Statement Regarding Disassociation from the Episcopal Church*, DIOCESE OF S.C., https://www.dioceseofsc.org/news-events/legal-news/diocese-releases-statement-regarding-disassociation-

and resulted in the Lower Diocese of South Carolina breaking away from the national Episcopal Church and joining the Anglican Church.[16] The dissociated Lower Diocese filed suit in 2013 seeking a declaration that it was "the true Diocese in the lower part of South Carolina, [and] that all property at issue belonged to that faction."[17]

Under the United States Supreme Court's neutral principles framework, courts may not undertake judicial review of ecclesiastical matters, including disputes resulting from differences in doctrine, polity, or governance.[18] In the 2017 *Episcopal Church* decision, the South Carolina Supreme Court held that the claim at issue concerned ecclesiastical matters of church polity and governance, and, thus, under the neutral principles approach gave deference to the national Episcopal Church.[19] The decision meant that the disassociated Diocese lost access to real property previously held by the local church for generations.[20]

In the same decision, the South Carolina Supreme Court held that the dissociated Diocese's state trademarks, which included reference to "Episcopal" in the Lower Diocese's name, were to be cancelled in favor of the national Episcopal Church's federal marks.[21] The South Carolina Supreme Court made this decision without reference to the U.S. Supreme Court's neutral principles

episcopal-church/ (last visited Sept. 23, 2019) (disapproving of the national Episcopal Church's acceptance of same-sex marriage) (on file with the Washington and Lee Law Review).

16. *See Diocese's Petition for Cert Denied by US Supreme Court*, DIOCESE OF S.C. (June 11, 2018), https://www.dioceseofsc.org/dioceses-petition-for-cert-denied-by-us-supreme-court/ (last visited Sept. 23, 2019) (noting the Diocese as a member of the Anglican Church in North America) (on file with the Washington and Lee Law Review).

17. *Protestant Episcopal Church*, 806 S.E.2d at 91.

18. *See Wolf*, 443 U.S. at 602–03 (describing the advantages of a neutral principles approach).

19. *See* Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 92–93 (S.C. 2017) (confirming the highest church tribunal's decision which granted real property to the national church).

20. *See id.* at 85 (noting the lengthy history of the congregation in South Carolina).

21. *See id.* at 92 (deciding the trademark dispute in favor of the national Episcopal Church).

approach.[22] In the end, the churches were left in uncertain territory, as the South Carolina Supreme Court's order was virtually unenforceable without further lower court action.[23] The South Carolina court removed itself from the real property dispute, yet felt it proper to adjudicate the trademark claim.[24] Why the difference in approach? The difference likely stems from the Supreme Court's lack of jurisprudence on the intersection between free exercise and trademarks.[25]

The United States was founded in part on the principle of freedom of religion—free from religious preference—where citizens were free to practice any religion.[26] The founding fathers felt so strongly about this principle that it was incorporated into the First Amendment.[27] The Free Exercise Clause states that, "Congress

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22. *See id.* (applying state and federal trademark law without reference to common law neutral principles).

23. *See* vonRosenberg v. Lawrence, No. 2:13-587-RMG, 2018 U.S. Dist. LEXIS 143513, at *4–5 (D.S.C. Aug. 23, 2018) (continuing the conflict over the service marks in the District of South Carolina); *see also* Andrew Knapp, *U.S. Supreme Court declines review of Episcopal property dispute from South Carolina*, POST & COURIER (June 11, 2018), https://www.postandcourier.com/news/us-supreme-court-declines-review-of-episcopal-property-dispute-from/article_372580c4-6d7a-11e8-9f32-6ba48799a28f.html (last visited Sept. 23, 2019) ("The breakaway diocese contended the conflicted nature of the state Supreme Court ruling 'is virtually unenforceable.'") (on file with the Washington and Lee Law Review).

24. *See Protestant Episcopal Church*, 806 S.E.2d at 92–93 (holding that court involvement in the real property case was improper, while deciding the trademark claim).

25. The Supreme Court has repeatedly denied certiorari on such issues. *See* Presbytery of the Twin Cities Area v. Eden Prairie Presbyterian Church, Inc., 2017 Minn. App. Unpub. LEXIS 375, *review denied*, 2017 Minn. LEXIS 444 (July 18, 2017), *cert. denied*, 138 S. Ct. 2619 (June 11, 2018); *Protestant Episcopal Church*, 806 S.E.2d 82 (2017), *cert. denied*, 138 S. Ct. 2623 (2018).

26. *See, e.g.*, Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary, Tripoli–U.S., Nov. 4, 1796, art. XI, 8 Stat. 154 ("[T]he government of the United States of America is not in any sense founded on the Christian Religion—as it has in itself no character of enmity against the laws, religion or tranquility of Musselmen . . . ."); Letter from James Madison to Edward Livingston (July 10, 1822), *in* THE AMERICAN ENLIGHTENMENT: THE SHAPING OF THE AMERICAN EXPERIMENT AND A FREE SOCIETY, 465–66 (Adrienne Koch ed., George Braziller Press 1965) ("Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters, is of importance . . . religion & Govt. will both exist in greater purity, the less they are mixed together.").

27. U.S. CONST. amend. I.

shall make no law . . . prohibiting the free exercise thereof . . . ."[28] The Supreme Court later adopted the neutral principles approach to avoid Free Exercise violations resulting from courts deciding real property disputes.[29] Without the application of the same neutral principles to intellectual property disputes between churches, however, there is real danger of violating the Free Exercise Clause.[30] This Note seeks to answer the question: Does the government's role in approving and enforcing trademark rights in intra-church disputes violate the Establishment and Free Exercise Clauses of the First Amendment? [31]

The rest of this Note proceeds as follows. Part II provides an overview of Supreme Court church property jurisprudence and describes the evolution of the neutral principles approach. This Note primarily focuses on property disputes between hierarchical churches, as their governing structure leaves them most vulnerable to Free Exercise implications. Part III outlines how an entity, secular or religious, registers a trademark with the U.S. Patent and Trademark Office (USPTO). The section details infringement actions and provides examples of registered church trademarks. Part IV concerns the constitutional implications of church trademark adjudication, specifically through the lens of the Establishment Clause and the Free Exercise Clause. Part IV.A concludes that the USPTO's registering of church trademarks does not violate the Establishment Clause. Part IV.B analyzes Free Exercise implications concerning the adjudication of trademark infringement suits. Because of the neutral principles approach and the inherently ecclesiastical nature of church trademarks, Part IV.B concludes that current court action violates the Free Exercise Clause. Part V suggests that courts should uniformly apply the neutral principles approach to real and intellectual property

28. *Id.*

29. *See* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969) (stating that courts have no role in determining ecclesiastical questions when dealing with property disputes).

30. *See* Brief of the Falls Church Anglican and the American Anglican Council as Amici Curiae Supporting Petitioners at 5, Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82 (S.C. 2017) (No. 17-1136) (noting the conflict and uncertainty resulting from competing interpretations of the neutral principles approach).

31. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

disputes alike. This section theorizes that such an approach would prevent future Free Exercise violations.

II. Supreme Court Church Property Jurisprudence

Religious schisms giving rise to property disputes are nothing new.[32] Most commonly, the disputes are caused by all, or part, of a local congregation disagreeing with the doctrinal changes of the national church, causing the local church to split from its denomination.[33] These cases typically involve a division of members into distinct factions, usually two, with each claiming the exclusive use of the property held and owned by that local church.[34] Religious congregations often have strong attachments to church property, most commonly the church building.[35] One such case saw leaders in the Lower Diocese of South Carolina seeking to leave The Episcopal Church over a doctrinal disagreement, while preserving the right to church property, including the congregation's place of worship.[36]

The intermingling of property and religious issues led the Supreme Court to first intercede in church property disputes

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32. *See* Episcopal Church v. Salazar, 547 S.W.3d 353, 360–61 (Tex. App. 2018) (noting that the Episcopal Church was founded in 1789 after it broke from the Church of England).

33. *See* Purcell v. Summers, 145 F.2d 979, 981–83 (4th Cir. 1944) (seeing those opposed to a church merger leave the church and seek to retain use of the church property and name); Christian Sci. Bd. of Dirs. of the First Church of Christ v. Evans, 520 A.2d 1347, 1349–51 (N.J. 1987) (adjudicating use of the name "Christian Science" between a break-off faction and the original church); Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 84–86 (S.C. 2017) (finding the majority of a local church leaving the national Episcopal Church).

34. *See* Watson v. Jones, 80 U.S. 679, 720–21 (1872) (stating that slavery was the source of conflict between the two religious factions).

35. *See supra* note 33 and accompanying text (noting cases where the church property suit centered on control of the church building); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 95–96 (1952) (finding the church wanting to occupy its building in New York after leaving the international church).

36. *See Protestant Episcopal Church*, 806 S.E.2d at 91 ("Respondents . . . [seek] a declaration that respondent Disassociated Diocese was the true Diocese in the lower part of South Carolina, that all property at issue belonged to that faction.").

almost 150 years ago.[37] The Court expressed the importance of strict adherence to the Free Exercise Clause, saying, "Ours is a government which by the 'law of its being' allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property."[38] The Court recognized that history is full of examples showcasing governmental involvement in religious disputes, stressing the danger that comes with adjudicating religious conflicts.[39]

Before adjudicating a church property claim, courts must first determine the religious organization's structure.[40] Churches can have one of two organizational structures: hierarchical[41] or congregational.[42] Hierarchical organization of a religious institution complicates intra-church property disputes because of the presence of a high church tribunal.[43] When religious disputes

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37. *See Watson*, 80 U.S. at 729 ("It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.").

38. *See Kedroff*, 344 U.S. at 120 (1952) (concerning the right to use and occupy a church building in New York City).

39. *See id.* at 124–25 (Frankfurter, J., concurring) ("The long, unedifying history of the contest between the secular state and the church is replete with instances of attempts by civil government to exert pressure upon religious authority."); *see also* John E. Fennelly, *Property Disputes and Religious Schisms: Who is the Church?*, 9 ST. THOMAS L. REV. 319, 324–25 (1997) (discussing Justice Frankfurter's recognition of the dangers of court involvement in religious disputes).

40. *See* Jones v. Wolf, 443 U.S. 595, 597 (1979) (finding that hierarchical church structures, like the church at issue, mandates deferral to the authoritative tribunal of the church).

41. *See id.* at 599 (noting that the local church property is held in trust for the general church and was, therefore, hierarchical).

42. *See* First Indep. Missionary Baptist Church v. McMillan, 153 So. 2d 337, 340 (Fla. Dist. Ct. App. 1963) ("Where a church is . . . strictly congregational . . . its rights to the use of the property must be determined by the ordinary principles which govern voluntary associations.").

43. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–09 (1976) (noting that where analysis involves "religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity"). The "Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church (Mother Church)" is the highest ecclesiastical tribunal. *Id.* at 697. The tribunal makes religious polity decisions for all churches under

are subject to final judgment under a church tribunal, the ruling stands for all lower churches within the denomination.[44] However, if the church is congregational, the dispute is easily solved, as the local church retains greater autonomy and holds the property independently.[45]

Crucial to adjudicating such disputes is the principle that the court cannot involve itself in any "consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[46] Courts employ a two-step framework for adjudicating real property disputes.[47] Over time, this framework has evolved into the modern neutral principles approach.[48]

First, the court must decide if the dispute requires the trier of fact to look into doctrinal issues, such as church governance or ideology of the adverse factions, as opposed to basic property issues, such as examining the title owner.[49] Doctrinal matters often stem from the national church attempting to respond to societal changes and political movements, which the local church resists.[50] There must be "no inquiry into the existing religious

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the Mother Church. *Id.* at 708.

44. *See* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 446 (1969) (noting the right for churches to establish their own high tribunals).

45. *See First Indep. Missionary Baptist Church*, 153 So. 2d at 340 (describing the application of ordinary law to solve congregational real property disputes). Because of this more straightforward application, congregational churches are not the focus of this Note. Unless otherwise noted, the religious organizations in this Note are hierarchical.

46. Md. & Va. Eldership of Churches of God v. Church of God, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

47. *See Wolf*, 443 U.S. at 605–08 (declaring that courts may either (1) defer to high church tribunals, or (2) apply neutral principles).

48. *See id.* at 599–604 (warning that neutral principles is not appropriate if the analysis "would require the civil court to resolve a religious controversy").

49. *See Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 449 (noting the danger of adjudicating a church property dispute involving doctrinal issues).

50. *See id.* at 442 n.1 (detailing the controversy that erupted when the Presbyterian Church endorsed women's ordination, opposed the Vietnam War, and supported the removal of prayer from public schools); Watson v. Jones, 80 U.S. 679, 690–91 (1979) (describing the church dispute over slavery); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 100–06 (1952) (detailing the Cold War-era split between a New York Russian Orthodox church and the Russian mother church).

opinions . . . for, if such was permitted, a very small minority, . . . might be found to be the only faithful supporters of the religious dogmas of the founders of the church."[51] Where the case requires doctrinal involvement, the court must yield and defer to the highest church authority.[52] Deference absolves the court of involvement in the matter.[53]

Second, assuming doctrinal issues are not at play and deference is not required, the court must apply neutral principles of law to adjudicate the real property dispute.[54] The neutral principles approach "is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity."[55] The approach is constitutional because it applies the law objectively, and absolves courts from involvement in religious polity disputes.[56] Neutral principles also involves examining property deeds, relevant state statutes dealing with implied trusts, and church legal documents or contracts signed between the local and general church to determine property ownership.[57]

Put simply, neutral principles first requires the court to determine if there is a doctrinal issue at play in the suit.[58] If doctrinal issues are present, then the highest court tribunal resolves the claim.[59] If the claim is free from doctrinal entanglement, the court is free to adjudicate the issue using

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51. *Watson*, 80 U.S. at 725.

52. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) (stating that courts are required to defer to ecclesiastical bodies when questions of religious doctrine or polity are involved).

53. *See Serbian E. Orthodox Diocese*, 426 U.S. at 724–25 (noting that when deference is exercised "the Constitution requires that civil courts accept their decisions as binding upon them").

54. *See* Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1249–50 (9th Cir. 1999) (listing the advantages of the neutral principles approach).

55. *Wolf*, 443 U.S. at 603.

56. *See* Fennelly, *supra* note 39, at 332 (commenting on the Court's reasoning in *Wolf* for adopting neutral principles).

57. *See Wolf*, 443 U.S. at 600, 602–03 (noting that the neutral principles approach is "consistent with the Constitution").

58. *See id.* at 607 (stating that the question of which church faction represents the "true congregation" cannot be answered by the court).

59. *See Watson*, 80 U.S. at 727 (recognizing the church tribunal's ultimate authority concerning ecclesiastical matters).

objective law.[60] A summary of the approach is seen in the following figure.

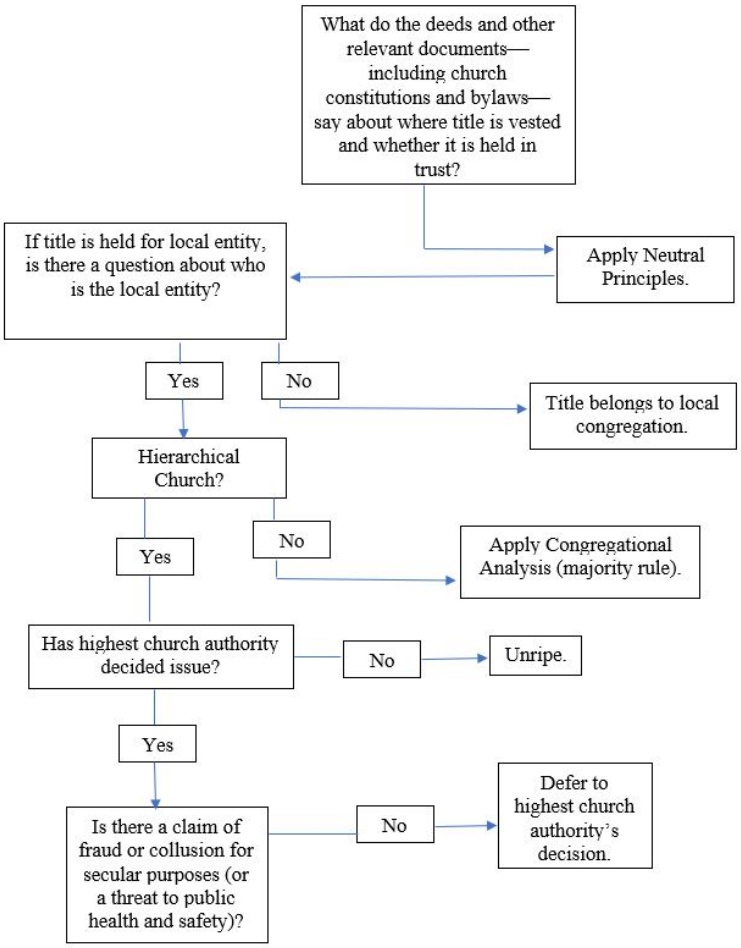

Figure 1[61]

60. *See* Presbyterian Church in U.S v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property.").

61. *See* Episcopal Church v. Salazar, 547 S.W.3d 353, 409 (Tex. App. 2018) (depicting the analytical process used by courts in adjudicating real property disputes with a neutral principles approach).

The Supreme Court applied neutral principles in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*.[62] The dispute centered around the right to use and occupy the St. Nicholas Cathedral in New York City, which was religiously affiliated with the Russian Orthodox Church.[63] The archbishop of the American churches, chosen by an American ecclesiastical committee, sought a corporate right to exclusively occupy the cathedral.[64] The then possessors of the Cathedral, led by the archbishop appointed by the Patriarch in Moscow, Russia, opposed this act.[65] Determination of the right to use and occupy the cathedral depended on which archbishop appointment, the American or Russian, was valid.[66]

Applying neutral principles, the Court first determined that the issue of church leadership was an ecclesiastical one.[67] Because the ecclesiastical head in Moscow retained power over the American churches, its appointment of the archbishop was considered valid.[68] While the dispute stemmed from the right to control real property, the Court recognized the underlying issue of church governance and properly applied neutral principles, which mandated deferral to the highest church tribunal.[69]

Yet, even though the Supreme Court adopted neutral principles,[70] state courts do not apply it uniformly.[71] This may

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62. 344 U.S. 94 (1952).

63. *See id.* at 95–97 (emphasizing the long connection between the local N.Y. congregation and its Russian counterparts).

64. *See id.* at 96 (stating that Archbishop Leonty, the head of all North American and Canadian churches, was appointed by an American ecclesiastical body).

65. *See id.* (discussing Archbishop Fedchenkoff's appointment by the ecclesiastical leaders in Moscow).

66. *See id.* at 96–97 (recognizing the potential constitutional issues in examining church governance issues).

67. *See id.* at 115 (noting that "the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America" was ecclesiastical).

68. *See id.* at 120 (finding no relinquishment of "power by the Russian Orthodox Church").

69. *See id.* at 120–21 ("Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.").

70. *See* Jones v. Wolf, 443 U.S. 595, 603 (1979) (adopting the neutral principles approach for its flexible, non-intrusive manner).

71. *See* Fennelly, *supra* note 39, at 335–53 (noting four states' rejections of

stem from the Court's own inner turmoil over the approach.[72] The addition of intra-church trademark disputes further complicates neutral principles. Because the Supreme Court has yet to speak on this specific issue,[73] lower courts left to their own devices produce inconsistent results.[74]

Even with the uncertainties surrounding church property adjudication, the Supreme Court envisioned a process as free from governmental involvement as possible.[75]

III. Trademarks Within the Religious Context

Trademarks and their precursors have been protected at common law and in equity since the founding of the United States.[76] Underlying trademark law is the principle that distinctive marks should be afforded protection to distinguish a particular good or service from others.[77] Courts recognize that, like secular entities, religious organizations should be protected by the "the common law principles of unfair competition."[78] In the

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the neutral principles approach and eight states' application of it).

72. *See Wolf*, 443 U.S. at 610–14 (warning that neutral principles may increase government involvement in church disputes); *see also* Fennelly, *supra* note 39, at 332 (discussing the four Justice dissent in *Wolf* that questioned the practicality of the neutral principles approach).

73. *See* Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82 (S.C. 2017), *cert. denied*, No. 17-1136, 2018 U.S. LEXIS 3624 (U.S. June 11, 2018) (denying certiorari on a church property dispute involving intra-church trademark components).

74. *See infra* note 191 (detailing cases in which courts reach varying results).

75. *See* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.").

76. *See* Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (summarizing the history of American trademark law (citing 3 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 19:8 (4th ed. 2017))).

77. *See id.* at 1751–52 (discussing how trademarks help consumers make purchasing decisions).

78. Okla. Dist. Council of the Assemblies of God of Okla. v. New Hope Assembly of God Church of Norman, 597 P.2d 1211, 1215 (Okla. 1979); *see also* Purcell v. Summers, 145 F.2d 979, 987–88 (4th Cir. 1944) (protecting the merged majority faction from infringement by the minority).

religious context, churches use trademarks to promote their unique identities amongst a sea of similar organizations.[79]

Along with the protection afforded by a registered trademark, the marks serve as source identifiers to the public.[80] In *Matal v. Tam*,[81] the Supreme Court evaluated a band name's proposed trademark and noted that the trademark would not only identify the band but would also serve to express a view about social issues.[82] The power of trademarks to convey such messages makes them especially important to religious entities.[83]

The Lanham Act establishes the regulatory framework for all entities seeking trademark protection for goods and services.[84] Religious and secular organizations are equally eligible to register and receive protection for their trademarks,[85] so long as their mark satisfies the necessary elements.[86] As of November 2018, the USPTO lists more than 1,000 trademarks including the word "church."[87]

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79. *See Purcell*, 145 F.2d at 985 ("[W]hile [churches] exist for the worship of Almighty God . . . they are nevertheless dependent upon the contributions of their members for means to carry on their work.").

80. *See* Christian Sci. Bd. of Dirs. of the First Church of Christ, Scientist v. Robinson, 115 F. Supp. 2d 607, 610 (W.D.N.C. 2000) (noting that the trademark "Seventh-Day Adventist" identified "the Mother Church as the source of products and services").

81. 137 S. Ct. 1744 (2017).

82. *See id.* at 1764 (granting the trademark under provisions of the Lanham Act).

83. *See Purcell,* 145 F.2d at 983 ("The name of this church, . . . was of great value, not only because business was carried on and property held in that name, but also because millions of members associated with the name the most sacred of their personal relationships and the holiest of their family traditions.").

84. *See* Trademark Act of 1946, 15 U.S.C. § 1051 (2012) (outlining the components necessary for federal trademark protection).

85. *See Purcell*, 145 F.2d at 985 (noting that non-secular organizations are eligible for trademark protection); Nat'l Bd. of YWCA v. YWCA, 335 F. Supp. 615, 621 (D.S.C. 1971) (stating that "a religious . . . organization is entitled to protect the use of its name against those who secede").

86. *See* 15 U.S.C. § 1051 (detailing application requirements for registration of trademarks with the Patent and Trademark Office); *see also Trademark Manual of Examining Procedure*, U.S.P.T.O. (Oct. 2018), https://tmep.uspto.gov/RDMS/TMEP/current (last visited Sept. 23, 2019) ("[O]utlines the procedures which Examining Attorneys are required or authorized to follow in the examination of trademark applications.") (on file with the Washington and Lee Law Review).

87. *See* Paul Tarr, *What the 2nd Circ. Missed in Religious Trademark Case*,

The Lanham Act first requires that the mark be used in commerce.[88] Trademarks used by members of a collective organization, known as collective marks, satisfy the "for use in commerce" requirement.[89] Collective marks, such as a church's name or symbol,[90] are used to indicate membership.[91] Collective marks are also trademarkable, subject to Section 1052 of the Lanham Act, which states that marks must be distinctive so as not to cause confusion, mistake or deception.[92] Church trademark infringement actions are most frequently brought under this provision of the Act.[93]

Religious marks often come under scrutiny when faced with the distinctiveness requirement of § 1052 because their marks are often labeled as generic.[94] Church trademarks are deemed generic if they merely state the denomination, such as "Assembly of God."[95]

Law 360 (Nov. 15, 2018), https://www.law360.com/articles/1101356/what-the-2nd-circ-missed-in-religious-trademark-case (last visited Sept. 23, 2019) (detailing the advantages of churches obtaining trademarks, including the ability to protect their "spiritual message") (on file with the Washington and Lee Law Review).

88. *See* 15 U.S.C. § 1127 (defining "use in commerce" as a bona fide use of the mark in the ordinary course of trade).

89. *See id.* §§ 1127, 1154 (stating that collective marks are registrable under the same requirements as trademarks).

90. *See, e.g.*, *Nat'l Bd. of YWCA*, 35 F. Supp. at 619 (noting plaintiff's five registered marks, indicating membership in the Young Women's Christian Association).

91. *See* MICHAEL J. SCHWAB, ACQUIRING TRADEMARK RIGHTS AND REGISTRATIONS (West 2019) (defining collective marks as used to distinguish goods and services of members from those of non-members).

92. *See* 15 U.S.C. § 1052(d) (detailing requirements for trademark protection).

93. *See* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 404–05 (6th Cir. 2010) (deciding a trademark infringement suit based on McGill's use of protected marks in advertising of his breakaway church); *Nat'l Bd. of YWCA*, 35 F. Supp. at 629 (upholding an infringement claim for the use of the trademark "Young Women's Christian Association").

94. *See* Okla. Dist. Council of the Assemblies of God of Okla. v. New Hope Assembly of God Church of Norman, 597 P.2d 1211, 1213–15 (Okla. 1979) (attacking the validity of trademark for "Assembly of God" on grounds it is generic); *see also* Purcell v. Summers, 145 F.2d 979, 988 (4th Cir. 1944) (noting that while the word "Methodist" is generic, the church's name in whole was not).

95. *See Okla. Dist. Council of the Assemblies of God of Okla.*, 597 P.2d at 1213 ("'Assembly of God'". . . is a generic or descriptive term having no specific relationship to any body or group but having a wide and broad application to those people who assemble to do God's work as they see it.").

A generic name is not entitled to legal protection because it is merely "descriptive of an article of trade, of its qualities, ingredients, or characteristics."[96] The Southern District of New York described the difference between a generic mark and a valid distinctive one, stating, "[A] generic mark is one that answers the question 'What are you?' while a valid trademark answers 'Who are you?'"[97]

Because generic names are so commonly used, giving only one entity the exclusive rights to a generic term creates a monopoly.[98] In *Oklahoma Dist. Council of the Assemblies of God of Oklahoma v. New Hope Assembly of God Church of Norman*,[99] the court decided that the term "Assembly of God" was generic and lacked secondary meaning outside of identifying the church denomination, precluding it from trademark protection.[100] Analyzing the church name for potential trademark protection is complex, and often leaves courts divided over whether similar marks are generic.[101]

Once a religious entity satisfies all trademark elements, the mark is entitled to trademark registration with the USPTO.[102]

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96. Mfg. Co. v. Trainer, 101 U.S. 51, 54 (1880). *See* 15 U.S.C. § 1052(e) (disallowing trademark protection for marks that are merely descriptive); Christian Sci. Bd. of Dirs. of the First Church of Christ v. Evans, 105 N.J. 297, 309 (1987) (noting that a secondary meaning, "no matter how strong, can never earn trademark status for a generic word or phrase").

97. *See* Universal Church, Inc. v. Universal Life Church/ULC Monastery, No. 14Civ.5213(NRB), 2017 U.S. Dist. LEXIS 127362, at *12, *15–18 (S.D.N.Y. Aug. 8, 2017) (deciding that the term "Universal Church" was generic); Universal Church, Inc. v. Toellner, No. 17-2960-cv, 2018 U.S. App. LEXIS 31153, at *2–4 (2d Cir. Nov. 2, 2018) (same).

98. *See* Christian Sci. Bd. of Dirs. of the First Church of Christ v. Evans, 105 N.J. 297, 306–07 (1987) (deciding that "Christian Science" was generic, and that granting the Church exclusive use to the term would preclude others from rightful use).

99. 597 P.2d 1211 (Okla. 1979).

100. *See id.* at 1214–15 (denying trademark protection for "Assembly of God" because it was deemed generic).

101. *Compare* Christian Sci. Bd. of Dirs. of the First Church of Christ, Scientist v. Robinson, 115 F. Supp. 2d 607, 610–11 (W.D.N.C. 2000) (deciding that the church name "Christian Science" was not generic), *with* Christian Sci. Bd. of Dirs. of the First Church of Christ v. Evans, 105 N.J. 297, 307–08 (1987) (deciding that the church name "Christian Science" was generic).

102. *See* 15 U.S.C. § 1051 (2012) ("A person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may request registration of its trademark . . . ."); *see also id.* § 1127

While registration is not mandatory to obtain legal protection,[103] it is highly recommended since it serves as constructive notice of the "registrant's claim of ownership" of the mark.[104] USPTO agents review each trademark application individually without an inquiry into the viewpoint of the mark.[105]

The USPTO has made it clear, however, that registration of a mark does not indicate the government's approval of the mark,[106] and the Supreme Court has indicated that trademarks are not a form of government speech.[107] Government neutrality in registering trademarks is key to Establishment Clause compliance.[108]

Registration of a trademark is especially useful in cases of trademark infringement[109] because it serves as prima facie evidence of one's exclusive legal right to the mark.[110] In church disputes, long-standing registration is used to preclude break-away factions from gaining access to the marks.[111] The

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(defining person as including "the United States, any agency or instrumentality thereof, or any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States").

103. *See id.* § 1125(c)(6) (providing remedies for trademark infringement without prior trademark registration).

104. *See id.* § 1072 ("Registration of a mark on the principal register . . . shall be constructive notice of the registrant's claim of ownership thereof."); *see also* Matal v. Tam, 137 S. Ct. 1744, 1752–53 (2017) (noting the advantages of registering a trademark with the USPTO).

105. *See Matal*, 137 S. Ct. at 1758 ("[I]f the mark meets the Lanham Act's viewpoint–neutral requirements, registration is mandatory.").

106. *See id.* at 1759 (finding the Court clarifying that "issuance of a trademark registration . . . is not a government imprimatur" (citing *In re* Old Glory Condom Corp., 26 U.S.P.Q.2d 1216, 1220 n.3 (T.T.A.B. 1993))).

107. *See id.* at 1758 ("If the federal registration of a trademark makes the mark government speech . . . [i]t is saying many unseemly things. . . . It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services.").

108. *See infra* notes 125–130 and accompanying text (discussing the neutral registration of trademarks, which avoids Establishment Clause implications).

109. *See* B&B Hardware, Inc. v. Hargis Indus., 135 S. Ct. 1293, 1301 (2015) ("The owner of a mark, whether registered or not, can bring suit in federal court if another is using a mark that too closely resembles the plaintiff's.").

110. *See* 15 U.S.C. § 1125(c)(6) ("The ownership by a person of a valid registration under . . . the principal register under this Act shall be a complete bar to an action against that person.").

111. *See* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 405 (6th Cir. 2010) (noting the church has registered marks "Seventh-day

registration of trademarks is fairly straightforward thanks to the clear procedures set out in the Lanham Act.[112] However, since a church's association with its names and marks often pre-dates the Lanham Act by many years, early common law trademarks often do not fit neatly into the Act's framework.[113]

IV. Constitutional Implications of Church Trademark Adjudication

When an entity alleges trademark infringement, courts apply the Lanham Act to determine if the legal rights to a mark have been violated, and if so, to determine the appropriate remedy for the violation.[114] The matter is complicated when non-secular entities are on both sides of a trademark infringement suit.[115] Because of the long history of separation of church and state in the United States, courts are wary to wade into religious matters.[116]

The First Amendment provides religious freedoms and protections, stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

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Adventist," "Adventist," and "General Conference of Seventh-day Adventists"); Nat'l Bd. of YWCA v. YWCA, 335 F. Supp. 615, 619–20 (D.S.C. 1971) (detailing the YWCA's five registered trademarks, including "Young Women's Christian Association"); Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 92 (S.C. 2017) (noting the federally registered trademarks held by the national church—"The Episcopal Church" and "The Protestant Episcopal Church in the United States of America"—which took precedence over state trademarks obtained by the local church).

112. *See* 15 U.S.C. § 1051 (describing the procedures for the registration of trademarks).

113. *See* Hooper v. Stone, 202 P. 485, 487 (Cal. Dist. Ct. App. 1921) (noting religious organizations are entitled to trade name protection in a decision decided before the passage of the Lanham Act in 1946).

114. *See* 15 U.S.C. § 1114 (2012) (noting remedies and infringement procedures).

115. *See infra* notes 191, 197, 198 and accompanying text (describing the challenges of church trademark adjudication).

116. *See* Nat'l Spiritual Assembly of the Bahá'ís of the U.S. Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Bahá'ís of the U.S., Inc., 628 F.3d 837, 846 (7th Cir. 2010) ("When a district judge takes sides in a religious schism, purports to decide matters of spiritual succession, and excludes dissenters from using the name, symbols, and marks of the faith . . . the First Amendment line appears to have been crossed.").

thereof . . . ."[117] The Establishment Clause prevents the state from supporting or declaring a religion,[118] while the Free Exercise Clause[119] gives citizens the "right to believe and profess whatever religious doctrine one desires" without state interference.[120]

A. The Establishment Clause

Establishment Clause jurisprudence is far from clear,[121] but there is a general consensus among courts that the Clause is not violated when churches are granted trademarks.[122] The U.S. District Court of South Carolina summarized the issue well, saying

> [T]his Court does not believe that the First Amendment prohibits the United States Patent Office from granting a trademark to the plaintiff or to any other religious organization . . . . Such registration by the

117. U.S. CONST. amend. I.

118. *Id.*; *see also* Jed Silversmith & Jack Guggenheim, *Between Heaven and Earth: The Interrelationship Between Intellectual Property and the Religion Clauses of the First Amendment*, 52 ALA. L. REV. 467, 470 (2001) (describing the role of the Establishment Clause in religious jurisprudence).

119. U.S. CONST. amend. I.

120. Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

121. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (describing a three-prong test for determining if state action violates the First Amendment); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 825–26 (1995) (proscribing that a statute is valid under the Establishment Clause if it is applied in an impartial manner). Courts inconsistently apply Establishment Clause jurisprudence and the Supreme Court's treatment of the Clause is "unsatisfying." *See* MICHAEL W. MCCONNELL, ET. AL., RELIGION AND THE CONSTITUTION 276–79 (2002) (noting the inconsistencies amongst courts in the Establishment Clause arena).

122. *See* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 405–08 (6th Cir. 2010) (confirming the validity of the church's federal trademark), Nat'l Bd. of the YWCA v. YWCA, 335 F. Supp. 615, 624–25 (D.S.C. 1971) ("Nothing in the Constitution prohibits a religious organization from owning property—and a trademark is a property right—or prohibits the government from protecting that property from unlawful appropriation by others."); Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 92 (S.C. 2017) (stating the validity of the national church's federal trademarks); Lutheran Free Church v. Lutheran Free Church, 141 N.W.2d 827, 834 (Minn. 1966) (affirming a majority faction's ownership of the church's trademark).

> Patent Office is . . . analogous to a state granting a charter to a church or to a religious institution.[123]

It is well-established that exclusive rights to trademark names may be given to businesses, including "charitable, religious and other societies."[124] Trademarks are granted to churches, just like corporations and secular entities, to protect against the use of one's identity or a similar name that would cause confusion for the general public.[125]

The USPTO grants trademarks without any regard to a religious organization's doctrine.[126] Trademarks are issued based on a set of definitive criteria that are evaluated in the same manner for secular and religious entities.[127] USPTO examiners, barring circumstances not at issue in this Note,[128] are not permitted to inquire "whether any viewpoint conveyed by a mark

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123. *Nat'l Bd. of the YWCA*, 335 F. Supp. at 624–25.

124. Hooper v. Stone, 202 P. 485, 487 (Cal. Dist. Ct. App. 1921); *see also* Purcell v. Summers, 145 F.2d 979, 985 (4th Cir. 1944) ("[A] benevolent, fraternal, or social organization will be protected in the use of its name by injunction . . . ." (citing NIMS ON UNFAIR COMPETITION AND TRADE-MARKS (3d ed.) § 86; THOMPSON ON CORPORATIONS (3d ed.) § 77)).

125. *See Purcell*, 145 F.2d at 987 ("Men have the right to worship God according to the dictates of conscience; but they have no right in doing so to make use of a name which will enable them to appropriate the good will which has been built up by an organization . . . ."); *see also* Howard J. Alperin, Annotation, *Right of Charitable or Religious Association or Corporation to Protection Against Use of Same or Similar Name by Another*, 37 A.L.R.3d 277 (2018) (noting that churches should be protected from unfair competition, but that "courts in a few of the cases herein have suggested that such rules ought not to be applied with the same strictness").

126. *See* Matal v. Tam, 137 S. Ct. 1744, 1758 (2017) (noting that the Lanham Act does not generally allow for inquiry into a trademark's viewpoint, and that registration is mandatory if all necessary elements are complied with); 1 GILSON ON TRADEMARKS § 3.04 (2018) (describing the application and approval process for obtaining a trademark through the USPTO).

127. *See* 15 U.S.C. § 1051 (2012) (listing criteria for registration of trademarks, such as exclusivity and use in commerce).

128. The only instance where USPTO examiners are permitted to inquire into the viewpoint of the trademark is where Section 2(a) of the Lanham Act is implicated. *See id.* § 1052(a) ("Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage . . . institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."). *Matal* involved a dispute of this sort. 137 S. Ct. at 1765 (holding the disparagement clause of the Lanham Act unconstitutional). *See also In re Brunetti*, 877 F.3d 1330, 1341 (9th Cir. 2017), *cert. granted*, Iancu v. Brunetti, 202 L. Ed. 2d 510 (2019) (questioning the constitutionality of the "immoral or scandalous" clause of the Lanham Act).

is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register."[129] Additionally, federal registration of trademarks does not constitute approval of the mark's content or message on the government's behalf.[130] A trademark simply indicates exclusive legal ownership in the eyes of the government.[131]

Because courts apply trademark law to religious organizations the same as they do to all other entities, state action granting churches trademarks does not run afoul of the Establishment Clause.[132] Trademark laws are secular in purpose.[133] Just as churches use corporate law to formalize their entity's existence,[134] churches use trademark law to protect their goodwill and reputation as would any entity with valuable intellectual property.[135] There is general agreement that the granting of trademarks to churches does not violate the Establishment Clause.[136]

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129. *See Matal*, 137 S. Ct. at 1757–58 ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").

130. *See id.* at 1758 (stating that trademark registration is not equivalent to government speech or approval of the trademark registered).

131. *See* 15 U.S.C. § 1057(c) ("[T]he filing of the application to register such mark shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect . . . .").

132. *See* Silversmith & Guggenheim, *supra* note 118, at 471–72 (stating that statutes survive Establishment Clause scrutiny if they are neutral and are applied even-handedly and broadly).

133. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (describing the three-prong test as (1) statute must have a *secular* legislative purpose, (2) principal or primary effect must be one that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion).

134. *See* Sovereign Order of Saint John v. Grady, 119 F.3d 1236, 1238 (6th Cir. 1997) (noting the church as a Delaware corporation); Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, 245 P.2d 481, 489 (Cal. 1952) (noting the corporate status of the religious organization).

135. *See* David A. Simon, *Register Trademarks and Keep the Faith: Trademarks, Religion and Identity*, 49 IDEA 233, 239 (2009) ("[R]eligious organizations use trademark law to protect their identities . . . because trademarks are cultural forms that assume local meanings . . . for those who incorporate them into their daily lives.").

136. The remainder of the Note focuses on the implications of church trademarks on the Free Exercise Clause. For additional scholarship on

However, state action deemed valid under the Establishment Clause may be considered invalid under the Free Exercise Clause.[137] The Supreme Court described the clash between the two religious clauses of the First Amendment, saying, "These two Clauses . . . are frequently in tension . . . . Yet we have long said that 'there is room for play in the joints' between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[138] While it is settled that the granting of trademarks does not abridge the Establishment Clause,[139] Free Exercise implications remain.

B. The Free Exercise Clause

The Free Exercise Clause of the First Amendment[140] prevents government regulation of religious beliefs and guarantees the freedom to believe whatever religious doctrine one chooses,[141] as "[t]he freedom to hold religious beliefs and opinions is absolute."[142] However, one may not claim "free exercise" to excuse disobeying a

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Establishment Clause issues in the church trademark context, *see* Silversmith & Guggenheim, *supra* note 118, at 468 (examining the clash between intellectual property rights and the religious clauses of the First Amendment); N. Cameron Russell, *Allocation of New Top-Level Domain Names and the Effect Upon Religious Freedom*, 12 J. MARSHALL REV. INTELL. PROP. L. 697, 700 (2013) (suggesting that there should be a strong presumption against religious trademark protection to avoid constitutional violations).

137. *See* Locke v. Davey, 540 U.S. 712, 718 (2004) (recognizing that the religious clauses of the First Amendment are distinct).

138. *Id.* at 718–19 (internal citations omitted (citing Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 669 (1970))).

139. *See supra* notes 132–136 and accompanying text (stating that religious-focused trademarks may survive Establishment Clause scrutiny).

140. U.S. CONST. amend. I.

141. *See* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); Richard F. Duncan, *Free Exercise is Dead, Long Lived Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 856 (2001) ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma.").

142. *See* Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (Warren, C.J.) ("Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden.").

neutral law.[143] In reality, there are limits on the "freedom" of free exercise.[144] While the freedom to religious beliefs is absolute, the freedom to act on those beliefs is not.[145]

A law is unconstitutional only if it is aimed at promoting or restricting religious beliefs.[146] In *Employment Division v. Smith*,[147] employees were denied unemployment benefits due to their religious use of the drug peyote.[148] While the religious use of the drug may have been legitimate, the justification behind the Oregon law, which criminalized the use of peyote, outweighed any Free Exercise concerns.[149] Although discriminatory in effect, the Oregon law was neutral in its purpose and thus did not violate the Free Exercise Clause.[150]

Much like Establishment Clause jurisprudence, the body of cases involving the Free Exercise Clause is muddled.[151] Legislation

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143. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("[The] Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'" (quoting *Braunfeld*, 366 U.S. at 603)).

144. *See* Duncan, *supra* note 141, at 850–51 (noting Court interpretation of the Free Exercise Clause as giving the government "a license . . . to 'proscribe conduct that . . . religion proscribes'").

145. *See* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("The freedom to act must have appropriate definition to preserve the enforcement of that protection. . . . [T]he power to regulate must be so exercised as not . . . unduly to infringe the protected freedom.").

146. *See Smith*, 494 U.S. at 878–82 (stating that neutral and generally applicable laws will only rarely violate the Free Exercise Clause).

147. 494 U.S. 872, 877 (1990).

148. *See id.* at 875 (noting that the religious use of peyote was outlawed under the Oregon law).

149. *See id.* at 878–80 (giving various examples of cases where neutral laws that infringed upon religious practices were upheld).

150. *See id.* at 890 (noting that state legislatures are free to make religious exceptions to their own laws that would prevent outcomes similar to the case in question).

151. Congress responded to *Smith* and enacted the Religious Freedom Restoration Act, which states that, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb–1 (2012). The Act is no longer applicable to states. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (invalidating the Act as applied to state action); Holt v. Hobbs, 135 S. Ct. 853, 859–61 (2015) (indicating that the Act was still in force regarding federal action). The Sixth Circuit indicated the inapplicability of the Act to intra-church trademark disputes since the Act "does not apply in suits between private parties." Gen. Conf. Corp. of

or state action must be neutral and generally applicable to avoid triggering Free Exercise scrutiny.[152] If a law appears to target religious practices or doctrine, the challenged state action must pass the "compelling interest" test, which requires the state to prove that the action does not burden free exercise rights, or to prove that any incidental burden imposed is justified by a compelling state interest.[153]

On its face the Lanham Act, which governs the federal issuance and enforcement of trademarks,[154] is not aimed at promoting or restricting religious beliefs—it is neutral.[155] The issuance of church trademarks does not infringe on the religious freedoms guaranteed in the First Amendment.[156] Free Exercise issues do arise, however, once churches find themselves in disputes with one another because these disputes force courts to intervene in ecclesiastical conflicts.[157]

While it is true that courts have an "obvious and legitimate interest in the peaceful resolution of property disputes,"[158] the interest must be balanced with the courts' duty to refrain from involvement in doctrinal disputes in conflict with the Free Exercise Clause.[159] Since the courts' initial involvement in church property

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Seventh Day Adventists v. McGill, 617 F.3d 402, 410 (6th Cir. 2010). For additional scholarship on the Free Exercise Clause, *see* Duncan, *supra* note 141, at 850 (arguing that Free Exercise is "alive and well in the wake of *Smith*").

152. *See* Duncan, *supra* note at 141, 865–67 ("The neutrality requirement is designed to forbid direct religious persecution, however, the 'precise evil' prohibited by the general applicability requirement is the inequality that results when underinclusive legal prohibitions are enforced against religious conduct.").

153. *See Sherbert*, 374 U.S. at 403 (stating that a compelling state interest must be "within the State's constitutional power to regulate").

154. 15 U.S.C. § 1051 (2012).

155. *See supra* notes 105–107 and accompanying text (discussing the neutral application of federal trademark laws).

156. *See supra* notes 128–135 and accompanying text (noting that religious freedoms are not violated when churches are granted federal trademarks).

157. *See infra* note 245 and accompanying text (describing cases where church trademark disputes implicated the Free Exercise Clause).

158. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) (stating that there is value in the courts providing a civil forum for church property adjudication).

159. *See* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 120–21 (1952) ("[I]n those cases when the property right follows as an incident from decisions of . . . ecclesiastical issues, the church rule controls . . . in order that there may be free exercise of religion."); Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, 245 P.2d 481, 487 (Cal. 1952)

disputes, "it was said that American law knew 'no heresy and is committed to the support of no dogma.'"[160]

Courts must avoid interference with church doctrinal topics, but should afford churches all protections allowed by civil law.[161] Before involvement in the case, courts must determine whether the dispute will require them "to decide issues of religious law, principle, doctrine, discipline, custom, or administration—in other words, is the corporate dispute actually ecclesiastical in nature."[162] The Supreme Court has cautioned against heavy court involvement in church doctrinal disputes, noting that justice would likely not be promoted by judiciary review.[163] Justice Frankfurter summarized many instances in history in which government action threatened the independence of religious institutions.[164] This fear influenced the Court to adopt a specialized approach[165] for adjudicating church property disputes that would avoid free exercise implications.[166]

("Although the principle that courts will not interfere in religious societies with reference to their ecclesiastical practice stems from the separation of the church and state, this view has always been qualified by the rule that civil and property rights would be adjudicated.").

160. *See* Fennelly, *supra* note 39, at 319–20 (citing Watson v. Jones, 80 U.S. 679, 728 (1871)).

161. *See* Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1248 (9th Cir. 1999) (stating that deprivation of protections of civil law "would raise its own serious problems under the Free Exercise Clause").

162. Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 87 (S.C. 2017).

163. *See* Watson v. Jones, 80 U.S. 679, 729 (1871) ("It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.").

164. *See Kedroff*, 344 U.S. at 124–25 (Frankfurter, J., concurring) (listing instances of interference with religion, such as Mussolini's attack on the Church of Rome, the Russian Church's tsarist governance, and Bismark's laws targeting German Catholics).

165. *See* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969) ("[L]ogic . . . leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes." (emphasis in original)).

166. *See Kedroff*, 344 U.S. at 116 (noting that church autonomy is granted protection under the Free Exercise Clause); *Watson*, 80 U.S. at 728 ("[T]he full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality

When the property rights in dispute follow from ecclesiastical incidents, such as decisions of church custom or law, court involvement is precluded.[167] Justice Frankfurter noted that "a very real danger to religious freedom [is] posed by even ostensibly innocent government intrusions into essentially religious matters."[168] Ecclesiastical[169] disputes are thus quarantined from all court involvement.[170]

Many church property disputes result from a doctrinal schism within a local congregation, causing a faction of the local church to withdraw from the national organization.[171] These cases commonly see "the belief on the part of those supporting disaffiliation that they are the ones following the 'true' faith while the ecclesiastical organizations above them are not."[172] If there are underlying

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and property, and which does not infringe personal rights, is conceded to all.").

167. *See* Fennelly, *supra* note 39, at 324 (noting that constitutional concerns mandate church control in ecclesiastical disputes).

168. *See id.* at 325 (summarizing Justice Frankfurter's concern over court involvement in church issues); *see also Kedroff*, 344 U.S. at 121 (Frankfurter, J., concurring) (noting the power to exercise religious authority was the "essence of this controversy").

169. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714 (1976) (defining ecclesiastical as concerning "church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them"); *Rosicrucian Fellowship*, 245 P.2d at 487–88

> The courts of the land are not concerned with mere polemic discussions, and cannot . . . determine the abstract truth of religious doctrines, or adjudicate whether a certain person is a Catholic in good standing, or settle mere questions of faith or doctrine, . . . or decide who the rightful leader of a church ought to be . . . .

(citing CARL ZOLLMAN, AMERICAN CHURCH LAW § 313 (1933)).

170. *See Protestant Episcopal Church*, 806 S.E.2d at 87 ("If the dispute is 'a question of religious law or doctrine masquerading as a dispute over church property or corporate control,' then the Constitution of the United States requires the civil court defer to the decision of the appropriate ecclesiastical authority.").

171. *See id.* at 85 ("A congregational church is an independent organization, governed solely within itself . . . , while a hierarchical (or ecclesiastical) church may be defined as one organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head."); 1 GILSON ON TRADEMARKS § 2.10 (2018) (noting that trademark adjudication is complicated by church "schisms and requests to determine the 'true' religious order").

172. *See* Korean Philadelphia Presbyterian Church v. Cal. Presbytery, 2003 Cal. App. Unpub. LEXIS 8523, at *73–74 (Sept. 10, 2003) (noting that the lower court violated "the rule prohibiting courts from interference in disputes over religious doctrine" when it inquired into the beliefs of the church members).

doctrinal issues at play in the property dispute, the court must refrain from addressing them.[173]

Courts agree that involvement in an ecclesiastical issue is a clear violation of the First Amendment.[174] This holds true in the specific context of intra-church trademark adjudication. [175] Courts that take "sides in a religious schism, purport to decide matters of spiritual succession, and exclude dissenters from using the name, symbols, and marks of the faith" violate the First Amendment.[176] Legal access to a religious organization's name or symbol enables the entity to retain control over its identity.[177]

Some lower courts have adjudicated intra-church trademark disputes with less disagreement than intra-church real property disputes,[178] declaring that they do not require involvement in ecclesiastical matters.[179] However, other lower courts are in tension regarding the impact of trademark adjudication on free exercise rights.[180] The Supreme Court has yet to speak on the

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173. *See* Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, 245 P.2d 481, 488 (Cal. 1952) ("The essential problem, nevertheless, is to ascertain from the acts, dealings and usages of the parties where the various rights rest in order to determine the ownership of civil and property rights, even though some so-called ecclesiastical rights are involved.").

174. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."); Watson v. Jones, 80 U.S. 679, 732 (1871) (noting the finality of ecclesiastical decisions made by church tribunals).

175. *See infra* Part IV.B.2 (outlining Free Exercise implications resulting from intra-church trademark adjudication).

176. Nat'l Spiritual Assembly of the Bahá'ís of the U.S. Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Bahá'ís of the U.S., Inc., 628 F.3d 837, 846 (7th Cir. 2010).

177. *See* Simon, *supra* note 135, at 239–40 ("Control of the organizational trademark is crucial to religious capital because the value of the mark consists of its identity.").

178. *See* Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 92 (S.C. 2017) (finding the court sharply divided over the real property dispute, but largely in agreement on the validity of the mother church's federal trademark rights).

179. *See* Purcell v. Summers, 145 F.2d 979, 987 (4th Cir. 1944) ("No question of religious liberty is involved."); Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 408 (6th Cir. 2010) ("Trademark law will not turn on whether the plaintiffs' members or McGill and his congregants are the true believers.").

180. *Compare McGill*, 617 F.3d at 408

> The district court held that it had no jurisdiction to resolve a

impact of court involvement in such disputes on the First Amendment.[181] Existing scholarship on the constitutional implications of intra-church trademark disputes affirms that the issue is far from settled.[182]

Due to the nature of intra-church trademark disputes,[183] court adjudication inherently infringes on a church's free exercise rights under the First Amendment.[184] Neutral principles of law must be used to adjudicate church trademark disputes, like any other church property dispute.[185] Church trademarks are ecclesiastical in nature[186] and, thus, precluded from court adjudication.[187] If

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> trademark-infringement claim brought by one sect against the other, as that would require it to decide the doctrinal issue of proper succession. The Ninth Circuit reversed, holding that "the district court can apply the regular factors that courts employ to determine infringement" and that "[t]he defendants can raise neutral defenses, such as prior use of the marks."

with Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1246 (9th Cir. 1999) (declaring that courts can decide church intellectual property issues without violating the First Amendment); Christian Sci. Bd. of Dirs. of the First Church of Christ v. Evans, 520 A.2d 1347, 1357 (N.J. 1987) ("As to the question of whether an injunction would violate defendants' rights to exercise their religion freely . . . we go no further than to record our grave reservations.").

181. Presbytery of the Twin Cities Area v. Eden Prairie Presbyterian Church, Inc., 2017 Minn. App. Unpub. LEXIS 375, *review denied*, 2017 Minn. LEXIS 444 (July 18, 2017), *cert. denied*, 138 S. Ct. 2619 (June 11, 2018); *Protestant Episcopal Church*, 806 S.E.2d 82, *cert. denied*, No. 17-1136, 138 S. Ct. 2623 (U.S. June 11, 2018).

182. *See* Silversmith & Guggenheim, *supra* note 118, at 505 (debating Free Exercise implications of church trademark adjudications); Simon, *supra* note 135, at 239 (noting that a church's trademark may encompass its identity); Russell, *supra* note 136, at 711 (stating that trade names may be a "religious touchstone for another individual").

183. This Note focuses on trademark disputes between churches, resulting from local churches leaving the national church or splitting from a local church. Most disputes of this nature involve hierarchical church structure. *See supra* note 171 and accompanying text (defining hierarchical).

184. *See infra* Part IV.B.2 and accompanying text (asserting that church trademarks are ecclesiastical in nature and should be freed from court involvement). This Note only examines free exercise rights in intra-church trademark adjudication. Church suits involving third party trademark infringement are not at issue in this analysis.

185. *See supra* notes 47–61 and accompanying text (summarizing the neutral principles approach).

186. *See infra* notes 221–223 (discussing the ecclesiastical character of church names).

187. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) (using neutral principles of

courts decide trademark disputes between churches, they involve themselves in ecclesiastical matters that are barred from court consideration, which violates the Free Exercise Clause.[188]

1. Neutral Principles of Law

The Supreme Court has long stated that real property disputes between churches are to be decided on neutral principles of law.[189] Lower courts generally apply neutral principles of law to settle real church property disputes,[190] but are not consistent in applying neutral principles to intra-church intellectual property disputes.[191] While "[t]he State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively,"[192] courts do not uniformly adjudicate claims to reach this goal.[193]

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law to free courts from doctrinal entanglement); Watson v. Jones, 80 U.S. 679, 729 (1872) (stating church hierarchical bodies must decide ecclesiastical matters).

188. *See Wolf*, 443 U.S. at 602 (adjudicating church property disputes cannot involve "consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith" (quoting Md. & Va. Eldership of Churches of God v. Church of God, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring))).

189. *See Watson*, 80 U.S. at 730 (noting that the Court has no "ecclesiastical jurisdiction").

190. *See* First Indep. Missionary Baptist Church v. McMillan, 153 So. 2d 337, 339 (Fla. Dist. Ct. App. 1963) (holding that the church abandoned its real property); Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 90–91 (S.C. 2017) (deciding in favor of the national church after a neutral principles analysis).

191. *See* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 408 (6th Cir. 2010) (applying neutral principles of law to church trademark adjudication); Sovereign Order of Saint John v. Grady, 119 F.3d 1236, 1244 (6th Cir. 1997) (remanding for application consistent with neutral principles); *Protestant Episcopal Church*, 806 S.E.2d at 92 (neglecting to go through a neutral principles analysis in deciding the trademark dispute); Okla. Dist. Council of the Assemblies of God of Okla. v. New Hope Assembly of God Church of Norman, 597 P.2d 1211, 1213 (Okla. 1979) (applying neutral principles after determining the dispute did not rest upon doctrinal analysis); Lutheran Free Church v. Lutheran Free Church, 141 N.W.2d 827, 831 (Minn. 1966) (comparing doctrinal beliefs of church factions in lieu of neutral principles).

192. *Wolf*, 443 U.S. at 602.

193. *See supra* note 191 and accompanying text (noting cases where the lower courts are inconsistent with their application of neutral principles in trademark disputes).

Although Congress codified modern trademark law in 1946,[194] intellectual property common law has an older origin.[195] It is not surprising then that court adjudication of religious marks precedes the Lanham Act,[196] creating a disconnect between the intersection of trademark law and the neutral principles of law approach.[197]

Many times, when courts incorporate neutral principles of law into a trademark analysis they simultaneously make doctrinal declarations.[198] Courts abandoned the "departure from doctrine" approach applied to real church property disputes in favor of the neutral principles approach,[199] but remnants of the former are still seen in church trademark analysis.[200] In *Lutheran Free Church v.*

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194. *See* Trademark Act of 1946, 15 U.S.C. § 1051 (2012) (defining criteria for federal recognition of trademarks).

195. *See* Statute of Monopolies 1623, 21 Jac. 1 c. 3 (Eng.), http://www.legislation.gov.uk/aep/Ja1/21/3/contents (codifying the first intellectual property law); *see also* B&B Hardware, Inc. v. Hargis Indus., 135 S. Ct. 1293, 1299 (2015) ("Trademark law has a long history, going back at least to Roman times." (citing Restatement (Third) of Unfair Competition § 9, cmt. b (1993)).

196. *See* Purcell v. Summers, 145 F.2d 979, 991 (4th Cir. 1944) (adjudicating a church trademark dispute prior to enactment of the Lanham Act in 1946); Hooper v. Stone, 202 P. 485, 487 (Cal. Dist. Ct. App. 1921) (same).

197. *Compare McGill*, 617 F.3d at 408 ("As this case involves the enforceability of intellectual-property rights, it makes sense to consider the Supreme Court's precedents in the area of church property disputes."), *with Protestant Episcopal Church*, 806 S.E.2d at 90–92 (applying neutral principles of law to the real property dispute, while applying federal trademark law to church service marks and trade names foregoing a complete neutral principles analysis).

198. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976) ("[T]he Supreme Court of Illinois substituted its interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation."); *McGill*, 617 F.3d at 408 (noting the doctrinal similarities between the plaintiff and defendant pastor, leader of the breakaway church); *Lutheran Free Church*, 141 N.W.2d at 831 (stating that there were no doctrinal differences between the Lutheran Free Church and the American Lutheran Church).

199. *See* Howard J. Alperin, Annotation, *Right of Charitable or Religious Association or Corporation to Protection Against Use of Same or Similar Name by Another*, 37 A.L.R.3d 277 (2018) (defining "departure from doctrine" as granting title to the "[church faction] remaining faithful to the doctrine upon which the society was organized").

200. *See* Watson v. Jones, 80 U.S. 679, 727 (1872) (departing from the English courts' approach of deciding "the true standard of faith in the church"); *see also* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451–52 (1969) ("[A] civil court may no more review a church decision applying a state departure-from-doctrine standard than it may apply

Lutheran Free Church,[201] the Supreme Court of Minnesota determined that the majority faction of the congregation did not deviate from the doctrinal beliefs of the original church and was thus entitled to use the name "Lutheran Free Church."[202] There, the Minnesota court engaged in an ecclesiastical determination at odds with neutral principles and the Free Exercise Clause.[203] This sort of analysis defeats the purpose of using the neutral principles approach, which seeks to free the court from any involvement in church doctrine.[204]

Neutral principles of law are violated any time a court analyzes the doctrinal beliefs of a religious organization.[205] Courts recognize that obvious declarations proclaiming who the "true church is" crosses the line in real property disputes,[206] yet approve of an analytical framework which compares the religious beliefs between two religious organizations when deciding intellectual

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that standard itself.").

201. 141 N.W.2d 827 (Minn. 1966).

202. *See id.* at 835–36 (declaring the majority faction the rightful owner of the tradename "Lutheran Free Church").

203. *See Watson*, 80 U.S. at 730 (noting that the Court has no "ecclesiastical jurisdiction").

204. *See* Jones v. Wolf, 443 U.S. 595, 603 (1979) ("The primary advantages of the neutral principles approach are that it is *completely* secular in operation." (emphasis added)).

205. *See Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 449

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.

206. *See* Nat'l Bd. of YWCA v. YWCA, 335 F. Supp. 615, 624 (4th Cir. 1971) ("[A]ny determination by a Court of Law as to whether plaintiff has deviated from a 'Christian' purpose . . . is prohibited by the First Amendment to the United States Constitution."); Nat'l Spiritual Assembly of the Bahá'ís of the U.S. Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Bahá'ís of the U.S., Inc., 628 F.3d 837, 842–43, 846 (7th Cir. 2010) (reversing the lower court's declaration that "[t]here is only one Baha'i Faith," and that the National Spiritual Assembly is the "highest authority for the Faith in [the] continental United States and is entitled to exclusive use of the marks and symbols of the Faith").

property matters.[207] The Supreme Court stated that any involvement in doctrinal or ideological discussion is prohibited—there is no exception for any type of doctrinal analysis, even if the court is not making decisions regarding who is the "true church."[208]

Courts should commit to applying neutral principles of law to all church property disputes, real and intellectual property alike.[209] If a court decides that real property disputes cannot be decided on the basis that the dispute is really a "question of religious law or doctrine masquerading as a dispute over church property [and] corporate control"[210] and is ecclesiastical, then it follows that any simultaneous dispute over trademarks should undertake the same analysis.[211] The Supreme Court recognized that churches are unique in their purpose and set out the neutral principles approach to accommodate for their differences.[212]

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207. *See* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 408 (6th Cir. 2010) (comparing the religious beliefs of churches and stating that the beliefs are identical); Lutheran Free Church v. Lutheran Free Church, 141 N.W.2d 827, 831 (Minn. 1966) (same); *see also Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 445–46 (rejecting the "departure from doctrine" inquiry used by English courts that require courts to analyze whether church doctrine is consistent with expected organization beliefs).

208. *See Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 451–52 ("The First Amendment prohibits a State from employing religious organizations as an arm of the civil judiciary to perform the function of interpreting and applying state standards."); *see also Wolf*, 443 U.S. at 607–09 (finding that the inquiry boiled down to which faction represented the "true" church).

209. *See infra* note 216 and accompanying text (describing the neutral principles framework as the best insurance against Free Exercise violations).

210. Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 86 (S.C. 2017) (quoting All Saints Parish Waccamaw v. Protestant Episcopal Church, 685 S.E.2d 163, 172 (S.C. 2009)).

211. *See id.* at 84–85, 92–93 (concluding that "the present property and church governance disputes are not appropriate for resolution in the civil courts," yet deciding the trademark dispute based on federal trademark law). The trademark dispute was decided in favor of the National church in the U.S. District Court for the District of South Carolina. *See* vonRosenberg v. Lawrence, No. 2:13-587-RMG (D.S.C. Sept. 19, 2019) (granting summary judgment for the National Episcopal church and enjoining the dissociated parishes from using the trademarked names).

212. *See* Purcell v. Summers, 145 F.2d 979, 985 (4th Cir. 1944) (noting that churches "exist for the worship of Almighty God and for the purpose of benefiting mankind and not for purposes of profit").

Applying neutral principles of law to intellectual property disputes does not mean that courts must ignore federal trademark law.[213] Neutral principles would direct courts to first consider whether the issue they are adjudicating, church trademarks, is ecclesiastical.[214] If the issue is ecclesiastical then the court would be precluded from applying federal trademark law to the dispute.[215]

Courts should treat all property disputes with the same analytical approach provided by neutral principles of law.[216] In an area complicated by complex constitutional law issues, lower courts need to apply neutral principles consistently.[217] The Supreme Court provided a consistent framework for intra-church real property disputes, which can similarly be applied to church trademark disputes.[218]

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213. *See* Watson v. Jones, 80 U.S. 679, 725 (1872) ("[W]here there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations.").

214. *See Protestant Episcopal Church*, 806 S.E.2d at 87 (determining that first courts must determine whether the adjudication requires involvement in issues of religion).

215. *See* Jones v. Wolf, 443 U.S. 595, 604 (1979) ("If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.").

216. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709–10 (1976) (noting that where "resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity" neutral principles is superseded by deference to the church tribunal); *Protestant Episcopal Church*, 806 S.E.2d at 87, 91–92 (describing the first step of neutral principles).

217. *Compare* Tubeville v. Morris, 26 S.E.2d 821, 826–29 (S.C. 1943) (attempting to apply neutral principals to the trademark dispute over use of the church name), *with Purcell*, 145 F.2d at 987–88 (wading into ecclesiastical matters by applying trademark law without reference to neutral principles); *see also* Silversmith & Guggenheim, *supra* note 118, at 525 (remarking that *Morris* and *Purcell* adjudicated the same dispute yet produced drastically different results).

218. *See supra* notes 47, 166 (outlining the framework for church property disputes).

2. Church Trademarks are Ecclesiastical in Nature

Once courts implement the neutral principles of law analysis for intra-church trademark disputes, the first step will preclude further adjudication.[219] In intra-church property disputes, the first step decides which path the court should take.[220] Because of the inherently ecclesiastical nature of church trademarks,[221] when asked whether the adjudication requires involvement in "issues of religious law," [222] the courts will be forced to answer yes.[223] The presence of ecclesiastical "issues of religious law" bars the court from engaging in a neutral principles analysis and mandates deference to the highest church authority.[224] In other words, a dispute over the use of a church trademark[225] is ecclesiastical and courts are precluded from involvement.[226]

Trademarks, specifically tradenames,[227] are representative of an entity's identity.[228] Churches seek out tradename protection to

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219. *See* Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1248 (9th Cir. 1999) (noting that deference is mandatory when the dispute would have the court "intrude impermissibly into religious doctrinal issues").

220. *See* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (noting that while neutral principles of law is available for use by courts, the approach is not appropriate where doctrinal issues are involved).

221. *See* Simon, *supra* note 135, at 239 (noting that trade names encompass the entities' identity); *infra* notes 226, 228 (arguing the ecclesiastical nature of church names).

222. Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 87 (S.C. 2017).

223. *See* Fennelly, *supra* note 39, at 320 ("[A] sound view rooted in our perception of church and state relations would require courts to accept, as final and binding, those decisions pertaining to religious matters made by the church's highest authority.").

224. *See* Masterson v. Diocese of N.W. Tex., 422 S.W.3d 594, 602 (Tex. 2013) (noting deference is "compulsory because courts lack jurisdiction to decide ecclesiastical questions").

225. *See* Simon, *supra* note 135, at 237 (describing collective trademarks that represent that the "source of the goods or services is a member of a larger group").

226. *See id.* at 240 (arguing that church trademarks are a legally cognizable form of the church's identity).

227. *See* Church of God v. Church of God, 50 A.2d 357, 362 (Penn. 1947) (granting exclusive rights to the phrase "Church of God" to one faction over another).

228. *See* Purcell v. Summers, 145 F.2d 979, 982 (4th Cir. 1944) (concluding that the name of a church has great value "because millions of members

safeguard identity,[229] but are unique in that the tradename represents a specific religious identity.[230] Several courts recognize this function of trademarks in the religious context.[231] Even if the dispute revolved around the use of a church name such as "Main Street Church," and lacked any reference to a specific religious denomination, the name would still represent a congregation's identity. Any conflict regarding the use of "Main Street Church" would be ecclesiastical and barred from court involvement under neutral principles analysis.

A church's name represents to the world what its congregants practice and believe.[232] Through intra-church trademark adjudication the court effectively tells the church banned from using the trademark at issue that they are not entitled to the identity attached to the respective mark.[233]

A prime example is the case of *General Conference Corp. v. McGill*.[234] In this Sixth Circuit case, Reverend McGill left the

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associated with the name the most sacred of their personal relationships and the holiest of their family traditions").

229. *See* Hooper v. Stone, 202 P. 485, 486–87 (Cal. Dist. Ct. App. 1921) (noting the common law rule that an entity is entitled to protection to its name under which business has been conducted); Tarr, *supra* note 87 ("[T]rademark law allows churches to forge identities representing coherent spiritual messages, with which their members can align.").

230. *See* Simon, *supra* note 135, at 240 ("Thus, the whole identity of the religious group—its ideology, its teachings and its practices—is contained in an identity-indicating name or symbol."); Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 388 (2011) (noting that traditional trademark doctrine sees trademarks as source identifiers).

231. *See* Church of God v. Church of God of Prophecy, Opposition No. 94,180, 2000 TTAB LEXIS 338, at *9–12 (T.T.A.B. 2000) (noting that the trademark in question may represent the identity and ideology of the church, but it is not a proper inquiry for the administrative board); Simon, *supra* note 135, at 278–79 (noting that the court "implicated identity" in its trademark infringement analysis) (discussing *Church of God*, 50 A.2d at 357–62)); *Purcell*, 145 F.2d at 982 (noting the church's name had value because it represented the church's identity to the public).

232. *See* Simon, *supra* note 135, at 240 ("The collective mark represents the embodiment of the organization's collective identity as owned by a group—something identified with and by all members of a religion.").

233. *See* Russell, *supra* note 136, at 711 ("Because the trade name may be a 'religious touchstone for another individual,' this acknowledgement of property protection may impede the ability of individuals to freely exercise religion without government interference.").

234. 617 F.3d 402 (6th Cir. 2010).

General Conference Corporation of Seventh-day Adventists over a doctrinal dispute, and began his own church, which he called "A Creation Seventh Day & Adventist Church."[235] The General Conference Corporation had multiple trademarks, including "Seventh-day Adventists," and sought to enjoin McGill from describing his church with the term.[236] In deciding the case, the court noted that, "[b]oth the plaintiffs and McGill believe that the second coming of Christ is imminent and that the Sabbath should be celebrated on Saturday."[237] The court concluded that the General Conference Corporation's trademark of "Seventh-day Adventists" was valid, barring McGill from use of the term in naming his church.[238] McGill and his congregation were, thus, stripped from use of the term that accurately described their identity to the outside world.[239]

In its discussion, the court not only analyzed the religious beliefs of the two churches,[240] a purely doctrinal issue, but it also reviewed the ecclesiastical issue of deciding which church was able to continue use of the identity-defining trademark.[241] As Justice Frankfurter noted, "[U]nder [the] Constitution it is not open to the governments of this Union to reinforce the loyalty of their citizens by deciding who is the true exponent of their religion."[242] The government, including the courts, has no place in religious

235. *See id.* at 405 (noting that the corporation holds title to all of the church's assets, indicating a hierarchical structure).

236. *See id.* (describing the various trademarks owned by the church that McGill allegedly infringed on).

237. *Id.* at 408.

238. *See id.* at 416 (affirming the lower court's ruling that McGill's use of the mark would cause confusion to the general public).

239. *See id.* at 405 (noting that McGill formed the church out of a "divine revelation").

240. *See id.* at 408 (comparing the beliefs of the two congregations).

241. *See id.* at 416–17 (granting continued use of trademarks to the General Conference Corp.). In contrast to the Sixth Circuit, the district court in *McGill* took the neutral principles approach. *See id.* at 408 ("The district court held that it had no jurisdiction to resolve a trademark-infringement claim brought by one sect against the other, as that would require it to decide the doctrinal issue of proper succession.").

242. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 125 (1952) (Frankfurter, J., concurring).

matters.[243] A neutral principles of law approach would preclude the court from making similar decisions.[244]

McGill is not an oddity in intra-church trademark jurisprudence.[245] Churches will continue to face the threat of loss of identifying marks and names because of the hierarchical organization in which the churches are formed.[246] "Nearly all . . . varieties of churches of the same denomination are the results of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church to adopt as a permanent part of its name the name of the parent organization."[247] Churches are vulnerable to infringement action when they continue using their "parent's" name in their new identifying marks.[248]

Churches are not like corporations, whose application of federal trademark law is fairly straightforward.[249] When

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243. U.S. CONST. amend. I.

244. *See supra* notes 214–215 and accompanying text (describing the neutral principles of law approach); *see also* Christian Sci. Bd. of Dirs. of the First Church of Christ, Scientist v. Robinson, 115 F. Supp. 2d 607, 610 (W.D.N.C. 2000) ("If a parent religious society remains true to the tenets of the religion, it is entitled to protection against a minority's use of the same name." (citing 1 MCCARTHY ON TRADEMARKS § 9:7 (4th Ed. 2000))).

245. *See* Hooper v. Stone, 202 P. 485, 487 (Cal. Dist. Ct. App. 1921) (seeing the seceding minority group barred from use of the church's name); Lutheran Free Church v. Lutheran Free Church, 141 N.W.2d 827, 831–33 (Minn. 1966) (seeing a minority congregation of a church lose its right to use the name it held for sixty years due to the majority's merger with another congregation under a new name); Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 84–85, 92 (2017) (barring the local church's use of the national church's identifying name, which it used for over 200 years).

246. *See Protestant Episcopal Church*, 806 S.E.2d at 85 ("[A] hierarchical [or ecclesiastical] church may be defined as one organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head."); Fennelly, *supra* note 39, at 321 (explaining that because hierarchical churches have both vertical and horizontal aspects, the church is defined as "the body of believers, united associationally as well as juridically beyond the congregation").

247. Christian Sci. Bd. of Dirs. of the First Church of Christ v. Evans, 105 N.J. 297, 312 (1987) (citation omitted).

248. *See id.* at 301–04 (finding a breakaway church sued by its "parent" church over use of identifying marks).

249. *See* Purcell v. Summers, 145 F.2d 979, 984 (4th Cir. 1944) ("[T]o use the name of a corporation . . . in such way as to attempt to appropriate the good will transferred and deprive the transferee of what it has thus acquired, is a wrong which should be enjoined . . . .").

corporations seek to infringe on another's trademark it is for the competitive advantage that mark provides.[250] However, when churches infringe on another's trademark it is because of the religious organization's long history of association with that trademark, which represents the congregation's beliefs.[251] The inherently religious nature of church names deserves special concern in trademark adjudication.[252]

Churches are unique in their purpose and should be treated uniformly regarding all property disputes.[253] Requiring application of the neutral principles of law approach to church trademark disputes, along with a finding that church tradenames are ecclesiastical, would prevent courts from further entanglement in doctrinal disputes.[254] Uniform application of neutral principles to real and intellectual property disputes provides churches with a consistent framework to plan for the future and prevent disputes.[255]

A return to *Protestant Episcopal Church v. Episcopal Church* illustrates the dangers of inconsistent application of neutral

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250. *See id.* (describing trademark infringement as "unfair competition").

251. *See* Patricia Sullivan, *'The church is not the building. It is our faith and our people.'*, WASH. POST (Dec. 26, 2015), https://www.washingtonpost.com/local/virginia-politics/the-church-is-not-the-building-it-is-our-faith-and-our-people/2015/12/26/dce43392-a41f-11e5-9c4e-be37f66848bb_story.html?utm_term=.f946e14c2436 (last visited June 8, 2019) ("[W]e know in our heart of hearts the church is not the building. It is our faith and our people.") (on file with Washington and Lee Law Review); *but see Purcell*, 145 F.2d at 987

> The right to use the name inheres in the institution, not in its members; and, when they cease to be members of the institution, use by them of the name is misleading and, if injurious to the institution, should be enjoined. No question of religious liberty is involved.

252. *See supra* notes 221, 227–233 and accompanying text (discussing the ecclesiastical identity imbedded in a church's trademark).

253. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) (applying neutral principles of law).

254. *See supra* note 245 and accompanying text (providing examples of cases that could have benefitted from a neutral principles approach to trademark adjudication).

255. *See Wolf*, 443 U.S. at 603–04 (explaining that churches can write procedures for resolving potential disputes into their trusts and books of order because the court will examine those documents when applying the neutral principles approach).

principles.[256] Recall the dispute began when the national Episcopal Church made polity changes, which the South Carolina local church's bishop disagreed with.[257] The Episcopal Church is hierarchical, meaning that the national Episcopal Church has title to the property on which the local church in South Carolina is located.[258] Hierarchical church structure mandates that courts defer to decisions of the highest ecclesiastical involvement when doctrinal issues are at play.[259]

When the local church sought to leave the Episcopal Church, it began "providing Parishes with quitclaim deeds purporting to disclaim any interest of the Diocese" so that it could maintain control of the church's real property.[260] The local church also amended its bylaws to renounce any affiliation with the national church.[261] The national church—the highest ecclesiastical body—accepted the local church's renunciation of its affiliation with the larger diocese, yet retained control of the congregation through the appointment of a new bishop.[262] The South Carolina Supreme Court held that because of the church's hierarchical structure, the court was bound by decisions of the church's "highest ecclesiastical body."[263] Because the national church accepted the renunciation and ordained a new bishop, the civil court had no place stepping into an ecclesiastical dispute.[264] With the national

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256. *See* 806 S.E.2d 82, 88–92 (analyzing the real property and intellectual property disputes with differing breadths).

257. *See id.* at 90 n.8 (noting that the bishop and his congregation were uncomfortable with the mother church's selection of the first openly homosexual bishop).

258. *See id.* at 85–86 (finding that the Episcopal Church is hierarchical).

259. *See* Watson v. Jones, 80 U.S. 679, 727 (1872) (stating that when questions of polity are involved, courts must defer to the church's highest ecclesiastical authority).

260. *Protestant Episcopal Church*, 806 S.E.2d at 91.

261. *See id.* ("[V]arious parishes in the Diocese undertook to sever the relationship between themselves and TEC through corporate amendments.").

262. *See id.* (executing the separation of the two factions).

263. *See id.* (giving deference to the church's ruling body (citing Pearson v. Church of God, 478 S.E.2d 849, 852 (S.C. 1996))).

264. *See id.* ("The finding that TEC is hierarchal requires that I defer to its highest ecclesiastical body.").

> TEC has recognized the Associated Diocese to be the true Lower Diocese of South Carolina with Bishop vonRosenburg as its head, a civil court cannot inject itself into this church governance dispute and

church's ruling, the church's real property vested in the new bishop's faction, who remained loyal to the national church.[265]

The same dispute also involved claims of trademark infringement over the local church's right to state-granted service marks, which indicated affiliation with the Episcopal Church.[266] While the court spent nineteen pages analyzing the real property dispute, it decided the service mark conflict in a single paragraph.[267] Instead of analyzing the trademark claim with the neutral principles approach, the court immediately looked to state trademark law to determine that the state service marks must be cancelled in favor of the national church's federal marks.[268]

The U.S. Supreme Court denied certiorari of the case, laying the real property issue to rest, while the trademark dispute faced further adjudication in the U.S. District Court of South Carolina.[269] Bishop Lawrence's local church faction lost the legal right to their church's real property in the state case, and were then dealt a loss of rights to service marks that identified them as the church they had been for more than 150 years.[270] While a straightforward application of trademark laws may dictate one church faction's rights to the use of marks over another,[271] history

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> reevaluate that decision applying state law principles because this is a question of church polity, administration, and governance, matters into which civil courts may not intrude.

Id.

265. *See id.* at 92–93 (recognizing the Episcopal Church's authority over the matter, which, in effect, granted property to the loyal church faction).

266. *See id.* at 92 (noting respondents' use of the term "Episcopal," and the national church's federally–registered trademarks, which include "The Episcopal Church" and "The Protestant Episcopal Church in the United States of America").

267. *See id.* (applying trademark law to determine that "in light of . . . confusion" caused by the state marks, they must be cancelled).

268. *See id.* ("[S]tate law dictates that the [national church's] right to these marks is superior." (citing S.C. CODE ANN. § 39-15-1145 (2016))).

269. *See* vonRosenberg v. Lawrence, No. 2:13-587-RMG (D.S.C. Sept. 19, 2019) (enjoining the breakaway churches from continued use of service marks).

270. *See Protestant Episcopal Church*, 806 S.E.2d at 85 (noting the national church was formed when the S.C. Diocese formed with six others); *see also* Knapp, *supra* note 23 (discussing the emotional heartbreak experienced by congregants after the national church's S.C. court victory).

271. *See* 15 U.S.C. § 1114 (2012) (detailing steps necessary for an infringement action); *see also* Hooper v. Stone, 202 P. 485, 487 (Cal. Dist. Ct. App. 1921) (applying common trademark law to determine that the majority was entitled to exclusive use of the mark).

proves that religious controversies are anything but straightforward.[272]

V. Should the Court Maintain Its Current Role?

In his concurrence to *Kedroff*,[273] Justice Frankfurter recognized the ability of church property, specifically a church's cathedral, to represent more than just a piece of land, stating that the cathedral served as an "outward symbol of a religious faith."[274] The purpose of a trademark is, similarly, meant to be a source identifier.[275] Just like the cathedral in *Kedroff* represented the religious faith of the congregation,[276] a church's name, serves the same purpose.[277] If the neutral principles approach is used to deal with the first property at issue,[278] why is it not used to deal with the second?[279]

Current court adjudication of intra-church trademark disputes violates the Free Exercise Clause of the First

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272. *See* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 102–03 (1952) (detailing church's history of political upheaval due to the Bolshevik Revolution and political unrest in Russia); Watson v. Jones, 80 U.S. 679, 734 (1979) (acknowledging the schism over the issue of slavery that "divided the Presbyterian churches through-out Kentucky and Missouri").

273. 344 U.S. 94 (1952).

274. *See id.* at 121 (Frankfurter, J., concurring) ("St. Nicholas Cathedral is not just a piece of real estate. . . . A cathedral is the seat and center of ecclesiastical authority. . . . What is at stake here is the power to exercise religious authority. That is the essence of this controversy.").

275. *See* Okla. Dist. Council of the Assemblies of God of Okla. v. New Hope Assembly of God Church of Norman, 597 P.2d 1211, 1214 (Okla. 1979) (noting in trademarks that carry a secondary meaning "the word or name has come to stand in the minds of the public as a name or identification for that product or firm").

276. *See Kedroff*, 344 U.S. at 121 (Frankfurter, J., concurring) ("[T]he religious authority becomes manifest and is exerted through authority over the Cathedral as the outward symbol of a religious faith.").

277. *See* Purcell v. Summers, 145 F.2d 979, 982–83 (4th Cir. 1944) ("The name of this church . . . was of great value, not only because business was carried on and property held in that name, but also because millions of members associated with the name the most sacred of their personal relationships and the holiest of their family traditions.").

278. *See Kedroff*, 344 U.S. at 120–21 (noting that where a property right flows from an ecclesiastical issue, courts must yield to church rule).

279. *See Protestant Episcopal Church*, 806 S.E.2d at 92 (finding the court applying trademark law without discussion of neutral principles).

Amendment.[280] The Supreme Court consistently recognized that First Amendment dangers accompany court resolution of church disputes, which led to the adoption of the neutral principles approach.[281] The framework is adaptable to any church dispute over property rights.[282]

Trademarks are a form of property rights.[283] At their core, trademarks carry the right to exclude others from the use of the registered mark, name, or symbol.[284] Trademarks have evolved to the point that the rights "are beginning to resemble a type of 'property right in gross.'"[285] In sum, trademarks have inherent value—the right to exclusive use[286]—akin to the value recognized in real property.[287] Trademarks, as property rights, are entitled to

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280. *See supra* notes 186–188, 204–208 (analyzing the Free Exercise implications that occur when courts adjudicate ecclesiastical trademark rights).

281. *See Watson*, 80 U.S. at 729–32 (recognizing the danger in courts unfamiliar with ecclesiastical law adjudicating a church dispute).

282. *See* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (stating that the neutral principles approach was developed "for use in all property disputes").

283. *See* Nat'l Bd. of the YWCA v. YWCA, 335 F. Supp. 615, 624–25 (D.S.C. 1971) (declaring that "a trademark is a property right"); Adam Mossoff, *Trademark As A Property Right*, 107 KY. L.J. 1, 7 (2018) (characterizing trademarks as a property "use-right," and detailing other "use-rights" such as easements); Richard Epstein, *Two Ways of Viewing IP*, FIN. TIMES (Apr. 7, 2005), https://www.ft.com/content/c3e23a90-a5ea-11d9-b67b-00000e2511c8 (last visited Sept. 23, 2019) (stating that the "sound rules of property law" apply to intellectual property) (on file with the Washington and Lee Law Review); *but see* Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, Fall 2007, at 36–38 (questioning whether the traditional notions of tangible property should apply to intellectual property), https://object.cato.org/sites/cato.org/files/serials/files/regulation/2007/10/v30n3-6.pdf.

284. *See* 15 U.S.C. § 1051 (2012) (requiring trademark applicants to ensure the exclusive use of the mark).

285. *See* Michael A. Carrier, *Cabining Intellectual Property Through A Property Paradigm*, 54 DUKE L.J. 1, 20 n.53 (2004) (noting that courts frequently refer to trademarks as property rights themselves, rather than in the goodwill they protect).

286. *See* Mossoff, *supra* note 283, at 4 ("Trademark law secures the exclusive use and enjoyment of a mark as representative of the exclusive use and enjoyment of the underlying property.").

287. *See* Mossoff, *supra* note 283, at 14 (noting that property is not just the tangible aspect, but "the right to freely possess, *use*, and alienate the same" (emphasis added)).

the same deferential approach set out by the Supreme Court through neutral principles.[288]

Those who find current court adjudication of intra-church trademark disputes consistent with the Free Exercise Clause overlook the purpose behind neutral principles.[289] Two such scholars noted that because trademark law is facially neutral the Free Exercise Clause is not implicated.[290] The analysis, however, cannot end here. While a church may receive trademark protection without Free Exercise implications,[291] issues arise once that mark is in dispute.[292]

When a church is stripped of its trademark, it loses the right to use that mark.[293] In the context of intra-church disputes, this property loss prevents the losing party from referring to itself in its preferred manner.[294] A two-hundred-year-old congregation loses its identifying marks;[295] a pastor is barred from referring to his church as his chosen denomination;[296] a minority congregation

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288. *See* Jones v. Wolf, 443 U.S. 595, 609 (1979) (requiring deference be given to the church's ruling body in cases concerning the church's identity).

289. *See* Silversmith & Guggenheim, *supra* note 118, at 521–22 (theorizing that the application of trademark law does not carry Free Exercise implications).

290. *See id.* ("[T]here has been no suggestion that the trade name and trademarks legislation was passed with the invidious design of inhibiting one group's free exercise.").

291. *See id.* (noting the grant of trademark protection does not inhibit worship).

292. Silversmith and Guggenheim recognize the role played by neutral principles, stating that "[c]ourts must only apply neutral principles of law" to intra-church trademark disputes. *Id.* at 526.

293. *See* 15 U.S.C. § 1116 (2012) (granting injunctive relief for parties deemed the rightful owners of a trademark).

294. *See* First Indep. Missionary Baptist Church v. McMillan, 153 So. 2d 337, 342 (Fla. Dist. Ct. App. 1963) (inhibiting the minority faction from using a name abandoned by the majority); Hooper v. Stone, 202 P. 485, 487 (Cal. Dist. Ct. App. 1921) (declaring right to the church's name in the majority faction); *but see* Pilgrim Holiness Church v. First Pilgrim Holiness Church, 252 N.E.2d 1, 7 (Ill. Ct. App. 1969) (allowing the minority faction to keep its preferred name previously abandoned by the majority).

295. *See* Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 92 (S.C. 2017) (canceling the local church's state trademarks in favor of the national church's federal marks).

296. *See* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 415–17 (6th Cir. 2010) (upholding the infringement claim against a pastor's use of the term "Seventh-day Adventist").

can no longer use the name it has held for over sixty years.[297] It is hard to deny that violations of the Free Exercise Clause have occurred in the previous examples.[298] A church's exercise of religion is burdened when it is prevented from publicly identifying with its preferred name or mark.[299] This type of burden on free exercise is the very thing neutral principles of law was created to avoid.[300]

While it would be simpler to immediately apply trademark law to such disputes,[301] constitutional concerns mandate a preemptive neutral principles analysis.[302] If courts apply neutral principles they are prevented from ever applying trademark law, as neutral principles tells courts to cease involvement once ecclesiastical issues are known.[303] The free exercise concern lies not with the trademark law itself, but with the property at issue–the inherently ecclesiastical trademark.[304]

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297. *See* Lutheran Free Church v. Lutheran Free Church, 141 N.W.2d 827, 835–36 (Minn. 1966) (ruling against a minority faction who opposed the church's merger and sought to retain possession of the old name).

298. *See* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952) (stressing the importance of a church's "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

299. *See* Fennelly, *supra* note 39, at 355–56 (noting that the Free Exercise Clause provides for church autonomy, including "the right to select their own leaders, define their own doctrines resolve their own disputes, and run their own institutions").

300. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (recognizing the role neutral principles play in preventing courts from violating the Free Exercise Clause).

301. *See* Silversmith & Guggenheim, *supra* note 118, at 525 (stating that courts are able to "simply resolve the trade-name issue on property grounds").

302. *See Protestant Episcopal Church*, 806 S.E.2d at 87 ("The court must first determine whether the property/corporate dispute will require the court to decide issues . . . actually ecclesiastical in nature.").

303. *See id.* (noting the court must cease involvement in the dispute once issues of polity or religion become apparent).

304. *See* All Saints Parish Waccamaw v. Protestant Episcopal Church, 685 S.E.2d 163, 172 (S.C. 2009) (cautioning courts to carefully analyze the property in dispute to determine whether it is a question of religious law rather than property law).

While neutral principles of law is not a perfect approach,[305] it is the framework given by the Supreme Court.[306] All property cases, real and intellectual alike, should be subject to the same deferential approach afforded by neutral principles of law.[307] Under current conditions, churches are left in purgatory over their rights to church trademarks.[308] Religious institutions deserve a consistent framework that can be applied to a myriad of property disputes.[309] A church schism is difficult enough without court intrusion.[310] It was not by accident that the nation's founders included provisions for religious freedom and protection in the First Amendment.[311] And while the Court responsible for the neutral principles approach worried that it would "increase the involvement of civil courts in church controversies,"[312] the majority of the Supreme Court recognized that the need for a framework for such disputes outweighed concerns over religious entanglement.[313]

In a perfect world the Supreme Court would grant certiorari and clear up confusion surrounding intra-church trademark adjudication.[314] For now, courts are left trying to fit a doctrine from

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305. *See* Jones v. Wolf, 443 U.S. 595, 610 (1979) (Powell, J., dissenting) (criticizing the majority's adoption of neutral principles that would "invite intrusion into church polity").

306. *See id.* at 602–03 (adopting the neutral principles approach).

307. *See id.* at 609 (noting that if the case required invasion of polity, "then the First Amendment requires that the . . . courts give deference to the presbyterial commission's determination of that church's identity").

308. *See supra* note 211 (finding the state trademark claim continued in federal court); Silversmith & Guggenheim, *supra* note 118, at 525 (detailing conflicting opinions between the South Carolina Supreme Court and the Fourth Circuit over the same property dispute).

309. *See Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 449 (noting the neutral principles approach's flexibility).

310. *See* Brief for 106 Religious Leaders as Amici Curiae in Support of Respondents' Petition For Rehearing at 17, Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82 (S.C. 2017) (No. 15-000622) [hereinafter Brief for 106 Religious Leaders] (discussing the $500 million property at stake in the fractured congregation's dispute).

311. *See supra* note 164 (detailing instances of government interference in religious matters).

312. *See Wolf*, 443 U.S. at 611 (Powell, J., dissenting) (declaring that the neutral principles approach "departs from long-established precedents").

313. *See id.* at 605–06 (stating that the neutral principles approach does not "'inhibit' the free exercise of religion").

314. *See* Brief for 106 Religious Leaders, *supra* note 310, at 17–18 (noting the

1979 to current intellectual property disputes mired in religious turmoil.[315]

VI. Conclusion

Supreme Court jurisprudence surrounding church real property disputes is subject to special rules to account for the complexities surrounding court involvement in a religious dispute.[316] The neutral principles approach, adopted by the Supreme Court decades ago, is applied inconsistently to intellectual property by lower federal and state courts.[317]

If the neutral principles approach were consistently applied, it would preclude court involvement in intra-church intellectual property disputes, specifically trademark disputes.[318] Church trademarks, such as a church's name or symbol, are inherently ecclesiastical due to the association of the mark with the church's identity and religious beliefs.[319] Court inquiry into intra-church trademark disputes violates the Free Exercise Clause of the First Amendment because it essentially tells one church faction, "You are the church," while telling the other, "You are not."[320] In effect,

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insecurity surrounding intra-church disputes that makes "many rounds of future litigation inevitable").

315. *See Wolf*, 443 U.S. at 602–09 (adopting the modern neutral principles framework).

316. *See Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 449 (approving of the neutral principles approach to avoid the ever-present hazards of inhibiting free exercise of religion).

317. *See* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 408–10 (6th Cir. 2010) (failing to apply the neutral principles framework); Purcell v. Summers, 145 F.2d 979, 985–87 (4th Cir. 1944) (same); Protestant Episcopal Church v. Episcopal Church, 806 S.E.2d 82, 91–92 (S.C. 2017) (applying neutral principles to the real property dispute, but not to the trademark dispute).

318. *See supra* notes 253–255 and accompanying text (discussing how neutral principles would prevent courts from delving into an ecclesiastical trademark dispute).

319. *See Simon*, *supra* note 135, at 312 (stating that churches turn to trademark law "because there is no other mechanism to adequately protect their identities").

320. *See McGill*, 617 F.3d at 408 (finding the defendant arguing that "the district court could not apply neutral principles of trademark law without resolving an underlying doctrinal dispute: to wit, who are the 'true' Seventh-day Adventists").

the church faction precluded from trademark use is left with no name.[321]

While the neutral principles approach is not perfect, it is the framework courts have at their current disposal. Until the Supreme Court clarifies the proper analysis for intra-church trademark disputes, courts should apply neutral principles on a consistent basis to all church property suits.

321. *See id.* at 415–16 (awarding summary judgment and leaving the defendant's church without use of its former name).