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Eric G. Osborne
Andrews Kurth LLP, eric.g.osborne@gmail.com

Michael D. Bush
SOUTH CAROLINA LAY SCHOOL OF THEOLOGY, bush.md@gmail.com

RETHINKING DEFERENCE: HOW THE HISTORY OF CHURCH PROPERTY DISPUTES CALLS INTO QUESTION LONG-STANDING FIRST AMENDMENT DOCTRINE

Eric G. Osborne and Michael D. Bush***

BECAUSE of First Amendment concerns, church property is treated in a different manner than practically any other type of property. Yet, as an area of First Amendment law, church property law draws comparatively little attention. A myriad of law review articles have been written on the subject in recent years—many of them student notes—but the recent scholarship is doctrinal and focuses almost exclusively on disputes and proposals for how the Supreme Court should treat the subject.[1] What is sorely lacking is a deep and scholarly dive into the historical roots of the Supreme Court's jurisprudence. Such an analy-

* Eric G. Osborne is a litigation associate at Andrews Kurth Kenyon LLP. A graduate of Stanford Law School, Eric earned a Master of Divinity (M. Div.) from Princeton Theological Seminary before enrolling in law school. A substantial portion of Eric's practice is devoted to representing churches and other faith-based institutions.

** Michael D. Bush is a Presbyterian minister. Having earned master's degrees from Union Presbyterian Seminary and Yale University Divinity School, he received the Ph.D. in history of doctrine from Princeton Theological Seminary. He has served on the faculty of Erskine Theological Seminary and the staff of Gordon-Conwell Theological Seminary, and has published a number of scholarly and popular articles, books, and reviews.

1. *See* Christopher W. Wynne, Comment, *WWJD: A True Neutral Principles Approach? Arkansas Courts Should Take Another Look*, 65 ARK. L. REV. 481, 481 (2012); Bernie D. Jones, *Litigating the Schism and Reforming the Canons: Orthodoxy, Property & the Modern Social Gospel of the Episcopal Church*, 42 Golden Gate U.L. REV. 151, 152–153 (2012); Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 VA. L. REV. 443, 443–44 (2010); Mark Strasser, *When Churches Divide: On Neutrality, Deference, and Unpredictability*, 32 HAMLINE L. REV. 427, 429 (2009); Cameron W. Ellis, Note, *Church Factionalism and Judicial Resolution: A Reconsideration of the Neutral-Principles Approach*, 60 ALA. L. REV. 1001, 1002 (2009); Jeffrey B. Hassler, Comment, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 PEPP. L. REV. 399, 400–05 (2008); Meghaan Cecilia McElroy, Note, *Possession is Nine Tenths of the Law: But Who Really Owns a Church's Property in the Wake of a Religious Split Within a Hierarchical Church?*, 50 WM. & MARY L. REV. 311, 313–18 (2008); Justin M. Gardner, Note, *Ecclesiastical Divorce in Hierarchical Denominations and the Resulting Custody Battle over Church Property: How the Supreme Court Has Needlessly Rendered Church Property Trusts Ineffectual*, 6 AVE MARIA L. REV. 235, 236–38 (2007); Kathleen E. Reeder, Note, *Whose Church is it, Anyway? Property Disputes and Episcopal Church Splits*, 40 COLUM. J.L. & SOC. PROBS. 125–28 (2006); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1843 (1998).

sis provides clarity into what motivated the earliest decisions and may call into question some fundamental assumptions upon which the entire area of law rests.

The basic principle of church property law is that the First Amendment limits what matters courts may decide, particularly if such matters infringe on ecclesiastical issues. Beginning with a landmark case in 1871, the United States Supreme Court decided that secular courts could not decide ecclesiastical matters.[2] Instead, the Court opined, courts should defer to the hierarchy of a church denomination.[3] In the decades that followed, the Court enshrined that holding as a matter of First Amendment law.[4]

Any major phenomenon involves a who, what, when, where, and why. In the case of the Supreme Court's jurisprudence adopting the hierarchical deference model, the first four questions have been answered. The deference model (what) was adopted by the Supreme Court (who/where) in 1871 (when).[5] But to the best of our knowledge, the why has never been explored. Yes, the *Watson v. Jones* opinion itself gives a reason—the Court stated that America's principles of freedom of religion required deference.[6] But why did the justices decide then, at that time, that principles of freedom of religion required deference when the common law had been to the contrary for so long?

In *Planned Parenthood v. Casey*, in explaining *stare decisis* and when it is proper for the Court to overrule precedent, Justice O'Connor emphasized that the Court reconsiders doctrine when "[s]ociety's understanding of the facts upon which a constitutional ruling [is] sought . . . [are] fundamentally different from the basis claimed for the [prior] decision."[7] As Justice O'Connor concluded, "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations."[8] If a decision's "factual underpinnings" are challenged, the decision may be reexamined.

This Article demonstrates that the factual underpinnings of the original *Watson* decision are suspect, such that the "changed conditions" present today should cause the courts to reconsider long-held doctrinal beliefs. As detailed below, the *Watson* decision was made by a radical Republican Court in the wake of the Civil War at a time of intense national division. [9] At least some historians have suggested that the impetus of the decision might have been to restore national unity by empowering north-

2. Watson v. Jones, 80 U.S. 679, 730 (1871).

3. *Id.*

4. *See* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952) (holding in a post-*Erie* environment that the First Amendment mandated deference to a church hierarchy).

5. *Watson*, 80 U.S. at 730.

6. *Id.* at 728.

7. 505 U.S. 833, 863 (1992).

8. *Id.* at 864.

9. *See* discussion *infra* Part VII.

ern churchmen,[10] but a look at the actual history shows that unity is probably not what motivated northern churchmen (i.e., the Court may have been misled on that account). Moreover, the decision had the opposite effect as it played a role in intra-church division for generations to come.

By the time the next-round of church schism emerged in the 1930s, the deference rule was firmly ensconced.[11] Legal scholars, now decades removed from the Civil War did not understand the context of the deference rule. It became an accepted part of constitutional jurisprudence.

In 1979, the Supreme Court finally limited *Watson* when, in *Jones v. Wolf*, the Court held that states could also apply a "neutral principles" approach to church property, rather than just hierarchical deference.[12] But even then four justices dissented, believing they had to follow the deference rule as a matter of constitutional law.[13] Since then, state courts have divided over the rules they apply and the mandates of the Constitution.[14]

We suggest that the deference model itself is fundamentally flawed and has been *ab initio*. We do this by looking at the political and religious context in which the original decision was made. We then examine historian Mark DeWolf Howe's contention that the decision was made to prompt national unity and show that it, in fact, promoted disunity. The result of the deference rule has been to empower denominational hierarchies, thus making divisions and intra-church fights for control especially bitter. In today's world of partisanship and division, scholars, practitioners, and jurists alike would do well to reconsider deference and its repercussions.

I.

In connection with the Civil War, there was an old Presbyterian legend that Cyrus McCormick, inventor of the famous reaper, had once said that before the war, "the two great hoops holding the Union together were the Democratic Party and the Old School Presbyterian Church."[15] It is not surprising McCormick would have made such a statement, for he was heavily involved in both the Democratic Party and the Presbyterian Church.[16] Indeed, McCormick's involvement in Presbyterian life was so great, and his beneficence so large, that one of the church's oldest semi-

10. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 81 (1965).

11. *See Watson*, 80 U.S. at 728.

12. 443 U.S. 595, 604 (1979).

13. *Id.* at 610.

14. *See infra* notes 29–30 and accompanying text.

15. *See, e.g.*, LEWIS G. VANDER VELDE, THE PRESBYTERIAN CHURCHES AND THE FEDERAL UNION: 1861-1869 21 (1932).

16. Mitchell Wilson, *Cyrus Hall McCormick: American Industrialist and Inventor*, ENCYCLOPEDIA BRITANNICA (July 29, 2015), http://www.britannica.com/EBchecked/topic/354011/Cyrus-Hall-McCormick [https://perma.cc/9W9F-2U7C].

naries bears his name.[17]

McCormick's claim has a strong basis in fact. The Presbyterians may very well have been the only significant national organization—other than the Democratic Party—that transcended the country's growing sectional divide. By the start of the Civil War, of the three largest Protestant denominations in the United States,[18] only the Old School Presbyterian Church remained united. The Methodists had split over the issue of slavery in 1844.[19] The Baptists followed the Methodist lead in 1845.[20] In contrast, the Presbyterians had split in 1837 over doctrinal and polity issues rather than regional and political issues.[21]

To be sure, the Old School's non-division was more a reflection of the church's decision not to address slavery forcefully, rather than a sign of unity.[22] But by 1861, the Old School Presbyterian Church, the largest Presbyterian denomination in the country, was scattered widely across the United States, yet still linked together in its governing structure.[23]

Despite McCormick's saying and the ongoing connection of the Presbyterian Church leading up to the Civil War, it was nevertheless a dispute within the Old School Presbyterian Church at issue in *Watson v. Jones*. The United States Supreme Court's first entry into such disputes involved a church property dispute from Kentucky.[24] Prior to *Watson*, state courts handled church property disputes, but previous disputes were local and centered on specific issues of state law.[25] In *Watson*, the Supreme Court stepped into a national controversy and developed principles of federal common law that came to apply generally throughout the land.

Those principles still apply in many jurisdictions today, as church property litigation has become one of the most active, yet rarely discussed, areas of First Amendment law. In a flurry of litigation during the past decade—and at an ever-increasing pace—state high courts have been deciding church property disputes according to First Amendment principles

17. *Our History*, MCCORMICK THEOLOGICAL SEMINARY, http://mccormick.edu/content/our-history [https://perma.cc/LT6C-QWPA].

18. *See* VANDER VELDE, *supra* note 15, at 4 (noting that Methodists, Baptists, and Presbyterians were the most important Christian denominations, from a numerical perspective, in 1860).

19. *See The Slavery Question and Civil War: 1844-1865*, UNITED METHODIST CHURCH, http://www.umc.org/who-we-are/the-slavery-question-and-civil-war [https://perma.cc/MV8K-LM7M].

20. *American Baptists: A Brief History*, AMERICAN BAPTIST CHURCHES 3, http://www.abc-usa.org/wp-content/uploads/2012/06/history.pdf [https://perma.cc/TQE3-GZ3Y]; *see also About Us*, SOUTHERN BAPTIST CONVENTION, http://www.sbc.net/aboutus/default.asp [https://perma.cc/5XCY-YPBF].

21. VANDER VELDE, *supra* note 15, at 4. As we shall see below, one of the resulting denominations, the New School Presbyterians, was strongly abolitionist, but this was not a reason for the division of 1837. *See infra* notes 77–83 and accompanying text.

22. In this way, the Old School Presbyterian Church was similar to the political structures of the country as a whole that similarly refused to address the issue of slavery head-on.

23. VANDER VELDE, *supra* note 15, at 4.

24. 80 U.S. 679, 713 (1871).

25. *See, e.g.*, Baker v. Fales, 16 Mass. 488, 492–93 (1820); McGinnis v. Watson, 41 Pa. 9, 13–14 (1861).

set out by the United States Supreme Court.[26] The Court has ruled that the First Amendment "commands civil courts to decide church property disputes without resolving controversies over religious doctrine" or "ecclesiastical questions."[27] When dealing with disputes within churches that are considered "hierarchical," courts instead must decide such disputes via one of two constitutional paths: deference to the decision of the church hierarchy (the deference model) or adjudication pursuant to neutral principles of property law.[28] Since the Supreme Court approved the neutral principles approach, more and more state courts have opted for it, but courts have been divided over what "neutral principles" entails. Some courts have ruled that the First Amendment permits or even requires them to enforce trust provisions in denominational constitutions,[29] while others read neutral principles to require judgments based on the same property law applied to non-religious entities.[30]

Such disagreements between state courts over First Amendment requirements continue to percolate, as even more states have cases pending.[31] Although the Supreme Court has so far denied requests to clarify the issue,[32] the divide over a constitutional question, coupled with the

26. *See infra* notes 29–30 and accompanying text.

27. Presbyterian Church in the United States v. Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

28. Jones v. Wolf, 443 U.S. 595, 602–06 (1979) (explaining that hierarchical deference is not required; neutral principles is a constitutionally permissible).

29. A Louisiana court treated an argument to this effect by a general church as a sanctionable misrepresentation of *Jones v. Wolf*. Carrollton Presbyterian Church v. Presbytery of S. La. of Presbyterian Church, 2014-1214 (La. App. 1st Cir. 3/9/15), 172 So. 3d 1, 5–6, 13, writ denied, 2015-0682 (La. 5/22/15), 171 So.3d 257. *But see, e.g.*, *In re* Episcopal Church Cases, 198 P.3d 66, 84 (Cal. 2009); Petition for Writ of Certiorari at 15, Timberridge Presbyterian Church, Inc. v. Presbytery of Greater Atlanta, Inc., 132 S. Ct. 2772 (2012), (No. 11-1101), 2012 WL 755072; Petition for Writ of Certiorari at 14–15, Gauss v. Protestant Episcopal Church in United States, 132 S. Ct. 2773 (2012) (No. 11-1139), 2012 WL 900636; Petition for Writ of Certiorari at 14, Rector v. Episcopal Church, 132 S. Ct. 2439 (2012) (No. 11-1166), 2012 WL 991422; Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920, 921 (N.Y. 2008); Hope Presbyterian Church of Rogue River v. Presbyterian Church, 255 P.3d 645, 647 (Or. Ct. App. 2011); Convention of Protestant Episcopal Church in Diocese of Tennessee v. St. Andrew's Parish, No. M2010-01474-COA-R3-CV, 2012 Tenn. App. LEXIS 274, at *34–41 (Tenn. Ct. App. 2012).

30. *See, e.g.*, Church of God in Christ, Inc. v. Graham, 54 F.3d 522, 525–26 (8th Cir. 1995) (applying Missouri law); Ark. Presbytery of the Cumberland Presbyterian Church v. Hudson, 40 S.W.3d 301, 306–07 (Ark. 2001); Presbytery of Ohio Valley, Inc. v. OPC, Inc., 973 N.E. 2d 1099, 1106–07 (Ind. 2012); Carrollton Presbyterian Church v. Presbytery of S. La. of Presbyterian Church (USA), 2011-0205 (La. App. 1 Cir. 9/14/11), 77 So.3d 975, 977, *writ denied sub nom.* Carrollton Presbyterian Church v. Presbyterian of S. La. of Presbyterian Church (USA), 2011-2590 (La. 2/17/12), 82 So.3d 285; Heartland Presbytery v. Gashland Presbyterian Church, 364 S.W.3d 575, 581 (Mo. Ct. App. 2012); All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C., 685 S.E.2d 163, 171–72 (S.C. 2009), *cert. dismissed*, 130 S. Ct. 2088 (2010).

31. *See* Episcopal Diocese of Fort Worth v. Episcopal Church, 422 S.W.3d 646, 650–52 (Tex. 2013); *see also* Brief of Appellant at 22–29, Convention of Protestant Episcopal Church in Diocese of Tenn. v. Rector, Wardens, & Vestrymen of St. Andrew's Par., No. M2010-01474-COA-R3-CV, 2010 WL 4279303, at *22–29 (Tenn. Ct. App. Apr. 25, 2012) (denying appeal).

32. *See supra* note 30.

sheer scope of ongoing litigation that affects thousands of churches comprised of millions of members, begs for resolution.

But what if a crucial building block of this entire area of law, the hierarchical deference rule as enunciated in *Watson*, the Supreme Court's first church property case, is faulty? What if the very first Supreme Court case on church property was so politicized (and so captured by a particular, fervent religious creed) as to raise serious suspicions about the deference rule? This Article examines the religious and political history behind *Watson* to make precisely this point. The history shows that the *Watson* decision discarded centuries of common law (and centuries of Presbyterian theological and ecclesiastical understanding) and let loose an array of unintended consequences for both the law and the churches. This ought to give every contemporary jurist and practitioner pause.

It is difficult to see the context of the Civil War and Reconstruction in which *Watson* unfolded with neutral eyes because we now comprehend just how evil the institution of slavery was and therefore question the motives of those who supported it. But, in law things are rarely so simple. It is only by looking directly at difficult issues that clarity can emerge.

A landmark case, *Watson* had more at stake than the fight over slavery that roiled the nation at that time. As we shall see, matters of polity, belief, theology—including, fundamentally, what it means to be a Christian—were at issue. Those matters tore churches asunder, even as the nation came back together after that war. The Supreme Court's decision had an enormous impact on those theological issues, even as its opinion ostensibly held that it could not do so, and altered how churches in the United States would govern themselves thereafter. The repercussions, both for the law and through its effects for the church, remain with us today.

It is our view, as a matter of law and history, that *Watson* was a shortsighted decision made by a politicized court controlled by justices with fervent religious views. We argue that *Watson* grossly distorted legal and theological understandings of church polity and church property and led to the transfer of hundreds of millions of dollars in real property to parties that had never paid for it. Although we have no patience for people whose sympathies, votes, dollars, and lives supported the horror of American slavery, a reexamination of the *Watson* decision from a historical point of view suggests a rethinking of this area of law is necessary today if courts are to fairly adjudicate the latest manifestation of church property disputes. [33]

33. We are writing about the great Presbyterian schisms of the nineteenth century. Over the last few years, another schism has divided the Presbyterian Church over LGBT rights. David Masci & Michael Lipka, *Where Christian churches, other religions stand on gay marriage*, PEW RES. CTR. (Dec. 21, 2015), http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/ [https://perma.cc/CN42-RD6W]. This Article reaches no conclusion on the merits of any contemporary schisms other than to show that how the law treats church property has a profound effect on the church itself. A case could be made that the most recent schism would not have happened if local con-

II.

Watson v. Jones originally involved a question of who were the rightful elders of the Walnut Street Presbyterian Church in Louisville, Kentucky.[34] This primary question gave rise to the question of who rightfully held the property.[35] At the beginning of the controversy, the majority of the congregation had sympathized with the Confederacy and a significant plurality sympathized with the Union.[36] By the time the Supreme Court received *Watson*, most of the Southern faction had left the congregation, but continued as parties to the case.[37]

While the Supreme Court's opinion spoke to specific trusts and independent congregations as well,[38] the crux of the opinion centered on how property disputes involving what it called hierarchical churches should be decided.[39] The Court held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."[40] The decision overturned the previous common law rule known as "Lord Eldon's Rule," which held that property should go to the faction most true to the beliefs of the church's founders.[41] The Court justified abandoning the common law rule because "[i]n this country the full and free right to entertain any religious belief . . . is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[42] In short, the Court held that it could not make decisions regarding theology and church doctrine. Instead, the *Watson* Court established the "hierarchical deference" principle, a unique principle of American law that requires courts to defer to the hierarchy of a church (when one exists) in deciding church property matters.[43]

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gregations did not have to worry about losing their property when caught in a denomination in which they are a theological minority.

34. Watson v. Jones, 80 U.S. 679, 694–96 (1871). The Presbyterian Church is governed under a democratic structure. An "elder" is an elected ruling member in a Presbyterian congregation. A group of elders composes the Session, which is the ruling body for the congregation. In the case of the Walnut Street Church, trustees held title to the land, but they were to hold the land for the benefit of the congregation and according to its wishes as expressed through its ruling elders. *See id.* at 683. Thus, although the trustees technically held the property, since they were bound to follow the lead of the elders, the property was effectively held by the elders. The dispute in *Watson* was originally over who were the rightful elders of the congregation. *Id.* at 717–718.

35. *Id.* at 696–99.

36. *Id.* at 691–92.

37. *Id.* at 692–93.

38. *Id.* at 723–24.

39. For an argument that *Watson*'s division of the ecclesiastical universe into hierarchical and congregational polities is fatally flawed, *see* Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 327–28 (2016).

40. *Watson*, 80 U.S. at 727.

41. *See* Attorney-General v. Pearson, [1817] 36 Eng. Rep. 135, 150 (H.L.).

42. *Watson*, 80 U.S. at 728.

43. *Id.* at 730.

When the United States Supreme Court stepped in, it overruled a Kentucky Court of Appeals decision,[44] which had been based on Kentucky common law and the trial court's fact-finding.[45] For the highest court of the land to override a state court decision is somewhat irregular, but this is not the most irregular fact of *Watson v. Jones*. Federal jurisdiction was itself at issue.

The question of federal jurisdiction had at least two important aspects. One was whether the plaintiffs in the federal suit had moved to Indiana merely to create diversity jurisdiction so their case could be heard in federal court. The plaintiffs claimed to be citizens of Indiana.[46] The defendants disputed this; they argued that the plaintiffs had moved to Indiana as a "contrivance for the purpose of bringing and prosecuting this suit, and to give this court seeming jurisdiction of the parties and subject-matter set up in complainants' bill."[47] However, in 1855, the Supreme Court held that it was permissible for a party to engage in such a contrivance, so long as the move reflected a good faith intention to take up residence in the second state.[48] Thus, the question became whether these plaintiffs had moved to Indiana with the intention to remain. William Jones, a plaintiff in the federal suit, was challenged at trial about his intention, and testified, "I would have moved to New Albany, Indiana without reference to the suit," and that he did not intend to return to Kentucky.[49] The Supreme Court majority did not question the veracity of Jones's testimony, or seriously consider this issue in any way. In the decision, Justice Miller brushed the question aside with an assertion that the Watson party had abandoned the argument.[50] Within a few years, the Supreme Court held that it was necessary for courts to satisfy themselves that they have jurisdiction whether the parties challenge it or not, so *Watson* almost certainly would not be heard by federal courts today. But this was not yet the rule in 1871.[51]

The other jurisdictional problem, and the basis upon which Justices Nathan Clifford and David Davis dissented in *Watson*, was that a substantially identical action was alive in a state court when the federal suit was filed.[52] Though the state appellate court had ruled nominally in favor of the southern faction, while at the same time requiring that they use the

44. At that time, the Court of Appeals was the highest court in Kentucky.

45. Watson v. Avery, 65 Ky. (2 Bush) 332, 349 (1867).

46. Watson v. Jones, 80 U.S. at 694.

47. Abstract of Evidence and Pleadings at 33, Watson v. Jones, 80 U.S. 679 (1871) (No. 108), *reprinted in* SUPREME COURT RECORDS AND BRIEFS, 1832-1978 (Gale 2013) [hereinafter Abstract].

48. Jones v. League, 59 U.S. 76, 81 (1855) ("The change of citizenship, even for the purpose of bringing a suit in the federal court, must be with the *bona fide* intention of becoming a citizen of the State to which the party removes. Nothing short of this can give him a right to sue in the federal courts, held in the State from whence he removed.").

49. Papers of John Marshall Harlan, Part I, Legal File, Box 12, Reel 9, Library of Congress.

50. *Watson*, 80 U.S. at 714.

51. Morris v. Gilmer, 129 U.S. 315, 325–26 (1889).

52. *Watson*, 80 U.S. at 735 (Clifford, J., dissenting).

property in accord with the northern faction's wishes, the marshal of the state Chancery Court refused to release the property—in defiance of three orders to do so.[53] Control of the property was finally released in September, 1868, but the federal case had been filed the previous July when the Chancery Court still controlled the property. [54] For this reason, Justice Clifford (a New England Unitarian, about as far religiously speaking from a southern Presbyterian as possible) wrote in the dissent:

> I am of the opinion that the Circuit Court had no jurisdiction to hear and determine the matter in controversy, as there were two courts of common law exercising the same jurisdiction between the same parties in respect to the same subject-matter, within the same territorial limits, and governed by the same laws.[55]

Though the state and federal courts might have originally had concurrent and coordinate jurisdiction, the matter was first filed in state court, so the Circuit Court should have dismissed the federal suit "for the want of jurisdiction."[56] Nevertheless, the majority distinguished the factual backgrounds of the state and federal cases, finding that the fulfillment of a schism within the congregation that was only beginning to take shape when the state suit was filed created a distinct set of issues to be tried in federal court.[57] On this basis, however slim, the majority found that the federal courts could exercise jurisdiction.[58]

Yet even this is not the most surprising fact of *Watson*. The most surprising fact of all is that the plaintiffs enjoyed unchallenged use of the church property at the time, and called a minister who shared their convictions.[59] They brought the suit merely because of a "frequently threatened and announced" intention by the defendants that they would try to take possession.[60] The Watson (i.e., southern) party pursued their claim in state court, defended themselves when sued in federal court, and then appealed to the Supreme Court.[61] However, they made no effort to encroach upon the northern group's use of the property. Indeed, Justice Miller acknowledged in the decision that the Watson party had moved on in their ecclesiastical life.[62] Therefore, it appears that there was no claim for relief when the federal case was filed and that the suit should have been dismissed as moot *ab initio*.

Why, then, would the Court go to such lengths in a trivial—perhaps moot—dispute?

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53. *Id.* at 688–89.
54. *See id.* at 690.
55. *Id.* at 737 (Clifford, J., dissenting).
56. *Id.*
57. *Watson*, 80 U.S. at 717.
58. *Id.*
59. *See infra* notes 191 and accompanying text.
60. Abstract, *supra* note 47, at 29.
61. *Watson*, 80 U.S. at 685–90.
62. *Id.* at 734.

Mark DeWolfe Howe has argued that the reason may have been primarily political. According to Howe, the majority of the Court may have felt that "they must somehow support the loyalists among the Presbyterians," and thus "[t]he nation's supreme authority . . . decreed that those Presbyterians who were loyal to the Union, not those who were faithless, could hold the church's property."[63] Howe does not directly state that something as mundane as pure sectarian partisanship was the foundation of the *Watson* decision;[64] his focus is on the Court's sympathy for "unifying forces in American society."[65] As Howe puts it, the Court wanted "to see a nation spring up from the dust of nullification and the ashes of war," and the Court was willing to support churches that might achieve this purpose.[66] His theory is simple—if the Old School Presbyterian Church was the "hoop holding together the Union," then supporting the church's hierarchy in disputes with recalcitrant congregations was one way to "re-establish effective spiritual authority throughout the land."[67]

Perhaps Howe is right that the *Watson* Court intended to support unifying forces in the Reconstruction era, though we raise doubts about this below.[68] However, it is certain that if such was the Justices' intention, their support for the Old School General Assembly missed the mark. In fact, actions by the post-war Presbyterian General Assemblies described below, partly in response to *Watson*, further divided the citizens who were its members.[69] If the Court indeed wanted to re-establish a unified spiritual authority, it would have done well to rule the opposite way, or better yet, to leave the matter in the hands of Kentucky courts.

Moreover, it seems clear that Howe's implied, more mundane point is surely true. Partisanship did motivate the Court in its choice to exercise "extraordinary—perhaps even outrageous"[70] jurisdiction, even when there was no common law ground nor any real necessity to do so. On the other hand, although the state court that ruled for the breakaway group followed the traditional common law, it may have been similarly caught up in a religious and political divide that permeated the state of Kentucky.

In the controversy leading to the *Watson* decision, political questions came to be seen as theological—with legal consequences. Disagreement over those confused issues divided the Church and the Louisville Presbytery,[71] together with the Walnut Street Presbyterian Church within it.

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63. HOWE, *supra* note 10, at 81.

64. Howe states merely that he "supposes" this to be a possibility. His focus is more on the rationale of the decision, for "the reasons stated for decision often outweigh in significance the conclusions reached." HOWE, *supra* note 10, at 81.

65. *Id.* at 87.

66. *Id.*

67. HOWE, *supra* note 10, at 87.

68. *See* discussion *infra* Part VII.

69. *See* discussion *infra* Part IX.

70. HOWE, *supra* note 10, at 81.

71. In the Presbyterian Church, a "presbytery" is analogous to a Catholic "diocese" or an American "state." A presbytery is a regional governing body. A "synod" is an interme-

When the Supreme Court ruled for the denomination in *Watson*, ostensibly to prevent courts from delving into matters of religious doctrine, it involved itself in these disputes as virtually a partisan, and empowered the politicization of the northern denomination. In these ways it helped ensure that the Presbyterian Church would not come back together for more than a century.

III.

The Walnut Street Presbyterian Church was organized in Louisville, Kentucky, in the late 1840s.[72] In 1853, one Edward P. Humphrey and his wife conveyed a parcel of land to the church, which was soon put under the control of the church's trustees.[73] The church affiliated with the Presbyterian Church in the United States of America (Old School), and remained with the denomination through the Civil War.[74] The Walnut Street Church was also a part of the Synod of Kentucky and the Louisville Presbytery.[75] It was this participation in the Louisville Presbytery and the Synod of Kentucky that led to the landmark property dispute. The local church was in a presbytery that was in tension with the national church—tension that exploded shortly after the war ended.

To understand how the *Watson* decision affirmed division in the country, it is important to understand how the status quo at the outbreak of the Civil War came to be.

At the beginning of the secession crisis of 1861, the Old School Presbyterian Church was the largest denomination that still maintained a unified national organization.[76] Whereas other denominations were torn asunder by slavery, decades earlier the Presbyterian Church in the United States of America (PCUSA) split into two denominations over a matter of church polity unrelated to slavery.[77] The division occurred over a plan for interchurch cooperation with Congregationalists known as the Plan of Union.[78] The party that included the former New England Congregation-

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diate body between the local presbytery and the General Assembly, the periodic national gathering.

72. Abstract, *supra* note 47, at 3.

73. *Id.*

74. *Id.*

75. *Id.*

76. VANDER VELDE, *supra* note 15, at 4.

77. *Id.*

78. The Plan of Union provided that the Presbyterian and Congregationalist churches would work together. D.G. Hart & John R. Muether, *New Horizons: Turning Points in American Presbyterian History Part 5: The Plan of Union, 1801*, ORTHODOX PRESBYTERIAN CHURCH, http://www.opc.org/nh.html?article_id=27 [https://perma.cc/EBJ8-SDPX]. Rather than have both churches expand into new areas, each church would defer to the other where it was already established. *Id.* Thus when Congregationalists moved west to areas where Presbyterians had already settled and established churches, the Congregationalists became Presbyterians. *Id.* This agreement was possible because Presbyterians and Congregationalists shared a "Reformed" faith derived from the teachings of John Calvin. *Id.* The historical difference between the two churches was polity. *Id.* Presbyterians governed themselves according to interconnected general church structures, while Congregationalists governed themselves at the congregational level. *Id.*

alists came to be known as "New School" Presbyterians, while the more traditional Presbyterians of Scottish and Scots-Irish ancestry predominated in the Old School group.[79] Eventually, the differences between the two groups became too much. At the 1837 General Assembly, a majority of Old School Presbyterians managed to rid the Church of those "tainted with 'diluted' orthodoxy and 'infirm' ideas of church government" [80] by voting to abrogate the Plan of Union and to expel four synods dominated by the Presbyterian-Congregational churches.[81] These Synods became the seed of the New School Presbyterian denomination. The remaining Old School Presbyterian Church, having purged its most courageous abolitionist members over this unrelated matter in 1837, was able to do no more than complain ineffectually about slavery until after the secession crisis and so managed to stay united in the years leading up to the Civil War.[82]

So it was that in May of 1861, in the aftermath of the attack on Fort Sumter, Presbyterians from Confederate and Union states traveled great distances to Philadelphia, Pennsylvania for the national General Assembly.[83] The Assembly had a substantial southern presence, so that there seemed to be an opportunity for the Assembly to be a last chance for unity.[84]

At first, the 1861 Assembly seemed to take pains to promote unity. When, early in the Assembly, Dr. Gardiner Spring from New York introduced a resolution to express "devotion to the Union of these States, and . . . loyalty to the Government," the resolution was promptly tabled.[85] When Spring continued to push resolutions affirming support for the United States government, Charles Hodge, a professor at Princeton Theological Seminary, managed to create a committee to consider all proposed motions and work on a compromise.[86] Incredibly, in light of the ongoing war, the committee came back with a moderate position supported by eight of its nine members.[87] The committee's position did not concern slavery, which it did not address, but rather focused on the question posed by Gardiner Spring: whether the Assembly would "express devotion" to the national union.[88] The committee recommended that the Assembly "feel bound to abstain from any further declaration . . . which all our ministers and members . . . might not be able conscientiously and

79. *See* Hart & Muether, *supra* note 78.

80. VANDER VELDE, *supra* note 15, at 14.

81. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 421 (1837).

82. In contrast, the New School denomination made significant declarations supporting the abolition of slavery, though it held together until 1857. In that year, the New School church effectively ejected its southern presbyteries, saying they could "have no fellowship" with those who did not "deplore the evil" of slavery.

83. *See* VANDER VELDE, *supra* note 15, at 42–43.

84. *See id.*

85. *Id.* at 48. The vote to table the resolution was 123 to 102. *Id.*

86. *Id.* at 56–57.

87. *Id.* at 57.

88. *Id.* at 57.

safely to join."[89] This was the approach that had held the Old School together since 1837.

Though commissioners to the Assembly began by tabling any discussion of such resolutions, by this point they had warmed to the idea. In place of the committee's recommendation, an even more stridently nationalist pair of resolutions than Spring originally proposed were passed by a large margin.[90] Spring had mildly (as it now seemed) written nothing more severe than that the Assembly should do all in their power "to promote and perpetuate . . . the integrity of these United States, and to strengthen, uphold, and encourage, the Federal Government."[91] In contrast, the General Assembly concluded the matter by roundly demanding that "the spirit of that Christian patriotism which the Scriptures enjoin" [92] required them, among other things, to "profess . . . unabated loyalty"[93] to the federal Constitution of the United States, "in all its provisions, requirements, and principles."[94] Even some northern Presbyterians, fully sympathetic to the Union, saw this for what it was: an illegitimate requirement that one must hold a particular political view in order to be a Christian in the Presbyterian way.

While the Church's resolution was celebrated by the northern press,[95] it was attacked in a protest by Hodge (himself a northerner)[96] and, of course, was rejected by the southern presbyteries. The Hodge protest asserted that the Assembly had unlawfully decided a political question and, more importantly, made fealty to this political stand a prerequisite of church membership.[97] He argued that this action was beyond the powers of the Assembly and wholly contrary to the doctrine and spirit of Presbyterianism.[98] Across the South, the Assembly's actions were the catalyst for an outright division. Forty-five presbyteries from ten southern synods assembled at Augusta, Georgia, on December 4, 1861, and created the Presbyterian Church in the Confederate States of America.[99] Thus, the Old School Presbyterian Church was split in two, and the "great hoop"[100] ceased to hold the Union together. Importantly for our case, soon after the Assembly's end, the Presbytery of Louisville rejected the Assembly's

89. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 325 (1861).

90. *See id.* at 330.

91. VANDER VELDE, *supra* note 15, at 58.

92. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 325 (1861).

93. *Id.* at 330.

94. *Id.*

95. *See, e.g.*, *The Church and the War*, N.Y. TIMES (May 28, 1861), http://www.nytimes.com/1861/05/28/news/the-church-and-the-war.html?pagewanted=1 [https://perma.cc/C65P-8AR8] ("[T]he Presbyterian Church is true to its eldest and noblest traditions. . . . [I]t has ever, with rare and eccentric exceptions, been the unflinching champion of universal liberty, a bulwark and the model of representative Government.").

96. VANDER VELDE, *supra* note 15, at 65.

97. *Id.* at 66.

98. *See id.* at 66–67.

99. *Id.* at 102.

100. *See supra* note 15 and accompanying text.

action, stating it constituted "errors of doctrine and principle . . . unconstitutional and of no binding force upon us."[101] The Louisville Presbytery went on to state it would "cordially unite with all true and conservative men in our beloved Church, North and South, in defending and preserving the purity, unity, and prosperity of the . . . Church."[102]

IV.

The most significant fact of the 1861 action was that it established that the Presbyterian Church now believed it could require political as well as religious beliefs of its members and ministers.[103] Having done this once, it was inevitable that "similar action must be taken in every similar gathering" during the Civil War, because the Spring resolutions "paved the way for a more emphatic and radical stand in each successive General Assembly."[104] Throughout the course of the war, the General Assembly took ever more stern political stands.

In 1864, after the General Assembly allowed loyal Old School ministers to proselytize in conquered southern territory and directed Presbyterians everywhere to give such missionaries "all the aid, countenance, and support . . . practicable," [105] the Louisville Presbytery "decline[d] to adopt the doctrine or obey the duty enjoined in [its] deliverance."[106] These actions caused one historian to comment: "There could be little doubt that if a movement to leave the Old School Presbyterian Church should be inaugurated in Kentucky, the Presbytery of Louisville would have a leading part in the undertaking."[107]

The General Assembly of 1865 began with a pronouncement against the Kentucky Synod and declared that it had "wholly failed to make any deliverance during the past year calculated to sustain and encourage our government in its efforts to suppress a most extensive, wanton, and wicked rebellion, aiming at nothing short of the life of the nation."[108] This was an ominous beginning for those who hoped for reconciliation. There were no southern commissioners to vote otherwise, so the northern wing of the church controlled the Assembly.[109] The 1865 Assembly took its cue from the Reconstruction Congress and took punitive action, including adopting a report that insisted the church would be free of unrepentant

101. VANDER VELDE, *supra* note 15, at 97 (internal citation removed).
102. *Id.* (internal citation removed).
103. Individual ministers had taken stands before (e.g., Lovejoy, Thornwell, Palmer, etc.), but the General Assembly had largely avoided such action. Regardless, the Assembly had not made a particular viewpoint a requirement of membership heretofore.
104. VANDER VELDE, *supra* note 15, at 106.
105. *Id.* at 188 (quoting Letter from Assistant Adjutant General E.D. Townsend to Military Generals in Mississippi, Department of the Gulf, of the South, and of Virginia and North Carolina (March 10, 1864)).
106. *Id.* at 188–89 (internal citation omitted).
107. *Id.* at 189.
108. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 541 (1865).
109. It was somewhat similar to how the Reconstruction Republicans controlled Congress in the Civil War's aftermath.

southern ministers, narrowly avoiding expelling any individual Presbyterian church member who would not conform his or her politics to the denomination's requirement.[110]

Thus, in four years, the Assembly had abandoned the spirit of mutual forbearance when faced with disagreement that had been a hallmark of the ante-bellum Old School Church. This is not to say that the southern Presbyterian Church was any less culpable or that the northern Presbyterian Church was not rightly aggrieved by the southerners' support of slavery and the Confederacy. But the actions of the 1865 Assembly, requiring federal political loyalty as a term of membership, assured that the Presbyterian Church, an organization that had promoted unity and purported to teach grace and forgiveness, would play no role in cooling the simmering tensions throughout the land.

These actions by the General Assembly inspired a revolt in the Presbytery of Louisville (of which the Walnut Street Church was a part) and instigated the dispute that gave rise to *Watson*. On September 2, 1865, the Louisville Presbytery responded to the General Assembly's actions by passing the "Declaration and Testimony against the Erroneous and Heretical Doctrines and Practices which have obtained and been propagated in the Presbyterian Church in the United States of America during the last five years" (hereinafter Declaration or Declaration and Testimony).[111] The Declaration and Testimony was "an open attack on the dignity and authority of [the] General Assembly."[112] It recommended resistance to certain orders by the Assembly and that monies be withheld from the national denomination.[113] Through the Declaration and Testimony, the Louisville Presbytery directly challenged the General Assembly's actions, arguing that the reports and resolutions of the war years were contrary to the doctrine, practices, and faith of the Church because they had made membership in the Presbyterian Church dependent on political views. The Presbytery promised, instead, to "bring back the church of our fathers," which it termed the "true Presbyterian church."[114]

The Presbytery's action had an immediate effect on the Walnut Street Church. Reverend W.T. McElroy, the pastor at the Walnut Street Church, had been under siege for unrelated reasons. The majority of the congregation had voted not to keep him as pastor,[115] but the session instead renewed McElroy's contract for six months, an action that divided the congregation and led to charges and counter-charges being laid.[116] Almost immediately thereafter, the Declaration and Testimony came

110. *See* VANDER VELDE, *supra* note 15, at 200–201.
111. Abstract, *supra* note 47, at 4.
112. *Id.*
113. *Id.*
114. VANDER VELDE, *supra* note 15, at 204 (quoting *Declaration and Testimony*, 38 BIBLICAL REPERTORY & PRINCETON REV. 427–28 (1866).
115. Abstract, supra note 47, at 5.)
116. *Id.* at 5–6. John Watson and Joseph Gault, who were southern sympathizers, filed charges against B.F. Avery, T.J. Hackney, and D. McNaughton, who represented the northern faction. *Id.* At the same time, counter charges were filed against Watson and

before the Presbytery.[117] McElroy voted in favor of the Declaration at the presbytery meeting.[118] It does not appear that the congregation initially voted to dismiss McElroy because he signed the Declaration, but the opposing parties within the congregation diverged over the Presbytery's resolution, just as they had over McElroy.[119] An intra-congregational dispute thus arose as to the pastor and the actions of the session, but underlying this was a dispute over the General Assembly's actions and the Louisville Presbytery's Declaration and Testimony.

In the Presbyterian system of 1865 (as today), a decision or dispute by a local body could be appealed to the next more comprehensive council of the Church, which in this case was the Presbytery of Louisville.[120] However, the dispute within the Walnut Street Church as to whether the session had acted constitutionally was appealed directly to the Kentucky Synod—the council that encompassed the Louisville Presbytery as well as others, with the same boundaries as the state of Kentucky.[121] This was contrary to the Constitution of the Presbyterian Church because there had never been any initial decision in a church court with original jurisdiction that could then be appealed to a higher ecclesiastical court. Rather, an intra-congregation dispute was sent directly to the Synod, leaping over the Presbytery—the court of original jurisdiction. The appeal was raised at the same meeting that took up the Declaration and Testimony from the Louisville Presbytery.[122] Thus this intra-congregational dispute involving factions for and against the Declaration and Testimony reached the Synod at the same time as the dispute over the Declaration and Testimony itself.[123] From that moment on, the Walnut Street Church's own internal struggles became a microcosm of the larger divisions within the Old School Presbyterian Church.

The Declaration and Testimony elicited a strong reaction within the Kentucky Synod, which met for an unprecedented ten days over the issue.[124] Dr. Robert Breckinridge, a professor at Danville Seminary and one of the most respected theologians in the Presbyterian Church, led a fierce resistance to the Declaration and Testimony. Breckenridge went so far as to call for the ouster of the Declaration supporters from the

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Gault. *Id.* It appears that both sides were working to stir up the congregation to support their view.

117. *Id.* at 5.

118. *Id.*

119. *Id.* The reasons given initially were that the majority of the congregation "were not edified by his ministrations, and that the congregation was decreasing under his charge." *See id.*

120. Abstract, *supra* note 47, at 2.)

121. *Id.* at 6.

122. The dispute was never, however, appealed to the Presbytery. *See id.* at 5–6.

123. This occurred in October of 1865. *See* VANDER VELDE, *supra* note 15, at 206; *see also* Abstract, *supra* note 47, at 6 (The Walnut Street Church dispute was appealed to the Synod of Kentucky on October 20, 1865).

124. VANDER VELDE, *supra* note 15, at 206.

Synod.[125] When he lost that vote,[126] he promised to appeal to the General Assembly, so that the Assembly "may censure, as its righteous judgment may deem proper, the sinful acts of the parties brought before the Synod."[127] While Breckinridge remonstrated and threatened appeal, the Synod both refused to expel or punish the Declaration supporters, but also refused to endorse the Declaration.[128] Just 35 members of the Synod felt the Assembly's actions justified withdrawal from the denomination, and the Declaration itself was ultimately condemned by the Synod on a 54 to 46 vote.[129]

Such close votes indicate that the Synod was divided by the Assembly's actions and the Louisville Presbytery's response. Still, as of October 1865, despite the Synod's disapproval of the General Assembly's actions, "a majority—though a dangerously small majority—of Old School Presbyterians in Kentucky . . . disapproved of the defiant conduct by the Presbytery of Louisville and was in favor of continuing in connection with the General Assembly of the Old School Church."[130] Simply stated, a narrow majority of the Presbyterians in the state of Kentucky as a whole were willing to give the General Assembly the benefit of the doubt. It would take further action to effect a full division that would drive most Kentucky Presbyterians out of the national church.

In light of the highly contentious division within the Synod, it is not surprising that the appeal from the Walnut Street Church was not satisfactorily settled.[131] A committee from the synod called a congregational meeting, at which four new elders sympathetic to the national denomination and opposed to the Declaration and Testimony (D. McNaughton, B.F. Avery, D. McPherson, and J. Leech) were elected and the resignations of elders Watson and Gault, who were southern sympathizers, were requested.[132] The trustees were to maintain control of the building, as provided by Kentucky law, subject "to the control and direction of the Session for purposes of religious worship."[133] The synod's committee then endeavored to help create a session all could support.[134]

Unfortunately, the Synod's work to broker a compromise between the opposing factions was in vain: elders Watson and Gault denied the validity of the election of the new elders, and with the help of two of the

125. *Id.*

126. The vote was 107 to 22. *See id.*

127. *Id.* (quoting SYNOD OF KENTUCKY, MINUTES OF SYNOD OF KENTUCKY 20–21 (1865)).

128. *Id.* at 207–08.

129. VANDER VELDE, *supra* note 15, at 208.

130. *Id.* at 209.

131. The case of the Walnut Street Church was raised at both the Kentucky Synod and the General Assembly. As we will see, there is dispute as to whether it was a legitimate appeal, because there is a question as to whether the session ever made a decision that could be appealed.

132. Watson v. Avery, 65 Ky. (2 Bush) 332, 340–42 (1867).

133. Abstract, *supra* note 47, at 6.

134. *See id.*

trustees,[135] denied them control of the church property.[136] In February of 1866, Avery and others sympathetic to the national church's position brought a civil suit in a Kentucky court against Watson and Gault, as well as the two "southern" trustees, Fulton and Farley, to assert their right *as elders* (i.e., elected spiritual leaders of the congregations) to participate in management of the church property for purposes of religious worship.[137] The division within the Walnut Street Church thus reached the civil courts, which were asked to resolve a matter of religious importance: who was the rightful session of the congregation?[138] At the same time as that case commenced, the Old School Presbyterian Church prepared for the 1866 General Assembly.[139] At the top of the docket was how the Assembly would respond to the Declaration and Testimony of the Louisville Presbytery.[140]

V.

The earliest stages of the *Watson* case comprised an intra-congregational dispute between two parties, both of which were still, for the time being, loyal to the Old School Presbyterian Church, though divided as to the validity of its actions respecting the southern churches and whether southern Presbyterians could be invited back into the Presbyterian fold. While the civil case made its way through the courts, events in the background changed the disposition of the parties.

At the 1866 General Assembly, Dr. Breckenridge brought his threatened appeal from the Kentucky Synod.[141] In the months after the Declaration, many other Presbyteries had signaled their support for it, showing, to the consternation of elites in the national Church, that many Presbyterians felt the denomination's actions, requiring fealty to certain political positions, were, in fact, heretical and contrary to Presbyterian doctrine.[142] Many northern Presbyterians worried that support for the Declaration and Testimony would continue to grow and could undo the resolutions of the previous Assembly.[143] Breckenridge's appeal was, therefore, important to the general church.

The General Assembly reprimanded the Louisville Presbytery. To begin, Dr. D.V. McLean, pastor of a small church in New Jersey, introduced a motion to deny seats to Louisville Presbytery's delegation altogether until the matter of the Declaration could be examined.[144] The political

135. The three trustees were Henry Farley, George Fulton, and B.F. Avery. *Id.* Farley and Fulton united with Watson and Gault against the new elders. *Id.* Another elder, Hackney, sided with the new slate. *Id.*
136. *Id.*
137. *See id.* at 6–7.
138. *See* Abstract, *supra* note 47, at 7.
139. *See* VANDER VELDE, *supra* note 15, at 206.
140. *Id.* at 220.
141. *Id.* at 206–07.
142. *Id.* at 209–17.
143. *See id.* at 210–11.
144. *See id.* at 223–24. *See also* Abstract, *supra* note 47, at 13.

question of 1861 and the church membership resolutions of 1865 had constituted a departure from tradition, but the Assembly now considered something even more extreme—expulsion from the Assembly of commissioners everyone agreed had been properly elected.[145] It might have been supposed, wrote one commentator, "that so high-handed a proposal would receive no consideration whatever from a dignified deliberative body,"[146] but on the contrary McLean's proposal was adopted 206 to 56 without any input from the Louisville commissioners.[147] Thus, the Assembly denied seats to the Louisville commissioners without a hearing and refused to give them the chance to defend themselves or their position.

McLean then went a step further, proposing a committee be created to look into the actions of the Louisville Presbytery. [148] Doing this would take the matter from the judicial committee, which normally considered doctrinal disputes, and put it instead into a legislative committee.[149] The judicial committee made decisions according to a deliberative process that included various procedural protections. When it approved creation of a legislative committee to decide how to handle the Declaration, the Assembly essentially voted to decide Breckenridge's appeal on a purely political vote, without collecting or hearing evidence.

To say that the rhetoric exchanged over the next few days was heated would be an understatement.[150] Charges and counter-charges flew back and forth. One commissioner at the Assembly, in light of all the charged rhetoric, is reported to have said, "while the soldiers were for peace, the ministers were for war."[151] War within the Presbyterian Church was declared, in a sense, when the committee established to look into the Declaration brought in its report. The committee recommended dissolving the Louisville Presbytery, requiring ministers to disavow the Declaration in order to remain with the national church, and removing ministers who refused to do so from the rolls.[152] The proposal was ultimately extended to all signers of the Declaration (i.e., not just those in the Louisville Presbytery, but anyone in the national church who had voiced agreement with the Louisville Presbytery's position).[153] The proposal was slightly tempered, so that the signers of the Declaration would be able to present

145. *See* VANDER VELDE, *supra* note 15, at 219–20.

146. *Id. at* 224.

147. *Id.* at 225.

148. *Id.*

149. *Id.* at 226.

150. For example, one commissioner, in speaking of the Louisville Presbytery, said, "[W]hen we have met the hydra with his hundred heads, and those hundred heads lie bleeding around us, we are to be frightened from our propriety by the wriggling of his dying tail?" *See id.* at 233.

151. VANDER VELDE, *supra* note 15, at 260.

152. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 39 (1866).

153. *See* VANDER VELDE, *supra* note 15, at 262.

their case at the 1867 General Assembly.[154] However, until then, no signers of the Declaration were allowed to participate in any Presbyterian functions beyond the local level.[155]

Thus, the Assembly officially removed all supporters of the Declaration from any high office or authority in the general Presbyterian church.[156] The Assembly did this without giving the supporters of the Declaration any chance to explain their position.[157] The Louisville commissioners, having been denied their chance to speak, swore to take the matter back to their presbytery and departed.[158]

The Louisville commissioners were, therefore, not present when the General Assembly considered the appeal (from the Synod of Kentucky) regarding the situation within their own Presbytery at the Walnut Street Church.[159] Not surprisingly, the same Assembly that had just effectively banished the Louisville Presbytery and its supporters found that the pro-northern faction of McNaughton, Avery, and Leach had been duly elected and wrongfully denied their status by the Louisville Presbytery.[160] Pro-southern Watson and Gault, conversely, were stripped of their ecclesiastical standing. [161]

Any hope of reconciliation within the denomination with the border state Presbyterians (and with the South, generally) had been quashed by the actions of the 1866 Assembly. This was probably intentional. The most outspoken proponent of harsh resolutions against the Declaration supporters was Thomas E. Thomas, pastor of the First Presbyterian Church of Dayton, Ohio.[162] A letter that Thomas received toward the end of the General Assembly from William C. Anderson exhibits part of what may have motivated the Assembly's majority:

> Brother. . .Thomas . . . Let all the Southern sympathizers go. Then urge on union with the New School Presbyterians. Don't be alarmed by the . . . old Philadelphia-Princeton clique of pro-slavery men. Let them go: they have been the deep curse of the Old School Church since 1845. A union with our New School brethren, now in perfect sympathy with us, will give us the grandest organization, especially if we can clear of [out?] the Hodge-VanDyke-Boardman school of Presbyterians. God bless you. Finish up the work that we may have

154. *See id.* at 266. In light of how the Louisville commissioners were denied the right to speak in 1866, one wonders how any signer's defense of the Declaration in 1867 would have gone. Regardless, the point soon became moot when most of the signers of the Declaration withdrew from the Church. Only two ultimately appeared in 1867 to explain their action. *See id.*

155. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 60–61 (1866).

156. *See id.*

157. *See id.*

158. VANDER VELDE, *supra* note 15, at 235.

159. Abstract, *supra* note 47, at 16.

160. *See id.* at 15–16.

161. *See id.*

162. VANDER VELDE, *supra* note 15, at 228.

peace in the future.[163]

As Anderson's letter indicates, Thomas and his cohort may have wished to see the Louisville Presbytery and its members expelled. Such an expulsion would open up the possibility of reunion with the fiercely anti-slavery New School of Presbyterians. Thomas would in fact get his wish within a few years.

VI.

With hope of reconciliation gone, and after having been denied seats at the Assembly and deprived of status within the church, the Louisville commissioners returned home to a Presbytery meeting. On June 19, 1866, the Louisville Presbytery gathered and, in defiance of the Assembly's act, allowed supporters of the Declaration to be enrolled in the meeting.[164] The majority who defied the Assembly declared itself the rightful Presbytery.[165] The minority, which remained true to the Assembly, demurred. Thus, in June of 1866, immediately after the 1866 Assembly, the Louisville Presbytery itself was divided in two.[166]

From this point on, the Walnut Street Church dispute was carried on between rival parties, one of which was no longer part of the Old School denomination, but each claiming to be joined with the true church. The anti-Assembly Presbytery (the Sanders Presbytery for the name of its leader) declared itself "absolved from all obligations to obey or in any manner to recognize the acts and ordinances of the General Assembly of 1866" subsequent to the expulsion of the Louisville Presbytery's commissioners.[167] The Sanders Presbytery in fact would not recognize "*any General Assembly hereafter* which recognizes the validity of the revolutionary acts and ordinances of the Assemblies of 1865 and 1866,"[168] but the Presbytery would join with other churches and ministers who "'stand in the old ways' of the Assemblies of 1837 to 1860" and who recognize that "[t]he General Assembly never had the power to establish regulations and a new plan of government."[169] In this way the Sanders Presbytery directly challenged the legitimacy of the Assembly's actions and called the Assembly out for acting beyond its powers. But the Sanders Presbytery promised reunion in the future should the Assembly change again.[170]

The Sanders Presbytery made up three-fourths of the ministers in Louisville,[171] but a remnant remained loyal to the Assembly. That remnant (the McMillan Presbytery) declared that the Sanders supporters, minis-

163. *Id.* at 231 (quoting Letter from William C. Anderson to T.E. Thomas (May 24, 1866)).
164. Abstract, *supra* note 47, at 16.
165. *See id.* (referring to the Sanders Presbytery).
166. *See id.* (referring to the pro-Assembly Presbytery as the McMillan Presbytery).
167. *Id.*
168. *Id.*
169. Abstract, *supra* note 47, at 17.
170. *See id.*
171. VANDER VELDE, *supra* note 15, at 261.

ters, and elders alike, had vacated their positions until they should "retrace their steps . . . and renew their adherence and submission . . . to the General Assembly."[172] In October, the Synod of Kentucky met and similarly split into the Douglas Synod (anti-Assembly) and the Lapsley Synod (pro-Assembly).[173]

This division was confirmed a year later by the General Assembly of 1867, which officially recognized the McMillan Presbytery and Lapsley Synod.[174] The Assembly declared that the recalcitrant Presbyteries and Synods were "in no sense true and lawful Synods and Presbyteries in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America."[175]

Within the Walnut Street Church, the majority recognized the authority of the McMillan Presbytery and the Lapsley Synod.[176] Avery, Leach, McNaughton, and Hackney led this group.[177] A minority supported the Sanders Presbytery and the Douglas Synod—Watson, Gault, Fulton, and Farley led this group.[178] The division within the local congregation reflected the division with the national church, the Synod, and the Presbytery, but the Walnut Street Church was unique: a pending lawsuit meant the courts would now weigh in on the intra-Presbyterian dispute.

The local Kentucky court issued an initial ruling in favor of the Avery faction.[179] When the Watson faction refused to recognize the initial order, the court ordered the marshal to take control of the property.[180] At that point, the Watson faction "abandoned all connection with the property and all participation in its control" which would later figure in the question whether there was in fact any claim for relief in *Watson*.[181] In May of 1867, the local court issued its final order, explaining that the Avery faction were legitimate members of the session *with* the Watson faction.[182] The two groups together were to control the property "*under the regulations of the Presbyterian Church in the United States of America*."[183] Because this ruling predated the 1867 General Assembly's renunciation of the Sanders Presbytery, both parties at this point could still legitimately claim to be members of the same national church.

The state case then went on appeal to the Kentucky Court of Appeals. The appeals court handed down a decision in November of 1867, recognizing the Watson group and denying the legitimacy of the Avery

172. Abstract, *supra* note 47, at 11.
173. *Id.* at 18–19.
174. *Id.* at 19–20.
175. *Id.* at 20.
176. *Id.* at 19.
177. Abstract, *supra* note 47, at 19.
178. *Id.*
179. *Id.* at 7.
180. *Id.* at 7–8.
181. *Id.* at 8.
182. Abstract, *supra* note 47, at 8.
183. *Id.*

group.[184] The ruling of the appeals court was based on Presbyterian ecclesiastical governance. The court held that more encompassing bodies (e.g., Synod, General Assembly) have the power to hear appeals, but for there to be an appeal, there must first be a decision below.[185] The question of who were the legitimate elders of the Walnut Street Church should have been tried before a presbytery (i.e., the Louisville Presbytery) before being brought to the Synod of Kentucky because the Presbyterian constitution did not allow for Synods (or the General Assembly) to exercise original jurisdiction over matters arising in a local congregation. Because "[n]o appeal had been prosecuted; nor was any decision of session, presbytery, or synod before the assembly for revision," the higher bodies could not organize or endorse an election in a local church such as the one that purported to bring the Avery contingent to power.[186] Simply put, the Court of Appeals found the election of the Avery faction unconstitutional by Presbyterian ecclesiastical law because the case initially began in a Presbyterian appellate body instead of one with original ecclesiastical jurisdiction. The election of the Avery faction violated the Presbyterian Church's own doctrine and rules, and in embracing that election, the General Assembly had departed from long-held Presbyterian doctrine as to church governance.

Thus, the Kentucky appellate court restored the original session of Watson, Gault, and Hackney as elders.[187] Fulton, Farley, and Avery were also restored to office as trustees.[188] The Watson group had been somewhat vindicated, but legally the church was now in the *status quo ante*, with a divided session and board of trustees.

Since 1861, southern Presbyterians had been insisting that the General Assembly's actions on politics and requirements for church membership were unconstitutional, directly contrary to Presbyterian rules and traditions.[189] Now the highest court in the state of Kentucky had stepped in and agreed with the southerners—the General Assembly was acting contrary to its own constitution. After six years of intra-church dispute, the highest state law court had vindicated the southern complaint.

It was at this point that federal courts intervened.

VII.

From a practical perspective, the Kentucky Court of Appeals decision had almost no effect. The property was being used by the Avery contingent, as the Watson group had ceased all efforts at control.[190] The Avery group was able to call a new pastor, who was received by the McMillan

184. *See* Watson v. Avery, 65 Ky. (2 Bush) 332, 363 (1867).
185. *Id.* at 348.
186. *Id.* at 359–60. The court agreed that the Avery group had petitioned with a complaint, but a complaint is not the same as an appeal. *Id.* at 360.
187. Abstract, *supra* note 47, at 12.
188. *Id.*
189. VANDER VELDE, *supra* note 15, at 66.
190. *See supra* note 181 and accompanying text.

Presbytery.[191] For over two years the Avery group had used the church undisturbed apart from a few idle threats from Farley, Fulton, and others.[192] The Avery group exerted effective control and full use of the property. Why then did the Avery contingent continue its litigation, and why did federal courts go to such extreme lengths to exercise questionable jurisdiction, all the way to the highest court in the land?

The answer likely lies in the importance of the Kentucky decision to the Old School Presbyterian Church and in the often-vindictive character of Reconstruction era politics. For years, southern supporters had been insisting that the actions of the General Assembly were contrary to the Church's constitution.[193] The Declaration and Testimony had made precisely this point—insisting the Assembly's actions were contrary not only to its own traditions, but to the tradition of historic and ecumenical Christianity. The Assembly's radical actions in crushing dissent suggest the southern complaints had purchase.

Now, however, a state court had given succor to the dissenters. More than that, the Kentucky appellate court had explicitly overruled the decision made by the national General Assembly resolving the dispute in favor of the pro-northern faction.[194] In essence, the Kentucky Court of Appeals had followed the old common rule and found that the Old School General Assembly's actions were a departure from doctrine.

At a time in which the national church was so divided, this could not stand. The result was that Presbyterians—for the first time ever—declared that courts should not examine church doctrine in their fact-finding.[195] The McMillan Presbytery reacted to the Kentucky court's decision with a harsh resolution, denying the competency or authority of civil courts to adjudicate ecclesiastical matters, even though it was the Avery faction, loyal to this same Presbytery, that had commenced the lawsuit in the first place.[196] The General Assembly of 1868 entered the fray too, siding clearly with the Avery contingent and unanimously condemning the Kentucky Court of Appeals' decision as "encroachment on religious liberty" and "a violation of the principle which determines the independence of the church upon the state."[197]

The language the Assembly used is almost the same language the Supreme Court ultimately used in the *Watson* decision. Essentially, the Su-

191. Abstract, *supra* note 47, at 21.

192. *See id.* at 29.

193. We use the term "southern" here to refer primarily to the border state Presbyterians from Kentucky, Missouri, and Maryland that were consistently outvoted and ultimately driven from the church in 1865 and 1866. *See* VANDER VELDE, *supra* note 15, at 209–10. The term does not include the Southern Presbyterian Church which had already broken off, but it does include the southern delegates to the 1861 Assembly who, had their position been the majority, might have averted the division within the church. *See id.* at 186.

194. Watson v. Avery, 65 Ky. (2 Bush) 332, 363 (1867).

195. Abstract, *supra* note 47, at 22.

196. *Id.*

197. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 652 (1868). *See also* Abstract, *supra* note 47, at 25.

preme Court endorsed the objections of the Old School denomination in *Watson*. The Court's holding stating that American courts should defer to a church's hierarchy was an entirely new principle of law.[198] The new principle displaced the British common law rule, which allowed the courts to examine church doctrines as relevant facts, as the Kentucky court had done.[199] The Court's new principle required it to avoid adjudicating the full corpus of relevant facts and law while focusing exclusively on a single fact, namely, the general church body's position. Once this one fact was known, the outcome of this and every future case in which the rule was applied was foreordained. *Watson* thus made general church bodies judges of their own cause.

Recall the questionable jurisdictional origins of the case.[200] The suspect nature of Federal jurisdiction is now more apparent as we come to the end of the story. To summarize, the United States Supreme Court exercised questionable jurisdiction to rule on a largely moot property dispute, thereby enacting a new legal doctrine, and wholly in keeping with the rhetorical declarations of one faction in a divided Church, despite apparent evidence that the national church was violating its own constitution. By stating that courts would defer to the hierarchy, the Court overturned the Kentucky decision, stripped the local majority of any moral support from court rulings, and assured that the General Assembly would be free to rule as it saw fit, able to rely on the courts to enforce its position. For more than a century afterwards, merely finding themselves in a property dispute with their denomination meant dissenters could not prevail, regardless of other facts, law, or equity. Courts would simply enforce the denomination's position regardless of other considerations. In states that continue to make use of the *Watson* rule, or turn the decision in *Jones v. Wolf* on its head so that it becomes little more than a restatement of *Watson*, this remains the case today.

Why did the Court so decisively rule for the Old School Assembly's side? Perhaps this is explained in part by looking at who the legal actors were in the case. The pro-Assembly faction was represented by B. H. Bristow, former Union general and federal prosecutor in Kentucky whose work earned him appointment as the first Solicitor General by President Grant.[201] Bristow was a fierce, pro-Union advocate who earned his reputation prosecuting the Ku Klux Klan.[202] In light of the terrible atrocities he had seen, it is not surprising that Bristow would have had no sympathy for pro-southern positions. He had political reasons to take a case like this and fight all the way to the highest court of the land.[203]

198. *See Watson*, 80 U.S. 679, 730 (1871).

199. *See supra* note 41 and accompanying text.

200. *See supra* notes 44–58 and accompanying text.

201. For a biography of Bristow, see the Solicitor General's website at http://www.justice.gov/osg/bio/benjamin-h-bristow [https://perma.cc/Z64X-D2RH].

202. *Id.*

203. As far as the authors are aware, *Watson* was the last case Bristow handled prior to becoming Solicitor General.

The *Watson* opinion was written by Justice Miller, a man with his own unique biases in a case such as this. Miller was from Kentucky, was a strong supporter of the Union, and was a fierce opponent of slavery.[204] He is reported to have seen his nursemaid flogged when he was a child, which was an experience that affected him for life.[205] In 1849, he ran for the Kentucky Constitutional Convention on a platform of emancipating the slaves.[206] When the emancipation effort failed, Miller was so disgusted that he moved to Iowa.[207] After his appointment in 1862, Miller became the most prolific writer on the Court.[208] Salmon P. Chase said of him, "[B]eyond question the dominant personality . . . whose mental force and individuality are felt by the Court more than any other."[209] It was this man from Kentucky with a deep-seated aversion to slavery who was now called upon to render judgment in a case he would have seen not merely as a property dispute, or as a question of which rival group of elders and trustees were legitimately elected (a theological question), but rather as a controversy between pro and anti-slavery groups—even though the issue of slavery was, at most, a shadow in the factual background of the case.

The other justices were not without an opinion either. Justice Swayne was known as a fierce abolitionist; he freed slaves that his wife inherited and became an early supporter of the Republican Party.[210] His decisions during the Civil War supported the government's emergency actions.[211]

Justice Field was the son of a stern Congregationalist minister and attended Congregationalist-dominated Williams College, graduating in the same year as the New School/Old School division in the Presbyterian Church.[212] Field's religious background (and pro-Union view) would have biased him to favor the anti-slavery Assembly group.

Justice Strong was the son of a northern Presbyterian minister and an ardent Presbyterian. In retirement, he devoted his energy to religious endeavors.[213] A pro-Union, northern Presbyterian, Strong too had "strong" sympathies for the pro-Union Assembly.

None of this is to suggest the justices were incapable of neutrality, but in the aftermath of a brutal civil war that had taken more than 600,000 lives, the shocking assassination of the man who had appointed many of them, and the fact that the justices surely knew people who had died in the recent war, it would have been hard to resist seeing this property

204. THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789-1993 176–77 (Clare Cushman ed., 1993).
205. *Id.* at 177.
206. *Id.*
207. *Id.*
208. *Id.* at 179.
209. *Id.* at 179.
210. THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789-1993 172–73 (Clare Cushman ed., 1993).
211. *Id.* at 174.
212. *Id.* at 186.
213. *Id.* at 200.

dispute clearly. This dispute was deeply grounded in the theological question of whether Christianity requires a certain political view, but may have been viewed as nothing more than the attempt of an anti-Union, pro-slavery faction to continue the Civil War.

Watson is often thought of as a religion case, but it may be better viewed as a Reconstruction case. In its simplest terms, the case was prosecuted and argued by an ardent foe of secessionists (Bristow) at the height of Reconstruction and decided by a Republican Court filled with justices from a pro-Union, Presbyterian/Congregationalist background. For these figures to have done anything other than rule decisively in favor of the pro-Assembly, anti-slavery faction would have been truly surprising. Indeed, in light of the strong Presbyterian ties of the Justices who comprised the Court, it is possible that the Justices not only wished to oppose southern sympathizers, but also to establish northern control of the Presbyterian Church.

VIII.

Historian Mark DeWolf Howe insists that the *Watson* action (which he admits was extraordinary)[214] was meant to affirm union. This seems doubtful, but even if it was so meant, the action did precisely the opposite. The northern Old School denomination did not speak forcefully against slavery until after the division of 1861 was effected. Instead, the Assembly created the schism by including "unabated loyalty" to the federal Constitution as a religious requirement. The southerners cogently argued that the Assembly divided itself from its own tradition, indeed from ecumenical Christianity as a whole, by making a political viewpoint a requirement for membership.[215] The pro-slavery position of the southerners was horrendous, but their theological view of forbearance and mutual respect, along with their closer alignment with the larger Christian tradition regarding the relationship between church and state, might have allowed for reconciliation.[216] The vituperative responses of the 1865 and 1866 Assemblies allowed no room for this, and if evidence like William C. Anderson's letter is any indication,[217] the northern majority may even have wanted the division. By overturning the Kentucky court and the old common law rule, the Supreme Court assured that division over political issues (and in particular divisions over the lingering effects of racism and slavery) would be a hallmark of the Presbyterian Church—both the northern church and the southern church—for genera-

214. HOWE, *supra* note 10, at 81.

215. VANDER VELDE, *supra* note 15, at 102–03.

216. This is not to say modern readers should be sympathetic to the southern view, seeing as it supported slavery and was couched in actions such as the Black Codes. But one does wonder if a more conciliatory approach by the national church (and if the church could not show a conciliatory approach, who could?) might have led to reunion of the Presbyterian Church and perhaps a better history for the entire country. Such speculation, however, is beyond the purview of this article.

217. *See supra* note 163 and accompanying text.

tions to come. The two branches were divided for 116 years. Only in 1983 did the northern and southern Presbyterian churches finally reunite.[218]

In the end, the desire of William C. Anderson came to pass. In 1869, the remaining element of the Old School Presbyterian Church reunited with the New School Presbyterians.[219] Recall that the New School church was primarily northern and anti-slavery, and that it was in large part the votes of conservatives and southerners that had driven out the New School in 1837.[220] Now the conservatives had either left or been driven from the Church, and the objections of the New School Presbyterians to the Old School Presbyterians were papered over by their agreement on the contentious issues that had divided the country. In 1869, the Basis for Reunion was approved by the Old School Assembly 285 to 9.[221] Shortly thereafter, the Presbyteries approved the action, and the two churches were reunited.[222]

There was peace of a sort in the Presbyterian Church. The division of 1837 had been partially healed. Unfortunately, peace came at the cost of a new, deeper division.[223] The regional split that emerged meant that there was now no great hoop bringing together north and south. Cyrus McCormick actually worked to reunify the Presbyterian churches after the war, so great was his belief in the Church's potential force for good, but his efforts were in vain.[224] No reunion took place. Southern Presbyterians would have no northern counterparts to interact with. There would be no sharing of theological values in the seminaries, no debating of virtues at the assemblies, and no representative democracy that might bring the country together. After the Presbyterians failed to reunite, all of America's major churches now reflected the divide that had just permeated the country.[225]

Had the southerners been invited back into the church, would their engagement with their northern brethren have led to a more moderate, more contrite, less-racist South, a more peaceful American history, and a more hopeful tomorrow? We will never know, for the *Watson v. Jones* decision cemented the actions of the Old School General Assembly, blocked any legal recourse for citizens unjustly deprived of church property, and reaffirmed the ongoing division.

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218. *See Church History: The History of the Presbyterian Church*, PRESBYTERIAN MISSION AGENCY, http://www.presbyterianmission.org/what-we-believe/church-history/ [https://perma.cc/ZU4E-J9HM] ("Presbyterian denominations in the United States have split and parts have reunited several times starting in the 18th century. Currently the largest group is the Presbyterian Church (U.S.A.), which has its national offices in Louisville, Ky. It was formed in 1983 as a result of reunion between the Presbyterian Church in the U.S. (PCUS), the so-called 'southern branch,' and the United Presbyterian Church in the U.S.A. (UPCUSA), the so-called 'northern branch.'").

219. *See* VANDER VELDE, *supra* note 15, at 516.

220. *See id.* at 14.

221. *Id.* at 516.

222. *Id.* at 516–17.

223. *Id.* at 517.

224. *Id.* at 502.

225. *Id.* at 4.

IX.

Over time, the effect of the *Watson* decision on the polity of the Presbyterian Church has been dramatic. The Presbyterian Church soon began to adjust its polity to bring it into alignment with the Court's description of it as hierarchical in *Watson*, suggesting the description there was tendentious even at the time. In short, in response to *Watson*, the Presbyterian Church (USA) and its antecedent bodies discovered themselves as hierarchical churches, at least with respect to church property disputes.

Before *Watson*, church property disputes were adjudicated either according to Lord Eldon's Rule or using what, since *Jones v. Wolf*, has been known as "neutral principles of law."[226] However, as often as not, local agreements eliminated any need to resort to the courts at all. Presbyterian general churches took this situation for granted and did not think they had beneficial ownership rights in the properties of local congregations. Thus, in 1862, the New School General Assembly responded to a presbytery's question as to how a congregation could withdraw and become independent. The General Assembly's answer was that the church should simply withdraw, "declining the further jurisdiction of the Presbytery. . ." and all the presbytery should do was to note "the character of the act of the withdrawing church" in its minutes.[227] Similarly, in 1866, several congregations from the Baltimore area withdrew from the Old School denomination and formed an independent Presbytery of Patapsco that was soon received as an entire presbytery by the (southern) PCUS and incorporated into its Presbytery of Rappahannock.[228] Each of these congregations kept its property. After an official attempt failed to persuade them to remain, the Presbytery of Baltimore simply recorded the withdrawal of the churches in their minutes and removed the ministers from their rolls. The congregation at Bladensburg, Maryland, later returned to the reunited PCUSA's newly-formed Presbytery of Washington City together with its property, and the PCUS did not object.[229]

After *Watson*, Presbyterian bodies began shifting their polity to conform to it. Thus, in 1876, the General Assembly of the PCUSA, in responding to a presbytery's question about the dismissal of a congregation to another denomination, stated that "[q]uestions of property must be determined by the courts of the State," though it still did not assert that as a national, general church it held a trust over local church property.[230]

Eventually they did begin to make such assertions, however. The hierarchical deference rule created by the *Watson* decision was applied by

226. *See* Watson v. Jones, 80 U.S. 679, 727–28 (1871).

227. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 171-172 (1862) (New School).

228. E.T. THOMPSON, PRESBYTERIANS IN THE SOUTH, vol. 2 182 (John Knox Press, 1973).

229. *See* J.E NOURSE, ET AL., THE PRESBYTERY OF WASHINGTON CITY AND ITS CHURCHES 26 (Gibson Bros. eds., 1888).

230. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 80 (1876).

state courts at the behest of presbyteries and denominations over the next several decades to award properties to general church bodies who had not paid for them and had only technical and questionable church-political claims to an interest in those properties.

This trend became clear to southern Presbyterians very quickly. In 1894 the southern PCUS declined the northern PCUSA's invitation to begin talks preparatory to reunion. In part this was because the memory that some of their affiliated congregations lost property to northern church factions because of the *Watson* decision. They replied, "the property interests of the Southern Church, under the decision of the Supreme Court of the United States, would be seriously jeopardized, in the event of any subsequent change in our relations."[231] The ministers and elders of the PCUS had learned from observation that under *Watson*'s deference rule, the outcome of cases was foreordained to favor national denominations that—unlike their own denomination at that time—chose to invoke it.

This concern of the PCUS was soon justified by emergent events. In 1906, the Cumberland Presbyterian Church, a denomination originally comprised of congregations that withdrew from the PCUSA in 1810, reunited with the PCUSA, but a number of local churches, making up about one third of the Cumberland denomination's membership, did not participate in the reunion and continued as a separate denomination that still exists today. The PCUSA and its presbyteries sued some of the withdrawing congregations. Although a few withdrawing Cumberland congregations in Tennessee and Missouri prevailed and kept their property,[232] most congregations in other states lost their property because state courts, applying the principle of hierarchical deference, deferred to the national PCUSA.[233] The denomination, of course, took the position that the dissenting local churches had forfeited their rights to the local church property.[234] When the Cumberland Presbyterian Church was originally formed by ministers and congregations departing the PCUSA in 1810, the PCUSA did not inquire about the ownership of any property in use by Cumberland congregations or their ministers. Nevertheless, under the nearly universal application of the deference rule created by the Supreme Court in *Watson*, the loss of Cumberland church properties was tremendous.

This pattern was repeated in 1935, in connection with a division that gave rise to the Orthodox Presbyterian Church (the OPC). When the OPC was founded, the PCUSA General Assembly created a special committee, "to guard all [the PCUSA's] interests and protect all its property

231. MINUTES OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES 212 (1894).

232. *See, e.g.*, Landrith v. Hudgins, 120 S.W. 783, 816 (1907).

233. *See, e.g.*, Brown v. Clark, 116 S.W. 360, 364–65 (Tex. 1909); Helm v. Zarecor, 213 F. 648, 659 (M.D. Tenn. 1913); Sherard v. Walton, 206 F. 562, 565 (W.D. Tenn. 1913). *See also* BEN M. BARRUS, ET AL., A PEOPLE CALLED CUMBERLAND PRESBYTERIANS 360–68 (1972).

234. *Landrith*, 120 S.W. at 786.

rights."[235] This committee oversaw cases for the denomination in which, for the most part, the automatic action of the hierarchical deference rule assured that properties stayed with the PCUSA presbyteries. For example, when the Susquehanna Avenue Presbyterian Church in Philadelphia voted to renounce the authority of the PCUSA, the Presbytery of Philadelphia declared the congregation "dissolved" (a fiction, as the congregation manifestly still existed) and claimed its property.[236] The hierarchical deference rule was applied,[237] and the congregation lost its property, in spite of the fact that the denomination had not invested in it, and there was no viable minority who wished to remain with the denomination.[238] Having dissipated a thriving congregation and claimed its assets through the automatic operation of *Watson*'s deference rule—assets for which that congregation had paid without assistance from the general church and title to which was held by the congregation's own trustees—the Presbytery of Philadelphia did nothing of enduring significance with their gains. The lot at Susquehanna Avenue and North Marshall Street on which this congregation's building once stood shows no sign there was once a vital place of worship there.

When, in 1979, *Jones v. Wolf* again changed the legal landscape by providing states with an alternative to *Watson*, the Presbyterian polity again changed in response. Thus, a PCUS committee report in 1981 stated that because of *Jones*, a new polity provision was needed, "in order that the results produced by the landmark decision of *Watson v. Jones* . . . will continue to be attained in cases involving our Church."[239] The pragmatic focus on getting a desirable judicial result, rather than on adhering to principles of Presbyterian polity concerning property, is unmistakable.

It appears, then, that since the *Watson* Court suggested to the PCUSA and similar denominations that they could assert an interest in congregational property, these denominations have shown themselves willing to improvise their polity related to church property to keep up with judicial cues. Indeed, even today, when the legal circumstance seems to demand it, the Presbyterian Church (USA) is as ready to deny it is hierarchical in polity as it is to assert the opposite in property matters.[240]

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235. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY 103 (1935).

236. *In re* Dissolution of Susquehanna Ave. Presbyterian Church of Philadelphia, 31 Pa. D. & C. 597, 605 (Pa. Com. Pl. 1938).

237. *Id.* at 609–10.

238. In a number of other cases, PCUSA presbyteries were able to take properties because the congregations entering the OPC refused to make use of civil courts due to their interpretation of the Christian Bible at 1 Corinthians 6:1–7, which says in part: "To have lawsuits at all with one another is already a defeat for you. Why not rather suffer wrong? Why not rather be defrauded?" 1 Corinthians 6:7.

239. GEN. ASSEMBLY OF PRESBYTERIAN CHURCH IN U.S.A., MINUTES OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES 105 (1981).

240. Thus, when it feared legal liability for a minister's misconduct, the same PCUSA presbytery that claimed in sworn testimony that it was hierarchical in *Timberridge Presbyterian Church, Inc. v. Presbytery of Greater Atlanta, Inc*, adopted a report claiming the opposite, namely that, ". . . in our Presbyterian form of government (*as opposed to a hierarchical polity*) we understand that '[e]cclesiastical jurisdiction is a shared power . . . .'" 132

Watson, wherever its rule has been applied, has turned the courts into enforcement agencies whose only role in hierarchical church property disputes is to give effect to the claims of the party representing the general church, regardless of any other relevant facts and law. When the hierarchical deference rule is applied, dissenting congregations lose just because they dissent, rather than because their claims are fairly adjudicated and they do not prevail. It is therefore reasonable to ask whether *Watson*'s deference rule violates the Establishment clause of the First Amendment, as the Louisiana Supreme Court has suggested it does.[241]

As church leaders, legal practitioners, and jurists litigating and deciding church property disputes deal with today's cases, which also often mingle property questions with moral and political issues, all would do well to remember how the Supreme Court's support for purely political, nonreligious commitments in a particular church denomination contributed to a great division of our country.

We can only hope that today's divisions will be settled with more grace. One way to move in that direction would be for courts to leave behind the highly problematic deference rule (along with versions of the neutral principles approach that turn *Jones v. Wolf* on its head and make it just another form of deference)[242] and in its place use an approach that takes into account the full factual, legal, and equitable background of each unique church property case.

S. Ct. 2772 (2012), (No. 11-1101), 2012 WL 755072; Minutes of the Presbytery of Greater Atlanta, A-52 (Aug. 17, 2013) (on file with the Presbytery of Greater Atlanta) (emphasis added) (alterations in original).

241. The Louisiana Supreme Court acknowledged in 1982 that the application of hierarchical deference is effectively an establishment of the hierarchy's religion: "Refusal to adjudicate a dispute over property rights or contractual obligations . . . simply because the litigants are religious organizations, may deny a local church recourse to an impartial body to resolve a just claim, thereby violating its members' rights under the free exercise provision, *and also constituting a judicial establishment of the hierarchy's religion*." Fluker Cmty. Church v. Hitchens, 419 So. 2d 445, 447 (La. 1982) (emphasis added).

242. *See supra* note 29.