PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 35 | Issue 2 Article 5

1-20-2008

A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife

Jeffrey B. Hassler

Follow this and additional works at: https://digitalcommons.pepperdine.edu/plr

Part of the First Amendment Commons, and the Religion Law Commons

Recommended Citation

Jeffrey B. Hassler *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 Pepp. L. Rev. Iss. 2 (2008)
Available at: https://digitalcommons.pepperdine.edu/plr/vol35/iss2/5

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife

I. INTRODUCTION
II. HISTORY AND BACKGROUND: WHAT *ARE* THE STANDARDS FOR CIVIL COURT INVOLVEMENT IN INTRACHURCH DISPUTES?
- *A. Denominational Taxonomy*
- *B. Constitutional Background*
  1. Constitutional Standards—The English Rule
  2. Constitutional Standards—Hierarchical Deference
  3. Constitutional Standards—Neutral Principles of Law
- *C. Denominational Reaction to* Jones v. Wolf
- *D. State Reaction to* Jones v. Wolf
  1. Interpretational Categories—Strict Hierarchical Deference
  2. Interpretational Categories—Strict Neutral Principles of Law
  3. Interpretational Categories—Hybrid of Deference and Neutral Principles of Law

III. ANALYSIS: WHAT *OUGHT TO BE* THE STANDARD FOR CIVIL COURT INVOLVEMENT IN INTRACHURCH DISPUTES?
- *A. Giving Hierarchical Deference its Due*
  1. Is the Deference Approach Actually Required by the Constitution?
  2. Weaknesses of Hierarchical Deference
- *B. Neutral Principles in Theory and Practice*
  1. How the Neutral-Principles-of-Law Approach Has Actually Worked
  2. Lesser Proposals for Resolving the Inconsistencies
     - *a. Neutral Principles, but Allowing for Some Implied Trusts (Hybrid Approach)*
     - *b. Neutral Principles, but General-Church Trust*

Clauses are Dispositive
c. *Neutral Principles, but Inquiry Limited by General Church Constitution*
d. *Neutral Principles, but Limited to Secular Documents*
e. *Free Speech Protection as Substitute or Shortcut?*
f. *Abandoning the Current Regime Entirely*
C. *The Best Proposal: Strict Neutral Principles Only*
IV. FUTURE TRENDS & IDEAS
A. *Signs of an Impending Legal Tidal Wave*
B. *An Issue for the Supreme Court?*
C. *The Possibility of Alternative Resolution*
D. *Significant External Matters*
V. CONCLUSION

I. INTRODUCTION

"'This body willfully confirming the election of a person sexually active outside of holy matrimony has departed from the historic faith and order of the Church of Jesus Christ' . . . . [This body] has 'divided itself from millions of Anglicans throughout the world.'"[1] These words and others like them were among the first shots fired in what may turn out to be Armageddon for The Episcopal Church. The occasion for Bishop Robert Duncan's comments was the headline-making August 2003 election of the Rev. V. Gene Robinson, an openly practicing homosexual, to be the Episcopal Bishop of the Diocese of New Hampshire.[2] The controversial decision sparked an already-smoldering debate centered on scriptural interpretation and resulting moral norms that has raged unabated ever since.

Like many conflicts in American society, this one has found its way into the legal system. Just over a year later, on August 17, 2004, St. James Church and All Saints Church, two traditionalist[3] Episcopal congregations in

1. Statement of the Rt. Rev. Robert Duncan, Episcopal Bishop of Pittsburgh, on the Consecration of the Rt. Rev. V. Gene Robinson as Episcopal Bishop of New Hampshire, *quoted in* Rachel Zoll, *Episcopalians Elect Gay Bishop, Moving Church Closer to a Possible Split*, ASSOCIATED PRESS, Aug. 5, 2003.

2. *See, e.g.*, Zoll, *supra* note 1.

3. It is a struggle to find a workable nomenclature for the two archetypical positions in the current debates in American mainline denominations. While the extreme positions are quite distinct, it is often difficult to categorize individuals or groups that fall somewhere in between. For the purposes of this article, the author has elected to use the designations "traditionalist" and "progressive," on the supposition that those labels strike the best balance between an accurate description of the positions and acceptability to those who hold the positions. "Traditionalist" generally signifies opposition to changes in historical Christian teaching, particularly on matters of sexual morality, while "progressive" generally signifies a willingness to consider such changes.

the Diocese of Los Angeles, announced they were disaffiliating from The Episcopal Church and placing themselves under the jurisdiction of an Archbishop in Uganda; a third Southern California church, St. David's, joined in the move a week later.[4] On September 7, the Diocese of Los Angeles filed lawsuits against the three churches in their respective county courts, seeking "to secure and protect the church properties which are owned in trust by the Episcopal Church, the Diocese, and our faithful parishioners."[5] In response, the churches issued a press release stating that "[t]he local churches hold the deeds to these properties, and hundreds of church families have raised money to acquire and build them."[6]

The same arguments were raised in December 2006, when eleven Episcopal congregations in Virginia, including two of the largest and most historic Episcopal parishes[7] in the country, voted to sever ties with the Diocese of Virginia.[8] The Diocese and the churches, which announced they were joining the Anglican Church of Nigeria's Convocation of Anglicans in North America, had agreed to a thirty-day standstill agreement foreclosing civil litigation.[9] But in January 2007, the Diocese announced it would not renew the agreement, signaling its intention to go to court to assert ownership of the property via a purported trust in favor of the Diocese and the national church.[10] A spokesman for one of the parishes asserted that "[d]enominational trusts in congregational property are not valid in the Commonwealth of Virginia."[11] On January 31, 2007, lawsuits were filed against the eleven departing congregations in their relevant jurisdictions by

---

Although the terms "liberal" and "conservative" are fairly accurate when applied to the two sides' respective theologies, they cannot but invite comparisons to American political philosophies. These comparisons are not only often pejorative, but are also likely to be inaccurate, as the correlation between theological liberals and conservatives and their political counterparts is by no means rigid.

4. Larry B. Stammer, *Parishes Split Off Over Gay Issues*, L.A. TIMES, Aug. 18, 2004, at B1; Larry B. Stammer, *North Hollywood Parish Is Third to Leave the Episcopal Church*, L.A. TIMES, Aug. 25, 2004, at B1.

5. *Episcopal Diocese of Los Angeles Sues Three Breakaway Parishes*, ASSOCIATED PRESS NEWSWIRES, Sept. 7, 2004 (quoting Bishop J. Jon Bruno, head of the Episcopal Diocese of Los Angeles) (internal quotation marks omitted)).

6. *Id.*

7. Although "parish" is generally understood to signify local congregations in the Roman Catholic and Anglican traditions, the author has taken the liberty of utilizing the term throughout to signify local congregations of any tradition, as against the relevant national church body.

8. Natasha Altamirano, *Church Dispute Headed to Court; Diocese Assets 'Abandoned,'* WASH. TIMES, Jan. 19, 2007, at A01.

9. Dionne Walker, *Diocese Will Not Renew 30-Day Agreement Avoiding Litigation*, ASSOCIATED PRESS NEWSWIRES, Jan. 9, 2007.

10. *Id.*; *see also* Altamirano, *supra* note 8.

11. Altamirano, *supra* note 8.

the Diocese, which asserted its ownership and asked the court to order the congregations to vacate the properties.[12]

These competing conceptions of property rights are merely the tip of a church-state iceberg that includes the First Amendment's religion clauses, over two hundred years of American jurisprudence, and the unique polity of hierarchical, quasi-hierarchical, and presbyterial religious organizations.[13] These bodies, including most prominently The Episcopal Church (TEC or ECUSA[14]), the Presbyterian Church (United States of America) (PC(USA)), and the United Methodist Church (UMC),[15] have been plagued by internal strife over theological innovations for decades, and the civil courts are all too frequently called on to resolve disputes over who owns property that departing congregations have been using.

Although congregational disaffiliation from mainline churches[16] is not a new phenomenon,[17] the current disputes threaten the deepest divisions yet.

---

12. Michelle Boorstein & Jacqueline L. Salmon, *Diocese Sues 11 Seceding Congregations Over Property Ownership*, WASH. POST, Feb, 1, 2007, at B04.

13. Although this article (as well the precedential cases to which it refers) refers primarily to Protestant Christian organizations, the principles are applicable to any religious body organized on similar lines. As Professor Greenawalt said in his article on the same general subject:

> All the important cases involve various Christian churches, and I refer to churches in general, but whatever standards apply to churches also apply to all analogous religious groups—Jewish, Muslim, Buddhist, Hindu, and so on. The concern here is not just one of terminology. As the variety of religious practices within the country continues to increase, so will the number of cases involving non-Christian groups. The standards for engagement of civil law with Christian churches will also apply to other religious groups with which most judges are much less familiar.

Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1846 (1998).

14. *See, e.g.*, Ruth Gledhill, *Ecusa is No More, Long Live The Episcopal Church*, TIMESONLINE (UK), June 13, 2006, http://timescolumns.typepad.com/gledhill/2006/06/ecusa_grow_in_l.html ("Canon Bob Williams of the Episcopal News Service was anxious to ensure that when writing about the Episcopal Church we should not refer to it as Ecusa any more. Since there are 16 countries that make up the Episcopal Church, he said, it would be better to refer to The Episcopal Church, or TEC . . . .").

15. Although the United Methodist Church is governed by the same standards as other mainline denominations, there are several notable differences in the way it handles church property. Much of this article will be readily applicable to situations involving Methodist bodies, but a much more specific treatment may be found in Thomas C. Oden, *Considerations Specific to Methodists*, *in* A GUIDE TO CHURCH PROPERTY LAW 87-117 (Lloyd J. Lunceford gen. ed., 2006).

16. Although the term is somewhat indistinct, "mainline" is generally used to refer to Protestant denominations whose "instincts lead [them] to seek common ground between what seem to be irreconcilable concepts or ideas." William McKinney, *Mainline Protestantism 2000*, 558 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 58 (1998). These instincts lead to tensions "between faithfulness to Christian orthodoxy and accommodation to the new insights and possibilities of philosophy and science" and, first and foremost, a disagreement with other Christian groups about "the degree to which churches ought to accommodate to cultural changes." *Id.* at 59. The category of mainline churches is generally thought to include Congregationalists, Presbyterians, Episcopalians, the Reformed Church, Lutherans, Methodists, the Disciples of Christ, American Baptists, and several other smaller groups. *Id.* at 58. Most if not all members of the National Council of Churches are considered to be mainline denominations. *Id.*

Although the "presenting issue" in the current disputes generally has to do with the sexuality of clergy or higher leaders, many argue that the disputes stem from fundamental differences over biblical interpretation and the authority of scripture.[18] According to some estimates, the number of congregations that have departed TEC in the wake of the Robinson consecration is around 100,[19] and includes some of the denomination's largest and most influential traditionalist parishes.[20] Disputes over controversial actions at the most recent national gatherings of both Episcopalians and Presbyterians have continued to draw additional scrutiny from dissenting member congregations.[21] As the relationships break down

17. Apart from sporadic departures by individual churches (which usually can be traced to local circumstances such as a deteriorating relationship with the regional governing body or even personality conflicts), there have been several waves of departures from the mainline churches. The most significant prior to the current conflict involved doctrinal developments leading to the decisions of the PC(USA) and TEC to begin ordaining women. The PC(USA) was formed by a 1983 merger between the Presbyterian Church in the United States (PCUS) and the United Presbyterian Church in the United States of America (UPCUSA). Lloyd J. Lunceford, *Considerations Specific to Presbyterians*, *in* A GUIDE TO CHURCH PROPERTY LAW, *supra* note 15, at 65. The UPCUSA began ordaining women in 1956, while the PCUS followed suit in 1964. PRESBYTERIAN CHURCH (U.S.A.), ORDINATION OF WOMEN IN THE PRESBYTERIAN CHURCH (U.S.A.): A HERSTORY (2005), http://www.pcusa.org/women/ordination/ordinationbulletin.pdf. This led to the formation of the traditionalist Presbyterian Church in America (PCA) in 1973. PRESBYTERIAN CHURCH IN AMERICA, A BRIEF HISTORY: PRESBYTERIAN CHURCH IN AMERICA, http://www.pcanet.org/general/history.htm (last visited Jan. 26, 2007) (describing the 1973 decision of "some 260 congregations" from the PCUS to form the PCA). Although the number of departing churches was large, the general church filed few civil actions seeking control over the properties, probably due to the sheer amount of legal resources that prosecuting such actions would require. John H. Adams, *Separatist PCA and EPC Voted Against Property Trusts*, THE LAYMAN ONLINE (Jan. 25, 2005), http://www.layman.org/layman/news/2005-news/separatist-pca-and-epc.htm. In TEC, the official decision to ordain women both as priests and as bishops came in 1976. THE EPISCOPAL CHURCH, A CHRONOLOGY OF EVENTS CONCERNING WOMEN IN HOLY ORDERS, http://www.episcopalchurch.org/41685_3276_ENG_HTM.htm (last visited Jan. 26, 2007). This action led to the division at issue in *Protestant Episcopal Church in the Diocese of Los Angeles v. Barker*, 171 Cal. Rptr. 541 (Ct. App. 1981), *cert. denied*, 454 U.S. 864 (1981). *See infra* notes 123-32 and accompanying text.

18. *See, e.g.*, John Yates & Os Guinness, *Why We Left the Episcopal Church*, WASH. POST, Jan. 8, 2007, at A15 ("The American Episcopal Church no longer believes the historic, orthodox Christian faith common to all believers.").

19. THE FALLS CHURCH & TRURO CHURCH, 40 DAYS OF DISCERNMENT 85 (2006), http://www.40daysofdiscernment.org/resources/40daysGuidebook.pdf.

20. Bill Turque & Michelle Boorstein, *7 Va. Episcopal Parishes Vote to Sever Ties; Same-Sex Unions, Choice of Gay Bishop Spark Conservatives' Break from Church*, WASH. POST, Dec. 18, 2006, at A01.

21. *See, e.g.*, Rachel Zoll, *Episcopalians Firm on Gay Bishops; Delegates Reject Anglicans' Request for Temporary Ban*, WASH. POST, June 21, 2006, at A11 ("Episcopal delegates snubbed Anglican leaders' request that they temporarily stop electing openly gay bishops, a vote that prompted the church's leader to call a special session in hopes of reaching a compromise to preserve

and long-term attempts at reconciliation fail, the parties involved are more frequently taking their disputes to the civil courts, where national churches and their regional organizational bodies[22] have sought to assert ownership of the property. Although the majority of disaffiliating congregations have been composed of traditionalists seeking to leave more progressive regional authorities, conflicts occasionally occur in the opposite orientation: progressive congregations in relatively traditionalist regions have voiced concern that they may not be allowed to remain in the general church if the entire regional structure chooses to disaffiliate.[23]

Courts adjudicating such disputes face a complex array of legal issues, ranging from applying intricate state trust law provisions to determining what relative weight to give often-contradictory documents.[24] These tasks are particularly difficult because the entities involved in church property litigation tend to be very unlike their secular counterparts, and because courts must always be wary of impermissibly involving themselves in religious matters.[25] Given these considerations, courts, churches, and their attorneys must be informed about the constitutional standards involved, the ways in which states have adopted, adapted, and applied these standards, and where this area of the law might be headed as America's mainline Protestant denominations continue to struggle with competing visions of self-identity.

Accordingly, Part II of this Comment briefly reviews the history of civil adjudication of church property disputes in America, focusing on the challenges posed by forms of church polity such as those of mainline Protestant denominations, as well as the jurisdictional limits established by

---

Anglican unity. The vote Tuesday by the Episcopal House of Deputies came just hours before Presbyterians, at a separate meeting, approved a plan to let local congregations install gay ministers if they wish.").

22. In Presbyterianism, these regional groups are known as presbyteries and synods, and have a roughly representative form of governance. PC(USA) - Presbyteries, Synods and Other Links of Interest, http://www.pcusa.org/links (last visited Oct. 23, 2007). The United Methodist Church elects and appoints bishops, who each oversee one or more annual conferences. Structure & Organization: Organization—UMC.org, http://www.umc.org/site/c.lwL4KnN1LtH/b.1720697/k.734E/Structure__Organization_Organization.htm (last visited Oct. 23, 2007). In the Anglican tradition, to which TEC belongs, the regional authorities are dioceses, and each is presided over by a bishop and an executive board. *See, e.g.*, EDOT—Executive Board, http://www.epicenter.org/edot/Executive_Board.asp?SnID=2 (last visited Oct. 23, 2007). These structural differences, which are the result of extensive and weighty theological history, often have a significant impact on the details of church property litigation; these differences will be noted here as far as it is relevant and practicable, but the similarities between the three denominations and others like them, particularly on the general level with which this article is concerned, are quite numerous. For a more detailed discussion of denominational differences and their implications for church property disputes, see A GUIDE TO CHURCH PROPERTY LAW, *supra* note 15, chs. 4-6.

23. *See, e.g.*, *Stipulation by Counsel*, Calvary Episcopal Church v. Duncan, (Ct. Com. Pl. of Allegheny Cty., Pa., 2006), *available at* http://www.calvarypgh.org/Signed_Stipulation.pdf.

24. *See generally* Lloyd J. Lunceford, *Introduction*, *in* A GUIDE TO CHURCH PROPERTY LAW, *supra* note 15, at iii-iv.

25. *See id.* at iii-vii.

the Constitution. It then surveys extant scholarship on the relevant Supreme Court decisions and categorizes the different approaches the states have taken in implementing those decisions. Part III proceeds to an evaluation of the various approaches to church property disputes, examining the asserted need for a uniform standard as opposed to one that is more flexible and fact-specific. After briefly weighing several inferior proposed solutions to the current confusion, it commends a strict neutral-principles-of-law approach as the interpretation that best comports with appropriate deference to precedent, the interests and desires of the parties involved, and the fundamental principles of American religious and civic practice. Part IV offers some thoughts on the future direction of the law in church property disputes in light of current events, focusing on several ongoing situations with national implications, the possibility of further consideration by the U.S. Supreme Court, and the potential impact of factors external to civil adjudication on future jurisprudence in the area. Part V will briefly conclude the Comment.

II. HISTORY AND BACKGROUND: WHAT *ARE* THE STANDARDS FOR CIVIL COURT INVOLVEMENT IN INTRACHURCH DISPUTES?

A. Denominational Taxonomy

Much of the legal complexity created by disputes such as those described above stems from the fact that the Supreme Court has identified essentially two standards for describing the organization of religious bodies: hierarchical and congregational.[26] The hierarchical model is typified by the Roman Catholic Church, and is characterized by the subjection of individual congregations to the authority of ascending orders of governing bodies or individuals.[27] Local bodies may enjoy some limited autonomy, but governance is centralized, with clergy and staff paid by superior bodies and title to local church property held by the same.[28] Churches of this type present relatively few problems in property disputes, because the general church[29] clearly maintains ownership of local property assets.[30] In contrast,

26. Lloyd J. Lunceford, *Federal Constitutional Principles*, *in* A GUIDE TO CHURCH PROPERTY LAW, *supra* note 15, at 28 n.1. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 597-98 (1979).

27. Lunceford, *supra* note 26, at 28 n.1.

28. *See id.*

29. The terms "national church" and "general church" are used interchangeably throughout the article, and both refer to the highest organizational authority in a denomination such as the PC(USA) or TEC.

congregational churches such as those in the Baptist and Evangelical Free traditions typically have no organizational structure connecting individual congregations in a legal sense, although they may form loose partnerships for shared purposes, such as supporting missionary work.[31] For legal purposes, such congregational churches are treated like other voluntary associations, without regard to religious doctrine, which generally means that disputes are resolved in favor of a majority of the local church group.[32]

Mainline Protestant denominations generally fall somewhere between these two categories, defying easy classification and giving rise to thorny issues for members and non-members alike.[33] In these denominations, "individual congregations are subject in varying degrees to the supervisory jurisdiction of regional or national bodies—presbyteries, dioceses, conferences, synods, General Conferences and General Assemblies."[34] Although some scholars have identified further distinctions among the hierarchical and intermediate forms, such as "synodical," "presbyterian," and "episcopal"[35] (with the lower-case initial letters indicating a manner of governance rather than a particular denomination), the Supreme Court, as noted above, has continued to implement the simpler distinction between "hierarchical" and "congregational," and has generally placed mainline

30. *See* Lunceford, *supra* note 26, at 28 n.1.

31. *See id.*

32. *See id.*; *see also* Jones v. Wolf, 443 U.S. 595, 595 (1979).

33. Lunceford, *supra* note 26, at 28 n.1.

34. *Id.* Organizations which have broken away from historical mainline denominations, such as the Presbyterian Church in America and the Convocation of Anglicans in North America, have chosen to organize themselves along explicitly congregational lines *with regard to property issues*, reflecting ongoing concern about the property implications of intermediate forms of governance. *See, e.g.*, THE BOOK OF CHURCH ORDER OF THE PRESBYTERIAN CHURCH IN AMERICA §§ 25-9 to -11 (6th ed. 2007), *available at* http://www.pcaac.org/BCO%202007%20Combined%20for%20Web.pdf ("All particular churches shall be entitled to hold, own and enjoy their own local properties, without any right of reversion whatsoever to any Presbytery, General Assembly or any other courts hereafter created, trustees or other officers of such courts . . . . While . . . in matters ecclesiastical the actions of such local congregation or church shall be in conformity with the provisions of this Book of Church Order, *nevertheless*, in matters pertaining to [questions of affiliation and church property], action may be taken by such local congregation or local church in accordance with the civil laws applicable to such local congregation or local church . . . . The relationship is *voluntary*, based upon mutual love and confidence, and is in no sense to be maintained by the exercise of any force or coercion whatsoever. A particular church may withdraw from any court of this body *at any time for reasons which seem to it sufficient*.") (emphases added); Convocation of Anglicans in North America Frequently Asked Questions, Question 19, http://www.canaconvocation.org/index.php?option=com_content&task=view&id=30&Itemid=34#Q19 (last visited Oct. 23, 2007) ("Each local congregation will hold title to its own property. In CANA, there will be no 'Dennis Canon' (a national canon purportedly passed in 1979 by which The Episcopal Church asserts an ownership interest in the property of all constituent member dioceses and congregations, subject to state law).").

35. Raymond J. Dague & R. Wicks Stephens II, *Considerations Specific to Episcopalians*, *in* A GUIDE TO CHURCH PROPERTY LAW, *supra* note 15, at 124 (citing David B. Stevick, CANON LAW: A HANDBOOK 71-86 (1965)).

Protestant denominations in the former. Mixed categorizations are possible; the Supreme Court has indirectly recognized at least one instance where a non-mainline church was considered generally hierarchical, but congregational as to property issues,[36] and some scholars have argued that TEC should be treated in the same manner.[37] For the purposes of this article, churches whose organizational structure falls somewhere between the extremes of hierarchical and congregational will be referred to as "semi-hierarchical."

B. Constitutional Background

Depending on the state in which a property dispute arises, the civil court's categorization of any particular religious body can be profoundly significant, if not determinative. However, before determining the implications of the categorization, a brief examination of the constitutional history of civil (as opposed to ecclesial) court resolution of church disputes in America is necessary.

Of course, civil court resolution need not reach the question of categorization, or any of the complex inquiries discussed below, when the grantor has expressly created a trust assigning ownership of the property in case of a dispute—a task that, depending on the circumstances, can be somewhat akin to signing a prenuptial agreement (and just as distasteful during periods of amicable relations).[38] Under the law of trusts, formation of an express trust requires "some judicially recognizable manifestation or expression of intent by the grantor" to give the property to the trustee subject to certain conditions (such as, for example, that the trustee congregation remain a member of the general church), rather than as an unencumbered gift.[39] The problem, however, is that in many cases the intent of the grantor is not clearly manifested or expressed, particularly when, in the case of church property disputes, the grantor either did not foresee or preferred not to plan for the possibility of schism.[40] This, as well as the order in which the

36. H. Reese Hansen, *Religious Organizations and the Law of Trusts*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 288 (James A. Serritella et al. eds., 2006) (discussing Md. and Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 241 A.2d 691, 700-01 (Md. 1968), *vacated and remanded*, 393 U.S. 528 (1969), *decree aff'd*, 254 A.2d 162 (Md. 1969), *appeal dismissed*, 396 U.S. 367, 367-68 (1970) (per curiam)).

37. *See generally* Dague & Stephens, *supra* note 35, at 133-34.

38. Hansen, *supra* note 36, at 283.

39. *Id.*

40. *Id.*

relevant constitutional doctrines and provisions were developed and enacted, has led to many congregations and national churches finding themselves without clear answers to the ownership question if and when disputes arise.

Turning to the constitutional rules governing the area, churches finding themselves in the lamentable situation of a split can expect at least this under modern First Amendment jurisprudence: the civil courts may not rule on church property disputes if doing so requires them to intrude on matters of doctrine or theology.[41] Doing so would constitute an impermissible establishment of religion.[42] However, this has not always been recognized, and to understand the thicket in which contemporary church property dispute jurisprudence now finds itself, the path the courts have taken to get there must be examined. Furthermore, although Establishment Clause violations have indeed been the main concern throughout the development of the law in this area, there has also been a more recent recognition that approaches giving too much deference to one party to lessen Establishment Clause concerns may run the risk of violating the other party's free exercise rights.[43]

1. Constitutional Standards—The English Rule

As in other areas of the law, early American courts were faced with the decision of whether to continue the prior approach taken by English courts when considering internal disputes of religious organizations. The "English rule," espoused in *Craigdallie v. Aikman*,[44] is also known as the doctrine of implied trust or the departure-from-doctrine rule.[45] It called on courts, in the absence of express language, to make an investigation into the doctrinal beliefs of the disputing parties, and to imply a trust in favor of the party most closely adhering to the beliefs held by the donor, effectively giving that faction ownership.[46]

Although practicable in England at the time, the standard was rejected by many American courts in cases through the nineteenth and twentieth centuries as "an unacceptable intrusion by civil authority into ecclesiastical

41. *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449-50 (1969) ("[T]he departure-from-doctrine element . . . requires the civil court to determine matters at the very core of a religion . . . . Plainly, the First Amendment forbids civil courts from playing such a role.").

42. *See id.*

43. Patty Gerstenblith, *Civil Court Resolution of Property Disputes among Religious Organizations*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES, *supra* note 36, at 317.

44. 4 Eng. Rep. 435 (1820) (resolving a property dispute between factions of a Scottish congregation of 'Burgher Seceders' by holding that unless otherwise agreed, the faction espousing the original founding principles of the group is entitled to the property).

45. *See* Hansen, *supra* note 36, at 286.

46. *Id.*

affairs and . . . an impermissible state establishment of religion."[47] However, the American rejection of the English rule was not absolute: in the first of three seminal Supreme Court cases on church property disputes, *Watson v. Jones*,[48] the Court was faced with a decision by a Kentucky appellate court purporting to apply the English rule. The Supreme Court declined to follow suit, instead utilizing the hierarchical-deference approach, discussed below, without absolutely rejecting the English rule.[49] Eventually, the Court revisited the subject and, in 1969, expressly found the English rule approach to be unconstitutional[50] in American courts.[51]

2. Constitutional Standards—Hierarchical Deference

In addition to announcing its disfavor of the English rule, the Court in deciding *Watson* elected to take what would become the second main approach to resolving church property disputes: hierarchical deference, under which courts give weight to the determination of the highest denominational court or tribunal that has spoken on the matter.[52] *Watson* involved a dispute over the issue of slavery between competing factions of the Walnut Street Presbyterian Church in Louisville, Kentucky.[53] One faction, strongly anti-slavery, garnered a majority of the church's membership, but was at cross-purposes with the church's governing session,

---

47. Dague & Stephens, *supra* note 35, at 29; *see also* Hansen, *supra* note 36, at 286 (noting an 1846 Vermont case, *Smith v. Nelson*, in which the court declined to apply the English rule).

48. 80 U.S. (13 Wall.) 679 (1871).

49. *Id.* at 725.

50. Several well-established procedural matters govern church property disputes. As Justice Powell rightly noted in his dissent in *Jones v. Wolf*, the Supreme Court expressly recognized the application of the First Amendment to the states through incorporation under the Fourteenth Amendment and the principle that federal courts are to follow the substantive law of the states when sitting in diversity (following *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)) in the area of church property disputes. 443 U.S. 595, 617 n.4 (1979) (Powell, J., dissenting) ("[B]eginning with *Kedroff v. Saint Nicholas Cathedral*, this Court has indicated repeatedly that the principles of general federal law announced in *Watson v. Jones* are now regarded as rooted in the First Amendment, and are applicable to the States through the Fourteenth Amendment.") (citations omitted).

51. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969), discussed further *infra*. Dean Hansen details an interesting proliferation in state-court use of the English rule during the almost 100 years between the Supreme Court's disapproval of it in *Watson* and total rejection of it in *Hull*. Hansen, *supra* note 36, at 287 & n.68 (noting "momentum favoring its adoption by other states" and listing supporting citations). Hansen also points to "an excellent and lucid discussion [in Dallin H. Oaks, TRUST DOCTRINES IN CHURCH CONTROVERSIES 42 (1984)] of the theoretical basis for the implied trust doctrine and its complete unsuitability as an American legal device." *Id.* at 286 n. 53.

52. Lunceford, *supra* note 26, at 29.

53. 80 U.S. (13 Wall.) at 681.

which was under the control of the congregation's pro-slavery minority.[54] The position of the anti-slavery faction was supported by the Declaratory Statements and Resolutions of the national church's General Assembly, the highest judicatory of the denomination,[55] but the intermediate bodies (the Presbytery and Synod) both divided on the issue of slavery, with each side professing to represent the true presbytery and the true synod, respectively, until the General Assembly declared the anti-slavery bodies to be the rightful ones.[56]

For the Court, the organizational structure was the deciding factor. In the words of the opinion, "the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments."[57] Because of this, "the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."[58] Accordingly, the Court deferred to the General Assembly and determined that the anti-slavery group was the "true church," and thus entitled to the property.[59] This analysis avoided the establishment problems posed by the English rule, and was also at least theoretically fair to all parties, as they voluntarily either created or affiliated with the church structure.[60] For nearly a century, the hierarchical-deference model was the preferred approach for civil courts addressing church property disputes, and is still permissible and, in fact, still in use in many states today.[61]

3. Constitutional Standards—Neutral Principles of Law

Finally, after nearly a century of using the hierarchical-deference approach of *Watson*, the Court turned its eye toward a new approach, one based on "neutral principles of law" and thus offering an additional permissible way to resolve church property disputes.[62] The neutral-principles approach was first addressed by the Court in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[63] a case involving two Savannah churches seeking to disaffiliate

54. *Id.* at 690-94.

55. *Id.* at 690-91.

56. *Id.* at 693.

57. *Id.* at 726-27.

58. *Id.* at 727.

59. *Id.* at 734-35.

60. Hansen, *supra* note 36, at 289. The hierarchical-deference approach is evaluated in further detail *infra* at notes 101-106 and accompanying text.

61. *See* Appendix, *infra*.

62. *See* Gerstenblith, *supra* note 43, at 334.

63. 393 U.S. 440, 442 (1969). In addition to finalizing the demise of the English rule for American courts, *see supra* note 51, the Court in *Hull* discussed the neutral-principles approach in

from the Presbyterian Church in the United States ("PCUS"), citing a host of doctrinal changes and actions the churches claimed were at odds with right doctrine and practice.[64] The Supreme Court of Georgia had applied the English rule, and the U.S. Supreme Court struck down that decision and remanded the case for adjudication under either the *Watson* hierarchical-deference approach, or one based on "neutral principles of law."[65]

The Court then expressly adopted and fleshed out the application of this standard in the landmark case of *Jones v. Wolf*.[66] *Jones* essentially

---

this influential passage:

> [T]here are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded . . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.

Id. at 449. The actual concept of the neutral-principles approach is actually of a much older vintage, as precursors and clearly discernable ancestors in lower court opinions predate the Supreme Court's consideration by decades. One notable example appears in the 1903 opinion in *Morris Street Baptist Church v. Dart*, in which the Supreme Court of South Carolina stated that

> [w]hen a civil right depends upon an ecclesiastical matter, it is the civil court, and not the ecclesiastical, which is to decide. But the civil tribunal tries the civil right, and no more . . . . The civil courts will not enter into the consideration of church doctrine or church discipline, nor will they inquire into the regularity of the proceedings of the church judicatories having cognizance of such matters. To assume such jurisdiction would not only be an attempt by the civil courts to deal with matters of which they have no special knowledge, but it would be inconsistent with complete religious liberty, untrammeled by state authority. On this principle, the action of church authorities in the deposition of pastors and the expulsion of members is final. Where, however, a church controversy necessarily involves rights growing out of a contract recognized by the civil law, or the right to the possession of property, civil tribunals cannot avoid adjudicating these rights, under the law of the land . . . .

45 S.E. 753, 754 (S.C. 1903).

64. *Hull*, 393 U.S. at 442. The Supreme Court of Georgia listed the objections as follows:

> '[O]rdaining of women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms, as originally adopted by the general church, and causing all members to remain in the National Council of Churches of Christ and willingly accepting its leadership which advocated named practices, such as the subverting of parental authority, civil disobedience and intermeddling in civil affairs'; also 'that the general church has . . . made pronouncements in matters involving international issues such as the Vietnam conflict and has disseminated publications denying the Holy Trinity and violating the moral and ethical standards of the faith.'

Id. at 442 n.1 (alteration in original) (citation omitted).

65. *Id.* at 449-52.

66. Jones v. Wolf, 443 U.S. 595 (1979). In the intervening years between *Hull* and *Jones*, the Court decided a church property dispute case by employing the hierarchical-deference approach

presented the Supreme Court's evaluation of Georgia's response to the Supreme Court's *Hull* decision a decade earlier.[67] The case arose in the wake of a vote by a majority of the Vineville Presbyterian Church in Macon to disaffiliate from the PCUS, and a resulting determination by the PCUS that those in the minority faction were the rightful owners.[68] Had the lower courts applied the *Watson* hierarchical-deference approach, the PCUS decision would have received the deference of the civil courts and the property would have been awarded to the minority.[69] However, both the trial court and the Supreme Court of Georgia applied the neutral-principles doctrine developed by Georgia courts following *Hull*, and found for the majority faction.[70] The U.S. Supreme Court, after weighing the merits of Georgia's new approach, concluded that it would satisfy the requirements of the First Amendment and remanded for adjudication under that standard.[71]

This approach, in which the civil court resolves church property disputes by examining any materials necessary, so long as its use of those materials does not require it to decide issues of religious doctrine or practice, consists of basically two steps.[72] First, the court must determine in which party title to the property is vested.[73] The court makes this determination by examining the deeds to the property and the group's corporate charter, paying special notice to any trust or condition in the general church's favor.[74] The court should also examine the constitution of the general

---

from *Watson*, illuminating the relationship of and differences between the hierarchical-deference and neutral-principles approaches, particularly in light of the very mixed responses of state courts to the *Jones* decision. *See* Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976). The seven-justice *Milivojevich* majority found that the dispute was primarily doctrinal and thus deferred to the hierarchical authorities to avoid transgressing the First Amendment. *Id.* at 709. The two dissenting justices insisted that neutral principles could be applied without raising First Amendment concerns and would have led to the opposite result. *Id.* at 733-34 (Rehnquist, J., dissenting).

67. Indeed, the Court began by noting that "Georgia's approach to church property litigation has evolved in response" to *Hull*. *Jones*, 443 U.S. at 599.

68. *Id.* at 598-99.

69. *Id.*

70. *Id.* at 599.

71. *Id.* at 604. The Court did note that, when applied to controversies between competing factions of a local congregation, the neutral-principles-of-law approach requires that there be some determination as to who is the "true representative" of the local church. *Id.* at 607. The Court explained that this determination must be made on neutral, secular grounds as opposed to inquiring into the decision of the religious hierarchy. *Id.* at 607-08. The Court suggested that the most likely candidate for such a neutral determination was a rebuttable presumption of majority control, and indeed, that was the test the respondents claimed was applied by the lower courts. *Id.* at 607. However, the lower court decisions did not explicitly state this presumption, and thus the Supreme Court was compelled to vacate and remand the decision of the Supreme Court of Georgia. *Id.* at 609-10.

72. *Id.* at 603-04.

73. *Id.* at 604.

74. *Id.* at 606.

church, searching for trusts in the general church's favor.[75] The ultimate goal of the civil court should be the enforcement of the parties' intent, if the intent is manifested by the documents.[76] The second step in the neutral-principles approach applies if the court determines that title is vested in the local congregation, and requires an investigation by the court to determine who controls the local body.[77] There is a presumption of majority control, but the presumption is rebuttable if the documents examined in the first step, or any others that are relevant and constitutionally permissible, so indicate.[78]

Aside from the operation of the standard, perhaps the most important element of the *Jones* Court's decision was its reiteration that the Constitution neither mandates nor prohibits either the hierarchical-deference or neutral-principles approach.[79] That being said, the five-justice majority in *Jones* extolled at some length the benefits of the neutral-principles approach as contrasted with hierarchical deference, giving an impression of strong support for the former over the latter.[80] (The *Jones* Court's rationale in support of the neutral-principles approach will be discussed further below.[81]) It is clear that the standard adopted by each jurisdiction (as well as the interpretation of that standard) has an enormous impact on the outcome of any particular case.[82]

---

75. *Id.*

76. *Id.*

77. *Id.* at 606-10.

78. *Id.* at 607-08.

79. *Id.* at 602. The *Jones* Court quoted Justice Brennan's statement in an earlier case that "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* (citing Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (per curiam)). Interestingly, the Louisiana Supreme Court found that, based on the First Amendment and the parallel provision in the Louisiana state constitution, the adoption of the neutral-principles approach was actually required. Fluker Cmty. Church v. Hitchens, 419 So. 2d 445, 447 (La. 1982) ("[W]e think the safeguards against laws establishing religion and prohibiting the free exercise thereof . . . necessitate our adoption of the 'neutral principles' approach. Whatever authority a hierarchical organization may have over associated local churches is derived solely from the local church's consent. Refusal to adjudicate a dispute over property rights or contractual obligations, even when no interpretation or evaluation of ecclesiastical doctrine or practice is called for, but 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.").

80. *Jones*, 443 U.S. at 603-06.

81. *See infra* notes 167-169 and accompanying text.

82. This flexibility for state courts has led one commentator to describe, in more than mild understatement, the states' reactions to *Jones* as having "considerable diversity." Hansen, *supra* note 36, at 290. This diversity is discussed in greater detail *infra* notes 96-137 and accompanying

C. Denominational Reaction to Jones v. Wolf

The Court's decision in *Jones* had a rapid impact on America's most prominent mainline denominations, none of whose constitutions contained specific property trust clauses at the time of the decision.[83] Seizing on the language of the *Jones* Court, which stated that "the constitution of the general church can be made to recite an express trust in favor of the denominational church . . . . And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form,"[84] several national churches amended their constitutions to add provisions stating that local bodies hold their property in trust for the use and benefit of the general church.[85] The legal effect of such clauses is hotly debated.[86]

The *Jones* decision was handed down just three months prior to The Episcopal Church's triennial national General Convention, at which the church was faced with an increasing number of parishes departing in response to significant doctrinal disagreements.[87] In response to both the departures and the *Jones* decision, the Church's House of Bishops adopted what has come to be known as the "Dennis Canon," stating that "[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located."[88] Following this adoption, several regional dioceses adopted their own versions of the Dennis Canon.[89] In litigation, representatives of the general church have stated that the trust clauses "merely codify[] a longstanding understanding of the right

---

text, and presented on a state-by-state basis in the Appendix, *infra*.

83. Lunceford, *supra* note 26, at 33-34.

84. *Jones*, 443 U.S. at 606. In context, the quoted statement reads as follows:

> At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Id.

85. Lunceford, *supra* note 17, at 68; Dague & Stephens, *supra* note 35, at 129.

86. *See, e.g.*, *infra* note 90 and accompanying text; *infra* notes 217-220 and accompanying text.

87. Dague & Stephens, *supra* note 35, at 129.

88. *Id.* at 129-30 (citing *Journal of the General Convention of the Protestant Episcopal Church of the United States of America otherwise known as the Episcopal Church* (1979), p. AA-282). There is some question, based on the documentation, as to whether the Dennis Canon was validly adopted by TEC. For an inquiry into this question, see *id.* at 130-31.

89. *Id.* at 134. An additional provision of the national Dennis Canon makes it clear that "[t]he several Dioceses may, at their election, further confirm the trust declared [above] by appropriate action, but no such action shall be necessary for the existence and validity of the trust." *Id.* at 130.

of the diocese to parish property upon a parish seeking to leave the denomination," but at least some commentators vigorously deny this is the case.[90]

The Presbyterian response (or more accurately, responses) to *Jones* is considerably more complex, primarily because the ruling preceded by only a few years the historic merger between the northern (UPCUSA) and southern (PCUS) Presbyterian churches.[91] Neither church's constitution historically had contained a trust provision akin to the Episcopal Dennis Canon.[92] The merger agreement, which resulted in the formation of the PC(USA), contained express guarantees that individual local churches could, by vote of the congregation, exempt themselves from the property provisions of the new PC(USA) constitution that were dissimilar from those contained in the prior denomination's constitution, and instead choose to be bound by the previous terms.[93] The PC(USA) constitution contained a trust clause from the date of the merger in 1983, but both the UPCUSA and the PCUS also amended their constitutions just prior to the merger to include trust clauses.[94] The end result was that after 1983, all Presbyterian congregations in the PC(USA) were at least subject to the language of a general-church trust clause, although it is very likely that this was not universally known.[95] Therefore, both of the major mainline Episcopalian and Presbyterian denominations claim the benefit of a trust provision.

D. State Reaction to Jones v. Wolf

These general principles and provisions—denominational structure, the three constitutional standards for resolving church property disputes, and denominational adoption of trust clauses—constitute the background material for state courts addressing church property disputes since *Jones*. The states have had to respond to the choice laid out by the Supreme Court: whether to continue using the *Watson* deference approach, or to adopt the neutral-principles-of-law method commended by the *Jones* majority. Of course, deciding which constitutional approach to take is only the first step in resolving such disputes, as the constitutional standards only dictate what sources a court may consider. If the court adopts the less restrictive neutral-

90. *Id.* at 134-35.
91. *See supra* note 17.
92. Lunceford, *supra* note 17, at 68.
93. *Id.*
94. *Id.* at 68-69.
95. *Id.*

principles approach, it may be called upon to analyze claims based on the laws of real property, trusts, charitable organizations, state statutes, or, less frequently, other areas.

Most discussions of the constitutional standards include a section in which the commentator attempts to reduce the pluriform responses of the several states into neat categories.[96] Some such groupings take state courts at their word[97] (i.e., when a state supreme court explicitly adopts or declines to adopt the neutral-principles approach, the state is placed analytically in the appropriate category, either "neutral-principles" or "hierarchical-deference," without further investigation into the way the test was and has been applied); however, this manner of labeling fails to take into account the widely divergent ways in which the standards, particularly neutral-principles, are applied. Even analyses that have noted and decried the inconsistencies among the states in applying the standards have often merely pointed out the results and the fact that different state courts have reached conflicting outcomes on substantially similar facts, rather than attempting to discern patterns of interpretation in the court opinions.[98]

Perhaps the most accurate and helpful construct for classifying state court responses to *Jones* is an approach, agreed upon by Dean Hansen and Professor Gerstenblith, that identifies three major interpretational lines courts take in applying the acceptable constitutional standards: strict hierarchical deference, strict neutral principles, and a hybrid category under which the court purports to adopt the neutral-principles approach, but then essentially engages in hierarchical deference to some degree.[99] Although there are some state courts whose modern opinions fit neatly into one of the three categories, others draw on elements of more than one. Arranging the

---

96. An exhaustive state-by-state analysis of state court reaction to *Jones v. Wolf* is beyond the scope of this article; indeed, all commentators writing in the area are careful to stress that practitioners should rely on academic writing only to understand the issues at play and the basic framework of the analysis, and perhaps to get a sense of where their jurisdiction likely falls along the spectrum. *See, e.g.*, Lunceford, *supra* note 24, at iv-v. Thorough research into the relevant decisions of the highest court of the local jurisdiction, if any, is absolutely necessary to ascertain which approach the jurisdiction follows and how that approach may be applied in any particular case. *Id.* With that rather extensive caveat, the author has endeavored to assemble an accurate categorization for reference purposes of each jurisdiction's general approach to property issues, including the most important decisions of each on the subject of church property disputes as of this writing. This compendium may be found in the Appendix, *infra*.

97. *See, e.g.*, Bishop and Diocese of Colo. v. Mote, 716 P.2d 85, 96 n.10 (Colo. 1986); William G. Ross, *The Need for an Exclusive and Uniform Application of 'Neutral Principles' in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L.J. 263, 280-81 nn.111-14 (1987).

98. *See, e.g.*, Ashley Alderman, Note, *Where's the Wall?: Church Property Disputes Within the Civil Courts and the Need for Consistent Application of the Law*, 39 GA. L. REV. 1027, 1039-51 (2005); Natalie L. Yaw, Note, *Cross Fire: Judicial Intervention in Church Property Disputes After* Rasmussen v. Bunyan, 2006 MICH. ST. L. REV. 813, 824-29 (2006).

99. Hansen, *supra* note 36, at 291; Gerstenblith, *supra* note 43, at 321-23.

cases along interpretational lines allows for some overlap, at least in analysis.[100]

1. Interpretational Categories—Strict Hierarchical Deference

The first interpretational category, strict hierarchical deference, consists of states that have considered *Jones* and its neutral-principles approach, but have elected to continue the *Watson* hierarchical-deference model, based on their conception of what comports most closely with the First Amendment, their own precedent in similar cases, or other factors such as state statutes.[101] This category is fairly straightforward, as there is little variation in the way

---

100. For more comprehensive and detailed examinations of the myriad different ways in which the interpretational approaches discussed in this section may be applied, see Hansen, *supra* note 36, at 290-300; Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 521-50 (1990).

101. Hansen, *supra* note 36, at 291. According to Dean Hansen, this category includes "at least seven states," including Florida, Nevada, New Jersey, West Virginia, Michigan, and Texas. *Id.* at 291-92 and 292 n.115. However, it appears that this is at least arguable in several cases, on several different grounds.

First, the state cases cited in support of this proposition include both state supreme court and state appellate court decisions—in the latter category, the most notable are decisions from Michigan and Texas. *Id.* at 292 n.115. Although it is a fair assumption that a state supreme court's refusal to overturn the decision of a lower court employing one constitutional standard or the other indicates support for or at least satisfaction with that reasoning, the fact remains that the highest court in the jurisdiction has not expressly and directly responded to the question posed to the states by the U.S. Supreme Court in *Jones*: will you retain the hierarchical-deference approach, or will you adopt the neutral-principles-of-law approach? This factor is one of the elements taken into consideration in the compendium accompanying this article. *See* Appendix, *infra*.

Second, it is possible that the most recent decisions in several "strict-hierarchical-deference" states actually misread precedent case law, which actually calls for the application of a different standard. In Michigan, for example, the local churches in the two most important recent cases argued unsuccessfully that the respective national churches, though hierarchical in some respects, were congregational with respect to property. *See* Bennison v. Sharp, 329 N.W.2d 466, 472 (Mich. Ct. App. 1982); Calvary Presbyterian Church v. Presbytery of Lake Huron of the United Presbyterian Church in the U.S., 384 N.W.2d 92, 94 (Mich. Ct. App. 1986). Although the local churches did not specifically reference them, the early Michigan Supreme Court cases of *Bear v. Heasley*, 57 N.W. 270 (Mich. 1893), and *Borgman v. Bultema*, 182 N.W. 91 (Mich. 1921), could at least arguably support the conclusion that churches need not be deemed hierarchical for all intents and purposes. Another example is Texas, where some commentators have argued that appellate courts applying the seminal decision of *Brown v. Clark*, 116 S.W. 360 (Tex. 1909), have "confused the Texas Supreme Court's treatment of threshold subject matter jurisdiction (absent in matters inherently religious in nature) with its treatment of the method civil courts are to apply when subject matter jurisdiction is exercised," and as a consequence, that the actual standard in Texas, at least for church property cases, is some variant of neutral principles. Lloyd J. Lunceford, *Sample Case Law from Selected State Courts*, *in A* GUIDE TO CHURCH PROPERTY LAW, *supra* note 15, at 55-62; *see also* Westbrook v. Penley, No. 04-0838, 2007 WL 1861168, at *7-8 (Tex. Jun. 29, 2007) (recognizing the neutral-principles approach articulated by the U.S. Supreme Court, but declining to apply it in a case dealing with a dispute over church discipline as opposed to church property).

courts apply the constitutional hierarchical-deference standard. Courts in this category first determine whether the church structure at issue is hierarchical;[102] if it is, the court asks whether the local church or its leadership is under the control of the hierarchy. If so, the court then defers to the determination of the hierarchy, either on the ground that it is a religious question into which civil courts are barred from inquiring,[103] or on the basis that it is a secular dispute, but one in which deference is required due to the hierarchical and religious nature of the parties.[104] The essential point is that under the hierarchical-deference approach, "the decision of the hierarchy will invariably be deferred to," and thus no secular areas of law have any direct application whatsoever.[105]

The strict-hierarchical-deference approach has been officially adopted by the highest courts of four or possibly five states, and is followed without state supreme court adoption in two or three other states.[106]

A good example of this approach is the final decision in *Mills v. Baldwin*.[107] *Mills*, a Florida case, involved a Presbyterian congregation in which a majority voted to separate from the PCUS.[108] The trial court, which applied (inappropriately, in the Supreme Court of Florida's view) the neutral-principles-of-law approach, found that the majority owned the property and could depart with it.[109] A majority of the Supreme Court of Florida held otherwise, rejecting the trial court's neutral-principles analysis and finding that the hierarchical nature of the church meant that the denomination's determination of which rival local group represented the "true church" was entitled to deference.[110] Because the hierarchical church

---

102. *See, e.g.*, *Bennison*, 329 N.W.2d at 472; Org. for Preserving the Constitution of Zion Lutheran Church of Auburn v. Mason, 743 P.2d 848, 851 (Wash. Ct. App. 1987); Church of God of Madison v. Noel, 318 S.E.2d 920, 923 (W. Va. 1984).

103. Townsend v. Teagle, 467 So. 2d 772, 775 (Fla. Dist. Ct. App. 1985); Mills v. Baldwin, 362 So. 2d 2, 6-7 (Fla. 1978), *vacated and remanded*, 443 U.S. 914, *reinstated*, 377 So. 2d 971 (Fla. 1979), *cert. denied*, 446 U.S. 983 (1980); Tea v. Protestant Episcopal Church in the Diocese of Nev., 610 P.2d 182, 184 (Nev. 1980); Protestant Episcopal Church in the Diocese of N.J. v. Graves, 417 A.2d 19, 24 (N.J. 1980), *cert. denied sub nom.* Moore v. Protestant Episcopal Church in the Diocese of N.J., 449 U.S. 1131 (1981); Diocese of Newark v. Burns, 417 A.2d 31, 34 (N.J. 1980); *Noel*, 318 S.E.2d at 923-24.

104. *See, e.g.*, *Calvary Presbyterian Church*, 384 N.W.2d at 93; Protestant Episcopal Church in the Diocese of N.J. v. Graves, 391 A.2d 563, 567 (N.J. Super. Ct. Ch. Div. 1978), *aff'd*, 401 A.2d 548 (N.J. Super. Ct. App. Div. 1979) (per curiam), *aff'd*, 417 A.2d 19 (N.J. 1980), *cert. denied sub nom.* Moore v. Protestant Episcopal Church in the Diocese of N.J., 449 U.S. 1131 (1981).

105. Hansen, *supra* note 36, at 293.

106. *See* Appendix, *infra*.

107. 362 So. 2d at 6-7.

108. *Id.* at 3.

109. *Id.*

110. *Id.* at 7. ("[A] careful reading of the cases makes clear that the issue in a case such as this is not who owns the property. The Madison Presbyterian Church of Madison, Florida, owns the property. The true issue is—who represents the Madison Presbyterian Church? The authorities

recognized the minority, the Supreme Court of Florida overruled the trial court.[111]

2. Interpretational Categories—Strict Neutral Principles of Law

Conversely, some states reject the *Watson* hierarchical-deference approach and strictly apply the neutral-principles-of-law standard described in *Hull* and adopted in *Jones*.[112] Rather than beginning with an analysis of the church structure and organization, these courts first undertake an examination of who has legal title to the property. This inquiry generally begins by looking at the deed to ascertain the identity of the express grantee, and then looking for any restrictions on that party's ownership, such as express trusts, reverter clauses, or conditions.[113] Courts taking this approach require a clear showing of intent to create a trust before concluding a trust has been created, which generally rules out implied trusts.[114] After making a determination as to the titleholder's identity, the court may decide who controls that entity. The titleholder is usually "an incorporated religious or not-for-profit corporation and thus is governed by its articles of incorporation and bylaws and by state statutes."[115] Courts following the

---

from *Watson v. Jones* forward clearly respond that petitioners represent that church because of the structure and government of PCUS.").

111. *Id.*

112. *See, e.g.*, Trinity Presbyterian Church of Montgomery v. Tankersley, 374 So. 2d 861 (Ala. 1979); Protestant Episcopal Church in the Diocese of L.A. v. Barker, 171 Cal. Rptr. 541 (Ct. App. 1981), *cert. denied*, 454 U.S. 864 (1981); First Evangelical Methodist Church of Lafayette v. Clinton, 360 S.E.2d 584 (Ga. 1987); York v. First Presbyterian Church of Anna, 474 N.E.2d 716 (Ill. App. Ct. 1984); Bjorkman v. Protestant Episcopal Church in the U.S. for the Diocese of Lexington, 759 S.W.2d 583 (Ky. 1988); Fluker Cmty. Church v. Hitchens, 419 So. 2d 445 (La. 1982); Piletich v. Deretich, 328 N.W.2d 696 (Minn. 1982); Presbytery of Elijah Parish Lovejoy v. Jaeggi, 682 S.W.2d 465 (Mo. 1984) (en banc); First Presbyterian Church of Schenectady v. Presbyterian Church in the U.S., 464 N.E.2d 454 (N.Y. 1984); Christensen v. Roumfort, 485 N.E.2d 270 (Ohio Ct. App. 1984); Presbytery of Beaver-Butler of the United Presbyterian Church in the U.S. v. Middlesex Presbyterian Church, 489 A.2d 1317 (Pa. 1985); Presbytery of Donegal v. Calhoun, 513 A.2d 531 (Pa. Commw. Ct. 1986); Presbytery of Donegal v. Wheatley, 513 A.2d 538 (Pa. Commw. Ct. 1986); Mikilak v. Orthodox Church in Am., 513 A.2d 541 (Pa. Commw. Ct. 1986), *appeal denied*, 528 A.2d 958 (Pa. 1987); Bd. of Bishops of the Church of the Living God v. Milner, 513 A.2d 1131 (Pa. Commw. Ct. 1986); Foss v. Dykstra, 319 N.W.2d 499 (S.D. 1982), *aff'd on reh'g*, 342 N.W.2d 220 (S.D. 1983).

113. *See, e.g., First Presbyterian Church of Schenectady*, 464 N.E.2d at 461.

114. *See, e.g., id.* at 462; *Christensen*, 485 N.E.2d at 270; *Middlesex Presbyterian Church*, 489 A.2d at 1324; *Mikilak*, 513 A.2d at 541.

115. Hansen, *supra* note 36, at 294. Apart from a few representative examples, the corpus and complexities of state law that apply in strict-neutral-principles jurisdictions are not addressed here, but can have a profound impact on the eventual decision reached by the court. *See, e.g., In re* Episcopal Church Cases, 61 Cal. Rptr. 3d 845, 878-85 (Ct. App. 2007) (discussing in detail sections

strict neutral-principles approach generally adopt the rebuttable presumption from *Jones* that a majority of a congregation controls the congregation.[116] Because of this, courts utilizing this approach sometimes find in favor of the local congregation (in the case of a break between the local and general church) or the majority of a divided congregation which seeks to leave the denomination.[117] This stands in contrast with the usually outcome-determinative hierarchical-deference approach, in which the general church prevails in all but the rarest of circumstances.[118] Of course, if the documents indicate that a local church in fact intended to make itself and its property subject to the control of the national church, a court may find for the latter even when taking a strict neutral-principles approach.[119] In one case, for example, a court in Louisiana (which mandates the neutral-principles approach[120]) found "mention of the general denomination in church documents sufficient to indicate an intention by the local congregation to be subject to hierarchical control."[121]

---

of the California Corporations Code and breaking sharply with another appellate district's interpretation of same), *review granted*, (Sept. 12, 2007).

116. *See, e.g.*, *Piletich*, 328 N.W.2d at 702 (presumption of majority rule).

117. Hansen, *supra* note 36, at 294.

118. *Id.*

119. *Id.* at 298 ("As evidence of [intent to create a trust benefiting the national church], the court relies on references to the denomination or beliefs in the deeds or in the charter, bylaws, or articles of incorporation of the local church; on state incorporation statutes that require affiliation with the denomination; or on provisions in the constitution or charter of the hierarchical church."). Although Dean Hansen cites this rationale as an example of a hybrid approach combining neutral principles and deference, it also seems possible that it could be merely a straightforward application of the strict-neutral-principles approach, if the court finds that the references sufficiently evidence express intent to create a trust in favor of the general church.

120. *See supra* note 79.

121. Hansen, *supra* note 36, at 298; *see, e.g.*, Fluker Cmty. Church v. Hitchens, 419 So. 2d 445, 448 (La. 1982) ("The act of sale recites that the tract was sold by Fluker Farms, Inc. to 'Fluker Chapel *A.M.E. Church*, Fluker, Louisiana.' . . . Consequently, Fluker acted solely within its capacity as an A.M.E. local church in acquiring [the tract]."). *Fluker* was a 1981 controversy involving Fluker Community Church, a congregation that voted to separate from the African Methodist Episcopal (A.M.E.) church after nearly 100 years in the denomination when the general church declined to redirect funds from foreign missions to make physical repairs requested by the local congregation. *Id.* at 446. The local congregation brought an action to prevent the general church from building a new building on another part of the property, and while the lower courts split on the outcome, the Louisiana Supreme Court found the reasoning of both incorrect. *Id.* The court expressed its commitment to the neutral-principles-of-law standard from *Jones*, but also stated that "[w]hatever authority a hierarchical organization may have over associated local churches is derived solely from the local church's consent." *Id.* at 447. After examining each party's documents, including particularly the act of sale which specified the purchaser as an A.M.E. church, the court found that "it was the intention of the parties, agreed upon before the dispute arose, that [the property] may not be alienated without A.M.E.'s consent, and will be considered abandoned to A.M.E. upon Fluker's disbanding as an A.M.E. society," and dismissed the local congregation's claim. *Id.* at 448.

The highest courts of at least nine states have adopted the strict-neutral-principles standard as governing their jurisdictions, while lower courts in several other jurisdictions have applied the approach.[122]

A clear example of the strict-neutral-principles approach is *Protestant Episcopal Church in the Diocese of Los Angeles v. Barker*, a California appellate-level decision from 1981.[123] The dispute in *Barker* arose when four Episcopal parishes, objecting to that denomination's decisions to begin ordaining women and doctrinal issues regarding the interpretation of the Nicene Creed, severed ties with the national church and the Diocese but retained their property.[124] The Diocese and general church sued, alleging that the parishes' claim to the properties was erroneous, based on the hierarchical-deference approach.[125] The trial court, ruling before the U.S. Supreme Court's decision in *Jones*, applied the hierarchical-deference standard and agreed, finding for the plaintiffs.[126] The appellate court noted both the intervening *Jones* decision and a 1979 California Court of Appeal case applying the neutral-principles standard based on the U.S. Supreme Court's *Hull* opinion,[127] which it read in tandem as definitively establishing the neutral-principles approach as the proper course for California courts to follow.[128] The court then proceeded to apply the neutral-principles-of-law

122. *See* Appendix, *infra*.

123. 171 Cal. Rptr. 541 (Ct. App. 1981), *cert. denied*, 454 U.S. 864 (1981). The strict-neutral-principles approach was applied (at least in name) by California courts from the time of *Barker* until the summer of 2007, when a three-judge panel of the 4th Appellate District issued its opinion in *In re Episcopal Church Cases*, 61 Cal. Rptr. 3d 845, 848 (Ct. App. 2007), *review granted*, (Sept. 12, 2007). Throughout that time and as of this writing, the California Supreme Court has not spoken on the matter and what had been considerable tension among the appellate districts over whether the neutral principles standard should be applied strictly or in a more deferential manner has now become express and outright conflict. *Compare Barker*, 171 Cal. Rptr. at 549, *with* Metropolitan Philip v. Steiger, 98 Cal. Rptr. 2d 605, 609 n.7 (Ct. App. 2000). *See also infra* notes 179-201 and accompanying text.

124. *Barker*, 171 Cal. Rptr. at 543.

125. *Id.*

126. *Id.*

127. Presbytery of Riverside v. Cmty. Church of Palm Springs, 152 Cal. Rptr. 854 (Ct. App. 1979).

128. *Barker*, 171 Cal. Rptr. at 549. Specifically, the *Barker* court stated:

> [W]e conclude that California has adopted neutral principles of law as the basis for resolution of church disputes; that use of the hierarchical theory is restricted to doctrinal and ecclesiastical controversies and does not extend to property disputes; that property disputes between ecclesiastical claimants, like property disputes between temporal claimants, must be resolved by neutral principles of law. We, therefore, reject and disapprove the reliance placed by the trial court on hierarchical theory as a means of adjudicating this cause.

Id. Again, this conclusion has been strongly criticized by the most recent relevant California

approach strictly, by examining the local congregations' title deeds and articles of incorporation, the constitution and canons of the general church, and California state corporations statutes in search of an express trust in favor of the Diocese or the general church.[129] The court drew on several analogies to secular organizations,[130] and eventually found that for three of the churches, no express or implied trust was created in favor of the Diocese or the general church, and therefore those three local congregations owned

---

decision. *See In re* Episcopal Church Cases, 61 Cal. Rptr. 3d 845 *passim*, *review granted*, (Sept. 12, 2007).

129. *Barker*, 171 Cal. Rptr. at 553-55.

130. Two particular sections discussing the national church's assertion of a trust over the property at issue are worth quoting at length, primarily for their likening of the religious bodies at issue here to secular organizations. The first is found in the court's discussion of its general approach to nationally affiliated local groups:

> Under neutral principles of law if a local body affiliated with a national body holds title to property in its own name and later secedes, the national body has little basis to claim that such property is held in trust for it. If a local organization secedes from one national entity and affiliates with another, absent other factors no claim can be laid to property owned by and held in the name of the local organization. *If a Kentucky Fried Chicken franchisee secedes from its national affiliation to join a Tennessee Fried Chicken operation, neutral principles of law do not recognize any claim by the ex-franchisor against its departing franchisee's real property.* In such instances valid claims may exist for breach of contract, abuse of name, false pretenses, and the like, but ordinarily no express trust arises against the property of the local organization. Under neutral principles of law the same is true of a local church organization which changes affiliation from one general church to another.
>
> We find nothing in the title deeds of the church properties to create an express trust in favor of the general church organizations.

Id. at 553-54 (emphasis added) (citations omitted). In discussing the parishes' articles of incorporation, the court observed:

> [E]ach of the articles of these three churches declares in substance that the constitution, canons, and discipline of PECUSA and the Diocese shall always form part of the articles of incorporation and prevail against anything repugnant. Such declarations are a far cry from an express trust in church property for the benefit of the Diocese and PECUSA. Nor, did either the Diocese or PECUSA, on the various dates of these incorporations, have any existing provisions in its rules for disposition of local church property on dissolution or disaffiliation of a local church. [The general church and the Diocese] interpret these general provisions in the articles of incorporation as a kind of open-ended agreement by the local churches to accept in advance any and all rules and regulations which might thereafter be put in effect by the general church. We do not believe such an interpretation accords with real property law, with contract law, with corporate law, or with trust law. Such declarations of affiliation and loyalty are nothing more than expressions of present intention. *We think such declarations no more restrictive of future amendments to the articles of incorporation than would be similar statements in an automobile dealer's articles that it would always distribute General Motors products and always be bound by General Motors rules and policies, or statements in a political club's articles that it would forever support the Democratic Party and be forever bound by the latter's rules and platform. A subsequent switch of affiliation by the dealer to Ford, or by the political club to the Republican Party, would, under neutral principles of law, furnish no basis for a claim of express trust by the superseded automobile manufacturer to possession of the dealer's showroom and repair shop or a claim by the deserted political party to possession of the political club's meeting premises and bank account.*

Id. at 554 (emphasis added).

the property.[131] Under a strict-neutral-principles analysis, however, the documents of the fourth church, which was established some nineteen years later than the next most recent, were shown to include an express trust in favor of the Diocese, and thus the church's actions made the Diocese the proper owner under state corporations laws.[132]

3. Interpretational Categories—Hybrid of Deference and Neutral Principles of Law

The third interpretational approach taken by some states in response to *Jones* consists of what is at least putatively a combination of the two other approaches. Generally, this takes the form of an express adoption of the *Jones* neutral-principles standard,[133] followed by the application of a more deferential approach than strict-neutral-principles.[134] Although there is a wide variety in exactly how much deference courts using the hybrid approach afford and the legal rationales they use in explaining their choices, there are generally two related but distinct categories of reasoning: finding that the local congregation intended to create an "implied" trust[135] in favor

131. *Id.* at 555-56.

132. *Id.* ("[Church of the Holy Apostles] is specifically identified as a subordinate body of a national body subject to the provisions of Corporations Code sections 9203 and 9802. It was incorporated subsequent to the adoption of Diocesan Canon 10.06 in 1958, which declares that on dissolution of a church its property shall revert to the Diocese. Its articles contain a specific provision declaring that on liquidation, dissolution, or abandonment of the corporation its property will inure to the benefit of a charitable fund organized and operated for religious or charitable purposes by the Diocese. We conclude that under neutral principles of law the property of Holy Apostles was subject to an express trust in favor of the Diocese . . . .").

133. *See, e.g.*, Bishop and Diocese of Colo. v. Mote, 668 P.2d 948, 952-53 (Colo. Ct. App. 1983), *rev'd*, 716 P.2d 85 (Colo. 1986); N.Y. Annual Conf. of the United Methodist Church v. Fisher, 438 A.2d 62, 68 (Conn. 1980); Hinkle Creek Friends Church v. W. Yearly Meeting of Friends Church, 469 N.E.2d 40, 43 (Ind. Ct. App. 1984); Emberry Cmty. Church v. Bloomington Dist. Missionary and Church Extension Soc'y, Inc., 482 N.E.2d 288, 293 (Ind. Ct. App. 1985); Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 816 (Iowa 1983); Fluker Cmty. Church v. Hitchens, 405 So. 2d 1223, 1225 (La. Ct. App. 1981), *vacated and dismissed on other grounds*, 419 So. 2d 445 (La. 1982); Presbytery of Balt. of the United Presbyterian Church v. Babcock Mem'l Presbyterian Church, 449 A.2d 1190, 1192 (Md. Ct. Spec. App. 1982), *aff'd*, 464 A.2d 1008 (Md. 1983); Green v. Lewis, 272 S.E.2d 181, 184 (Va. 1980).

134. *See, e.g.*, *Hinkle Creek Friends Church*, 469 N.E.2d at 44-45; *Fluker Cmty. Church*, 419 So. 2d at 448; *Babcock Mem'l Presbyterian Church*, 449 A.2d at 1194-95.

135. Many church property cases involve detailed trust law analyses. For the purposes of understanding the way courts look at and speak about trusts in the church property context, it is helpful to consider several excerpts from an essay on the subject by Professor Gerstenblith. "Trusts come in several varieties: express trusts, either private or charitable, and implied trusts, either resulting or constructive." Gerstenblith, *supra* note 43, at 329 (footnote omitted). In regard to

of the national church, and finding that the local church consented to be bound by the rules of the general church.[136]

Although the diversity of ways in which the hybrid approach has been applied makes it difficult to speak with absolute confidence about state court adoption, it is safe to say that at least eight states have officially adopted some version of the hybrid approach.[137]

Some courts utilizing the hybrid approach have made a determination that a trust was intended by looking only to the documents of general churches[138]—although some commentators have noted that looking to national church documents to ascertain the intent of the local congregation is

---

express trusts, Gerstenblith notes:

> An express trust is defined as a fiduciary relationship with respect to property "which arises as a result of a manifestation of an intention to create it" and which subjects the legal titleholder to equitable duties to deal with the property for the benefit of another person . . . .
>
> Courts often fail to distinguish between property donated by an individual, who is then the settlor of the trust, and property purchased by a local church with funds raised exclusively from within its membership. Property donated by an individual to a religious organization is generally held by the latter as a charitable trust, and the donor may impose various restrictions on use of the property, designate the beneficiaries, and provide for the trust's termination. In the case of donated property, the court must determine the intended beneficiaries if the settlor has failed to do so clearly. If the titleholder simply purchased the property, however, then there is no reason to presume that the form of property ownership is that of a trust, unless the titleholder is not empowered by state law to hold real property. Accordingly if the donor fails to express a restriction or if the local church simply purchases property and takes title in its own name, then there is no expression . . . of intent as required under trust law from which to imply the existence of a trust.

Id. at 330-31 (footnotes omitted). Gerstenblith then addresses both kinds of implied trusts:

> The first type of implied trust, the resulting trust, arises when circumstances indicate that the settlor did not intend the titleholder to take the entire interest in the property . . . . Unlike a resulting or express trust, a constructive trust arises contrary to the intent of the settlor. Courts impose constructive trusts in exercise of their equity jurisdiction as a remedy for unjust enrichment.
>
> *Courts that consider the imposition of an implied trust in the context of church property disputes agree that neither the resulting trust nor the constructive trust is an appropriate remedy.* Nevertheless, in the absence of written language creating an express trust, these courts have *used the term "implied trust"* without attempting to define it. Only one court has attempted to devise a term for a trust that neither fits into one of the categories of implied trusts nor contains specific language in its documents creating an express trust. In *Bishop & Diocese of Colorado v. Mote*, the Colorado Supreme Court used the term "implied express trust" to describe an express trust that was not created by actual language but instead was implied by the conduct of the parties and by the circumstances surrounding donation of the gift.

Id. at 331-33 (emphases added) (footnotes omitted). The end result is that when they contemplate trusts in the church property setting, courts are referring to either express trusts or the kind of "implied express trust" discussed by the Colorado Supreme Court.

136. Hansen, *supra* note 36, at 297-99.

137. *See* Appendix, *infra*.

138. *See* African Methodist Episcopal Zion Church in Am., Inc. v. Zion Hill Methodist Church, Inc., 534 So. 2d 224 (Ala. 1988).

somewhat unusual[139]—as well as to the local church's organization under state laws requiring denominational affiliation.[140] Another common approach is for the court to find that a history of subordination to the authority of the general church evinces an intent to be bound by that authority in property matters.[141]

Other courts frame their deference within the context of neutral principles in terms of the consent of the local congregation to the control of the national church.[142] A finding of consent often takes the form of a determination that something in the documents examined by the court has the effect of rebutting the presumption of majority control of the local congregation outlined in *Jones*.[143] Although the outcome is often precisely the same as in a strict-hierarchical-deference jurisdiction, the path traveled in arriving there is markedly different: under hierarchical deference, the court defers based on its determination of the organizational structure of the church, while under the consent-based hybrid model, the court defers based

139. Hansen, *supra* note 36, at 298 n.163 ("It is unclear how the court can use national church documents as evidence of intention by the local congregation to create a trust since trust intent must be found in the grantor. In these instances the national church, which is the beneficiary or grantee, evidences the intent to create the trust. The language in the documents is probably viewed as a legal limitation on the holding of property by the local church rather than as a trust.").

140. The fourth church in the *Barker* case is an excellent example of this version of the intent branch of the hybrid approach. That congregation, unlike the other three, was incorporated subsequent to the state's adoption of such a statute, and accordingly was found to have evinced an intent to be bound by the national church's trust provision. *See supra* note 132 and accompanying text.

141. *See* Green v. Lewis, 272 S.E.2d 181, 186 (Va. 1980) (finding that "from the language of the deed involved, the Discipline of the A.M.E. Zion Church, and the relationship which has existed between the central church and the congregation over a long period of years, that the A.M.E. Zion Church does have a proprietary interest in the property of Lee Chapel, and that its interest in the church property cannot be eliminated by the unilateral action of the congregation.").

142. *See, e.g.*, Ohio Se. Conference of Evangelical United Brethren Church v. Kruger, 243 N.E.2d 781, 786 (Ohio Ct. App. 1968) ("For many years the membership of the Mills Church consented and submitted to the control of a superior general church organization . . . . We find that the EUB Church is a connectional church and Mills Memorial EUB Church is a subordinate member of this larger religious organization and under its government and control."); *Green*, 272 S.E.2d at 186.

143. *See* Protestant Episcopal Church in the Diocese of L.A. v. Barker, 171 Cal. Rptr. 541, 556 (Ct. App. 1981) ("[Holy Apostles'] articles contain a specific provision declaring that on liquidation, dissolution, or abandonment of the corporation its property will insure to the benefit of a charitable fund organized and operated for religious or charitable purposes by the Diocese. We conclude that under neutral principles of law the property of Holy Apostles was subject to an express trust in favor of the Diocese on revocation of its charter . . . ."), *cert. denied*, 454 U.S. 864 (1981); Fluker Cmty. Church v. Hitchens, 419 So. 2d 445, 448 (La. 1982) ("[W]e conclude that the presumptive rule of majority control of use of Tract A has been overcome in favor of the hierarchical organization by provisions contained in its discipline and in the deed of acquisition.").

on the consent of the local church to be bound by the general church, as expressed in the documents.[144]

In many ways, these interpretational categories do little to clear up the conflicting results across the spectrum of state courts, in large part because the neutral principles approach and both of its subcategories can yield different results given the same facts, depending on how the court in question applies the standard.[145] Indeed, it is precisely this variation that has led many commentators writing since the *Jones* decision to question whether this patchwork of constitutional principles and fact-laden analysis is the best way to resolve the difficult issues presented by church property disputes in semi-hierarchical denominations. In the next section, these criticisms and some proposed solutions will be examined and evaluated. At the same time, it is also possible that the equitable interest in dealing with parties based on their circumstances in each particular case outweighs the need for uniformity—it would behoove courts to keep in mind Emerson's warning that "[a] foolish consistency is the hobgoblin of little minds."[146]

III. ANALYSIS: WHAT *OUGHT TO BE* THE STANDARD FOR CIVIL COURT INVOLVEMENT IN INTRACHURCH DISPUTES?

A. *Giving Hierarchical Deference its Due*

While the neutral-principles-of-law approach is currently followed, at least in name, by more states than any other approach, the older hierarchical-deference model is still relevant, and not only because it is currently in force in a number of other jurisdictions.[147] Several of the solutions proposed by commentators for resolving the problems with the neutral-principles approach result in precisely the same outcome as hierarchical deference, albeit utilizing a significantly different rationale to get there.[148]

144. *Compare* Draskovich v. Pasalich, 280 N.E.2d 69, 81 (Ind. Ct. App. 1972) ("[T]he local church in South Bend was organized as a church within the hierarchy of the Mother Church and therefore those who remain loyal to the Mother Church are entitled to control and use of the property in question."), *with* Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 818 (Iowa 1983) ("[T]he Book of Order gives [the general church] exclusive ultimate control of the uses and disposition of local church property. Local church property decisions are subject to general church approval, and the general church may take over local church government, as it did in this case, when it disagrees with local church handling of church affairs.").

145. *See, e.g.*, *infra* notes 179-201 and accompanying text.

146. 5 RALPH WALDO EMERSON, *Self-Reliance*, *in* ESSAYS AND ENGLISH TRAITS 63, 70 (Charles W. Eliot ed., P. F. Collier & Son Co. 1909).

147. *See* discussion *supra* Part II.D.

148. *See* discussion *infra* Part III.B.2.

1. Is the Deference Approach Actually Required by the Constitution?

Because the neutral-principles approach has been so widely adopted following *Jones*, it is vital to consider the strongest objections to it, and the *Jones* dissent is the logical place to begin. In his opinion, which garnered the support of three of his colleagues, Justice Powell[149] rebuked the majority's adoption of the neutral-principles approach and especially the majority's language endorsing neutral principles over *Watson*'s hierarchical-deference approach.[150] In Justice Powell's view, the new standard was a step in the wrong direction, both in terms of the difficulty in applying it and in the risk it posed of requiring civil courts to adjudicate religious questions in violation of the First Amendment.[151]

Justice Powell's main objections were based on two factors: first, his insistence that "[d]isputes among church members over the control of church property arise almost invariably out of disagreements regarding doctrine and practice[,]"[152] and second, his equally strong insistence that American religious organizations are by nature voluntary, and that by deciding to join such a body, a person consents to be bound by the decisions of that body, at least as to the resolution of disputed questions of faith.[153] According to Justice Powell, these principles necessitated a particular response from the civil courts:

> [I]n each case involving an intrachurch dispute—including disputes over church property—the civil court must focus directly on ascertaining, and then following, the decision made within the structure of church governance. By doing so, the court avoids two equally unacceptable departures from the genuine neutrality mandated by the First Amendment. First, it refrains from direct review and revision of decisions of the church on matters of religious doctrine and practice that underlie the church's determination of intrachurch controversies, including those that relate to control of church property. Equally important, by recognizing the authoritative resolution reached within the religious

149. Incidentally, Justice Powell was himself a Presbyterian. THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 246 (Lee Epstein et al. eds., 2d ed. 1996).

150. Jones v. Wolf, 443 U.S. 595, 610-11 (1979) (Powell, J., dissenting).

151. *Id.* at 610.

152. *Id.* at 616.

153. *Id.* at 617 ("All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871) (internal quotation marks omitted))).

association, the civil court avoids interfering indirectly with the religious governance of those who have formed the association and submitted themselves to its authority.[154]

For Justice Powell and his colleagues in the dissent, hierarchical deference was the only constitutionally acceptable option. Although the Court has not spoken expressly since *Jones* on the matter of church property disputes, it has declined to hear cases in which the lower courts followed the neutral-principles approach.[155] Thus, it appears that Justice Powell's insistence on hierarchical deference as the only constitutionally acceptable standard is unlikely to prevail, barring an unforeseen shift in First Amendment jurisprudence. Indeed, the trends in both Free Exercise and Establishment Clause jurisprudence are toward increased deference to the states,[156] so as long as both approaches continue to be constitutionally valid, such diversity of application appears likely to continue.

2. Weaknesses of Hierarchical Deference

Although both the majority opinion in *Jones* and subsequent practice have allowed hierarchical deference to continue, it has not been without its detractors. There are two main grounds upon which the hierarchical-deference approach is criticized: its unequal treatment of semi-hierarchical and congregational religious groups, and its tendency to invariably support the decisions of the general church regardless of the circumstances of those decisions.

According to Professor Greenawalt, the hierarchical-deference approach "contains an anomaly that is so evidently impossible to justify, it will almost certainly not survive. The anomaly is the different treatment accorded congregational and hierarchical churches once their polity is determined."[157] Because congregational churches and their members are dealt with by civil

154. *Id.* at 618 (footnote and citations omitted).

155. *See, e.g.*, Protestant Episcopal Church in the Diocese of L.A. v. Barker, 171 Cal. Rptr. 541, 555 (Ct. App. 1981) (applying neutral principles of law), *cert. denied*, 454 U.S. 864 (1981).

156. *See, e.g.*, Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (giving states significant leeway to pass "valid and neutral law[s] of general applicability" even if such laws conflict with some citizens' religious beliefs) (internal quotation marks omitted) (quoting United States v. Lee, 445 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))); Locke v. Davey, 540 U.S. 712, 718-19 (2004) (discussing the "play in the joints" between the Free Exercise and Establishment clauses, which allows states some flexibility in enacting laws concerning religion) (internal quotation marks omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970))); Steven K. Green, *Religion Clause Federalism: State Flexibility Over Religious Matters and the "One-Way Ratchet,"* 56 EMORY L.J. 107, 107 (2006) ("[W]e are witnessing an expansion of church-state collaborations at the state and local levels that deviate from a unitary, 'one-size fits all' model.") (citation omitted).

157. Greenawalt, *supra* note 13, at 1866.

courts on the same terms as secular voluntary associations, aggrieved members may seek civil court protection of certain common-law rights in their relations with the church.[158] Under the hierarchical-deference standard, members of hierarchical or semi-hierarchical congregations, on the other hand, may be deprived of all such rights as long as the denomination determines they should be.[159]

Another objection to the hierarchical-deference approach arises from the observation that it inherently favors one party to litigation (viz., the general church) over the other (the local congregation), regardless of the particulars of the situation, including who bought or donated the property and who maintained it. This tendency was perhaps best summed up by the Supreme Court of Kentucky in *Bjorkman v. Protestant Episcopal Church in the United States of America of the Diocese of Lexington*, in which that court outlined its reasoning for adopting the neutral-principles approach.[160] The court observed that

> [w]hile the neutral-principles doctrine may not be the panacea foreseen by the majority in *Jones v. Wolf*, in cases such as this, the application of neutral-principles appears to be preferable to compulsory deference since in every case, regardless of the facts, compulsory deference would result in the triumph of the hierarchical organization.[161]

The general effect of adopting an approach that always leads to the victory of the general church in any such dispute at least raises questions

158. The Supreme Court of Virginia noted that

> [a] member of a congregational church, seeking the aid of the court in protecting his civil and property rights, may appeal only to the simple and fundamental principles of democratic government which are universally accepted in our society. These principles include the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes. Such rights are fundamental to our notions of due process. They are neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well. Courts must apply them every day, and can do so without any danger of entering a "religious thicket." Therefore, the authorities which preclude the courts from examining whether an hierarchical church correctly followed its own internal procedures, or correctly applied its canon law, are inapposite to the question before us.

Reid v. Gholson, 327 S.E.2d 107, 113 (Va. 1985).

159. Greenawalt, *supra* note 13, at 1866.

160. Bjorkman v. Protestant Episcopal Church in the U.S. of the Diocese of Lexington, 759 S.W.2d 583 (Ky. 1988).

161. *Id.* at 586.

about whether that approach tends toward an impermissible establishment of religion.[162] Furthermore, deferring to the decision of a tribunal which is itself an arm of the general church potentially raises concerns about self-interested decision-making.[163]

At first glance, Justice Powell's contractual vision of hierarchical congregations detailed in his *Jones* dissent does away with both of these objections. After all, the member knew and understood (or should have, at least) the decision-making power of the internal structures of the church hierarchy before joining, and willfully chose to submit to those authorities. However, as Professor Greenawalt has pointed out, any such contractual commitment made by the affiliating parties may have been conditioned, perhaps expressly but more likely by unspoken expectation, on the continuance of the hierarchy to remain on the course it has followed in the past.[164] Greenawalt notes that radical changes may be enacted at the denominational level, and asks whether "local church members mean to adhere to hierarchical decisions in such altered conditions, rather than to the principles prevailing when they decided to join, or to local officials who refuse to follow the hierarchy."[165]

Based on these objections, the "members' expectations" rationale for strict hierarchical deference is a weak justification for the approach. Nevertheless, hierarchical deference is not only constitutionally permissible, but alive and in active use in many states.[166]

B. *Neutral Principles in Theory and Practice*

In giving its official approval to the neutral-principles approach in *Jones*, the Supreme Court extolled several virtues it felt commended the approach over earlier methods, and particularly over hierarchical deference. This litany of praise is worth examining in full:

---

162. Greenawalt, *supra* note 13, at 1876-77.

163. *See, e.g.*, Cal.-Nev. Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church, 17 Cal. Rptr. 3d 442, 454 (Ct. App. 2004) ("We know of no principle of trust law stating that a trust can be created by the declaration of a nonowner that the owner holds the property as trustee for the nonowner.").

164. Greenawalt, *supra* note 13, at 1874.

165. *Id.* Greenawalt also considers that denominational particulars may have a profound impact on the expectations of the parties:

> Roman Catholics may continue to have a sense that their main attachment is to an international church. In contrast, many Protestants now join a local church that seems suitable, with relatively little concern about the general denomination; they switch denominations freely and, regardless of denomination, may consider the congregational government of their local church as most important.

Id. at 1875.

166. *See* Appendix, *infra*.

> The primary advantages of the neutral-principles approach are that it is *completely secular in operation*, and *yet flexible enough to accommodate all forms of religious organization and polity*. The method relies exclusively on *objective, well-established concepts* of trust and property law familiar to lawyers and judges. It thereby promises to *free civil courts completely from entanglement in questions of religious doctrine, polity, and practice*.[167]

Although the Court acknowledged that there might be some problems in applying the neutral-principles approach, particularly when courts are asked to examine relevant documents containing religious language and to discern the secular effect of those provisions,[168] it also expressed confidence that in the final analysis, the benefits of the approach, particularly in its "promise of nonentanglement and neutrality," outweighed any difficulties it might present to lower courts in the future.[169]

1. How the Neutral-Principles-of-Law Approach Has Actually Worked

While the particular promises foreseen by the *Jones* majority may have been fulfilled, at least to some extent, the neutral-principles approach has yielded another result, unforeseen, or at least unmentioned by the Court in *Jones*: massive inconsistency in the application of the doctrine. This

---

167. Jones v. Wolf, 443 U.S. 595, 603 (1979) (emphases added). The Court continued:

> Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

Id. at 603-04.

168. *Id.* at 604 ("This is not to say that the application of the neutral-principles approach is wholly free of difficulty. The neutral-principles method . . . requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms . . . . In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." (citation omitted)).

169. *Id.*

variance, which some commentators predicted shortly after *Jones* was handed down, stems primarily from a lack of guidance given by the Court for the application of the approach.[170] The variety in positions goes far beyond the two main interpretational categories discussed above (strict-neutral-principles and hybrid of hierarchical-deference and neutral-principles), and has been the subject of much criticism, both from scholars[171] and from the judges whose duties require them to undertake the application of the standard.[172] Indeed, one judge contemplating subsequent state court church property dispute jurisprudence has called the current situation "a welter of contradictory and confusing case law largely devoid of certainty, consistency, or sustained analysis."[173]

Confusion centers around two related issues: whether and to what extent a trust in favor of the general church must be express to be recognized, and what burden the general church must carry in establishing the trust.[174] Some states require an express trust, on the ground that church property disputes do not generally lend themselves to the analysis courts normally undertake when determining whether property is subject to an implied trust,[175] while other jurisdictions (still purportedly applying neutral principles) find in favor of the general church even when the minimal standards for implied trusts are not satisfied.[176] Still other courts have entertained the possibility that the circumstances of the parties' relationship over time may indicate the local congregation should be estopped from denying its intent to give the general church control of the property.[177] In regard to the burden of showing the

170. *See* Louis J. Sirico, Jr., *The Constitutional Dimensions of Church Property Disputes*, 59 WASH. U.L.Q. 1, 77-79 (1981); Robert A. Recio, Note, Jones v. Wolf: *Church Property Disputes and Judicial Intrusion into Church Governance*, 33 RUTGERS L. REV. 538, 562 (1981). Of course, because the *Jones* Court was merely approving a standard rather than mandating one, the Court was not obligated to give guidance.

171. *See, e.g.*, Ross, *supra* note 97, *passim*; Hansen, *supra* note 36, at 296; Alderman, *supra* note 98, at 1043-51; Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 130-35 (1998).

172. *See, e.g.*, John E. Fennelly, *Property Disputes and Religious Schisms: Who Is the Church?*, 9 ST. THOMAS L. REV. 319, 353 (1997).

173. *Id.*

174. Greenawalt, *supra* note 13, at 1894.

175. *Id.* (citing Gerstenblith, *supra* note 100, at 554-56).

176. *See, e.g.*, Kendysh v. Holy Spirit Byelorussian Autocephalic Orthodox Church, 683 F. Supp. 1501, 1510-12 (E.D. Mich. 1987), *aff'd*, 850 F.2d 692 (6th Cir. 1988).

177. *See, e.g.*, Crumbley v. Solomon, 254 S.E.2d 330, 333 (Ga. 1979). This often includes consideration of the failure of a local congregation to object to or seek disaffiliation after a change to general-church documents which purports to alter the legal rights of the parties. For example, the Georgia Supreme Court noted that the local church at issue in *Crumbley* did not challenge the trust provision at issue for more than three decades, and stated that because it "remained a member of the Association and accepted the benefits flowing from that relationship, it cannot now deny the existence of a trust for the benefit of the general church." *Id.* Justice Bowles, writing in dissent, noted the majority's use of estoppel language and chastised the majority for departing from Georgia precedent precluding such an estoppel theory. *Id.* at 336-37 (Bowles, J., dissenting).

existence of a trust, some courts have required different levels for the general and local churches, while others have placed the parties on equal footing.[178]

The result of these discrepancies in applying the neutral-principles approach is that courts purporting to employ neutral principles in the same way actually place themselves in different interpretational categories, not only from state to state but even within states in some cases.[179] A prime example is found in the conflicting decisions of California's Courts of Appeal.[180] As discussed earlier, the 1981 *Barker* decision expressly applied the neutral-principles approach, and until very recently, California courts had employed that approach, though sometimes in very different ways.[181] The Second District's use of neutral principles in *Korean United Presbyterian Church v. Presbytery of the Pacific*[182] and *Guardian Angel Polish National Catholic Church of Los Angeles, Inc. v. Grotnik*[183] is simply inconsistent with that of the Fifth District in *California-Nevada Annual Conference of the United Methodist Church v. St. Luke's Methodist Church.*[184] Although both courts stated that the neutral-principles approach was the governing standard in California, the *Korean United* and *Guardian Angel* courts took what was essentially a hybrid approach,[185] while the court in *St. Luke's* sharply criticized the decision in *Guardian Angel* and followed the *Barker* court's strict-neutral-principles analysis.[186]

Korean United involved a dispute among the members of the Korean United Presbyterian Church, a Los Angeles congregation of the PC(USA) and the "oldest Korean immigrant congregation in the United States."[187] About seventy to eighty-five percent of the members sided with Rev. Sang Bom Woo and against the Presbytery, which designated Rev. Woo and his adherents as the "dissident" faction of the church and asserted ownership of

---

178. Gerstenblith, *supra* note 100, at 544.

179. Greenawalt, *supra* note 13, at 1903. For a further discussion of these discrepancies, see Alderman, *supra* note 98, at 1043-50.

180. Of course, with the Fourth District's June 2007 opinion in *In re Episcopal Church Cases*, it is now unclear whether California courts are to apply neutral principles at all. 61 Cal. Rptr. 3d 845 (Ct. App. 2007), *review granted*, (Sept. 12, 2007).

181. *See supra* notes 123-132 and accompanying text.

182. 281 Cal. Rptr. 396 (Ct. App. 2 Dist. 1991) (finding for general church), *overruled on other grounds by* Morehart v. County of Santa Barbara, 872 P.2d 143 (1994).

183. 13 Cal. Rptr. 3d 552 (Ct. App. 2 Dist. 2004) (finding for general church).

184. 17 Cal. Rptr. 3d 442 (Ct. App. 5 Dist. 2004) (finding for local congregation).

185. *Guardian Angel*, 13 Cal. Rptr. 3d at 561.

186. *St. Luke's*, 17 Cal. Rptr. 3d at 454-55.

187. *Korean United*, 281 Cal. Rptr. at 398.

the congregation's resources on behalf of the fifteen to thirty percent representing the "true church."[188] In finding for the PC(USA), the *Korean United* court stated that the California Corporations Code created a presumption that denominational trust rules were enforceable in California.[189]

Guardian Angel built on the decision in *Korean United* and involved a Los Angeles parish of the Polish National Catholic Church (PNCC).[190] Despite its name, the PNCC is not in communion with the Roman Catholic Church, and unlike that body is not organized on strictly hierarchical grounds.[191] The parish's board of directors voted to disaffiliate with the national church, and the trial court found that under the neutral-principles approach, the property belonged to the parish.[192] The appellate court disagreed, giving precedence to the PNCC's internal rules over California statutes governing nonprofit associations.[193] The court found that, even under the neutral-principles approach, "[p]rovisions found in the general church's constitution 'can override any right the majority of a local congregation might otherwise have to control the local church property.'"[194] Provisions in the national church constitution required diocesan approval of the board of directors for decisions of that board to be valid, and because the board of directors was not approved, its actions to repeal the parish's bylaws and withdraw from the PNCC were likewise invalid.[195] Based on the constitution and the (unrepealed) bylaws, the court found that the property was held in trust for the national denomination.[196]

In *St. Luke's*, a Methodist congregation was found by both the trial court and the appellate court to have created a trust in its property in favor of the national church.[197] However, while the trial court found the trust irrevocable by the parish under a California statute, the appellate court found that the trial court's interpretation of the statute at issue (based on the *Korean United* opinion) conflicted with "basic principles of trust law," which state that the settlor, or maker of a trust (in this case, the parish), may revoke it, as the parish in fact did.[198] In its opinion, the Court of Appeal for the Fifth District noted that its decision conflicted with the Second Circuit's *Korean United*

188. *Id.* at 398-99.
189. *Id.* at 412-13.
190. *Guardian Angel*, 13 Cal. Rptr. 3d at 553.
191. PNCC.org: Our History, http://www.pncc.org/who_history.htm (last visited Nov. 2, 2007).
192. *Guardian Angel*, 13 Cal. Rptr. 3d at 558, 560-61.
193. *Id.* at 561.
194. *Id.* at 560 (quoting Metropolitan Philip v. Steiger, 98 Cal. Rptr. 2d 605, 610 (Ct. App. 2000)).
195. *Id.* at 557, 560-61.
196. *Id.* at 561.
197. Cal.-Nev. Annual Conference of the United Methodist Church v. St. Luke's Methodist Church, 17 Cal. Rptr. 3d 442, 450-51 (Ct. App. 2004).
198. *Id.* at 452-53.

and *Guardian Angel* decisions, and strongly criticized those opinions as essentially giving dispositive weight to the determination of the general church, in a manner essentially indistinguishable from the hierarchical-deference approach, despite the strict-neutral-principles precedent of *Barker*.[199] The *St. Luke's* court concluded by stating:

> [W]e respectfully disagree with the view that acts of a board of directors of a lawfully formed corporation may be viewed by a civil court to be a nullity simply because those acts are deemed unauthorized not by any recognized rule of state law, but rather only by the general church's own rules. In *Barker* the court stated: "Essentially, the hierarchical theory subordinates civil control of church property to ecclesiastical control of church property. Under this theory the canons and rules of a general church override general principles of legal title in the resolution of church controversies over property." *Although the hierarchical theory has supposedly been rejected in California, it will nevertheless live on under the label of "neutral principles of law," if a church's own rules are viewed as trumping state statutes.*[200]

This type of split may result even when a jurisdiction has expressly placed itself in one of the two narrower interpretational categories, either strict-neutral-principles or a hybrid of neutral-principles and hierarchical-deference.[201]

---

199. *Id.* at 455-56.

200. *Id.* at 456 (emphasis added) (citation omitted). Again, the Court of Appeal's *In re Episcopal Church Cases* opinion means that it is by no means clear that hierarchical deference has been rejected in California—the decision says precisely the opposite, that the entire *Barker* line of cases ignores the California Supreme Court's last word on the matter, and that neither the strict-neutral-principles interpretation of *St. Luke's* nor the nominally neutral-principles hybrid interpretation of *Korean United* and *Guardian Angel* are warranted under California law. *In re* Episcopal Church Cases, 61 Cal. Rptr. 3d 845, 894-95 (Ct. App. 2007), *review granted*, (Sept. 12, 2007). Furthermore, the *Episcopal Church Cases* court rejected the *St. Luke's* court's interpretation of the California Corporations Code, holding that in hierarchically organized churches, the general church (rather than the parish) is the settlor. *Id.* at 878-84. The California Supreme Court's unanimous grant of review in *In re Episcopal Church Cases* on September 12, 2007 means there may soon be a resolution to at least this threshold question. *See* Docket (Register of Actions) for *In Re Episcopal Church Cases*, No. S155094, (Sept. 12, 2007), http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=484283&doc_no=S155094.

201. Hansen, *supra* note 36, at 296.

2. Lesser Proposals for Resolving the Inconsistencies

Must these inconsistencies be resolved? The conflicts between states are perhaps not terribly problematic because the substantive areas of law implicated by the neutral-principles approach, such as property, trust, and corporate law, have traditionally been areas controlled by state law. However, there are two arguments for the proposition that anything beyond the mildest of discrepancies requires some correction. First, as noted above, there have been some splits between courts in the same state.[202] Second, allowing for a vast multiplication in the variety of reasoning within each constitutionally acceptable approach places a substantial burden on the general churches, which as national organizations would be hard pressed to litigate under as many as fifty (or more) different legal standards.[203] The first is more defensible as a justification for judicial intervention. As to the second, it seems evident that by allowing parishes to acquire and hold title to real property, general churches have enjoyed relief from the administrative burdens and liabilities borne by more centralized bodies such as the Roman Catholic Church and Church of Jesus Christ of Latter-Day Saints. The tradeoff may be that granting this allowance could significantly weaken the general church's claim of ownership.

If courts must resolve these discrepancies, how should they approach this task? Commentators disagree on the most important values civil courts should consider when deciding church property disputes. Some argue that maintaining standards which treat the parties equally should be paramount, because otherwise courts run the risk of "establishing one religious faction at the expense of the free exercise rights of the other."[204] Of course, treating the parties equally generally requires a very intensive search into the circumstances, upon which the result may turn. Where the controversy itself may be religious in nature or have religious aspects, this depth of inquiry can raise its own First Amendment problems, because the court may be asked to tread close to the line of resolving doctrinal or theological matters. Others contend that the primary concern in establishing a standard should be predictability and consistency, even if that comes at a substantial cost to the equal treatment of the parties.[205]

202. *See supra* note 123; *see also supra* notes 179-201 and accompanying text.

203. Although regional bodies such as Presbyteries and Dioceses are sometimes the main litigants on the general church side, these entities sometimes span state lines and thus raise the same concern.

204. Gerstenblith, *supra* note 43, at 317; *see also* Greenawalt, *supra* note 13, at 1904.

205. *See, e.g.*, Belzer, *supra* note 171, at 135 ("It is unquestioned that religious bodies are free to organize themselves and their system of governance in any manner that they deem appropriate. However, if religious institutions cannot predict the outcomes of potential disputes their ability to organize church polity is significantly curtailed. Predictability in the resolution of intrachurch disputes is essential to the First Amendment's guarantee of Free Exercise, because only with predictability will churches be truly free to exercise their ecclesiastical choices regarding polity and

With these principles in mind, commentators have prescribed a number of treatments they hope will heal what all agree is a diseased patient, namely, the corpus of American law dealing with church property disputes. Most (though not all[206]) support some version of the neutral-principles approach, though, like decisions employing that reasoning, they differ considerably on what the proper scope of a neutral-principles analysis should be.

a. Neutral Principles, but Allowing for Some Implied Trusts (Hybrid Approach)

Many of these objections lead critics of the strict-neutral-principles approach to contend that the hybrid interpretation is more likely to give effect to the intent of the parties, as it allows courts to imply trusts or contracts in some cases provided they find reason to do so upon examination of the documents (subject always, of course, to the constitutional bar on deciding matters of doctrine).[207] According to this line of reasoning, the hybrid approach takes into account the purported inability or unwillingness of churches to draft instruments that clearly invite civil perusal and allows the conflict to be settled without offending constitutional principles.[208]

Many of the objections to this approach have already been discussed; they include most notably the assertion of a tie between implied trusts and the forbidden English rule approach, the inscrutability of the grantor's intent when circumstances have changed dramatically, and the argument that secular judges are ill-equipped for and possibly constitutionally forbidden from making guesses about the religious purposes which may underlie ambiguous language in the documents of both parties.[209] Taken together, these defects make the hybrid approach dangerous on both constitutional and fairness grounds, and should lead courts to reject its implementation.

organization." (footnotes omitted)).

206. *See id.* (decrying the inconsistencies inherent in any neutral-principles approach and arguing that hierarchical deference is the only constitutionally appropriate standard).

207. Hansen, *supra* note 36, at 301.

208. *Id.* at 301-02.

209. *See supra* notes 47-51, 164-66, 168-69 and accompanying text.

b. *Neutral Principles, but General-Church Trust Clauses are Dispositive*

In 1987, William G. Ross posited that predictability in the application of neutral principles of law could most easily be obtained if the national churches adopted express trust clauses in their own constitutions, making clear the relationship between the national church and the local bodies.[210] In doing so, Ross relied on a paragraph in the *Jones* decision, which proposed that in anticipation of adjudication under the neutral-principles approach, the general church's constitution "can be made to recite an express trust in favor of the denominational church . . . . And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form."[211] Ross noted that the mainline Episcopal and Presbyterian churches had adopted such clauses following the *Jones* decision, and speculated that the changes would mandate the most predictable result—court victory for the national church in every case—and also result in a decrease in the number of lawsuits over church property.[212]

Suffice it to say that things have not quite gone that way. The flow of church property cases has not abated, despite the adoption of express trust clauses in the constitutions of general churches, and the results of those actions have been anything but uniform, at least in neutral-principles-of-law jurisdictions.[213] The primary reason for the failure of the churches' constitutional provisions to definitively resolve each dispute is that many courts applying the neutral-principles approach have considered it their duty to look not only to the constitution of the general church, but to other relevant documents as well, including the deeds and articles of incorporation of local congregations and relevant state statutes.[214] Enough courts applying the *Jones* neutral-principles approach have given equal weight to each of these documents that it is obvious that constitutional changes by the general churches, in and of themselves, are insufficient to resolve these matters.[215]

Denominational trust clauses have been subjected to criticism apart from their lack of dispositive effect. In addition to the attacks on the validity and

---

210. Ross, *supra* note 97, at 313-15.

211. Jones v. Wolf, 443 U.S. 595, 606 (1979).

212. Ross, *supra* note 171, at 314 ("Although courts have not yet had occasion to construe the effect of those provisions, it seems clear that under either . . . approach a court *must hold that the national church controls local property*." (emphasis added)). Ross also posited that "[l]ocal churches will recognize that an express trust in favor of the national church will compel summary judgment in favor of the national church." *Id.*

213. *See supra* notes 179-201 and accompanying text.

214. *See, e.g.*, Protestant Episcopal Church in the Diocese of L.A. v. Barker, 171 Cal. Rptr. 541, 553-55 (Ct. App. 1981), *cert. denied*, 454 U.S. 864 (1981).

215. *See supra* notes 179-201 and accompanying text.

the fairness of the clauses discussed above,[216] there have been significant objections to reliance solely on purported trust provisions on the grounds that they fail to reflect the mutual intent of the parties, as required by the language in *Jones*, which stated that "the civil courts will be bound to give effect *to the result indicated by the parties*."[217] In the words of one commentator, the Court in *Jones* "apparently presumed that national adoption of any proposed amendments would be contingent on relevant, local ratification."[218] At least some courts have taken this approach, holding that national trust clauses adopted after the local congregations joined the denomination failed to reflect the intent of both parties to create a trust relationship, and thus could not be enforced without additional confirmation of the parties' intent.[219] Other commentators have suggested that even when trust clauses predate a local congregation's affiliation with the general church, acceptance of the trust clause may be compulsory for admittance to the denomination, and thus may not actually represent the intent of the congregation.[220]

On balance, denominational trust clauses by themselves are not dispositive and in fact raise numerous other objections.[221] Consequently, these clauses do not provide a definitive means of resolving the confusion in the application of neutral principles of law.

c. *Neutral Principles, but Inquiry Limited by General Church Constitution*

Another somewhat related possibility is that the interests of the parties would best be served by a limited version of the neutral-principles approach that operated by restricting the inquiry to only what is permitted by the

---

216. *See supra* notes 83-94 and accompanying text; Hansen, *supra* note 36, at 300.

217. Jones v. Wolf, 443 U.S. 595, 606 (1979) (emphasis added).

218. Lunceford, *supra* note 26, at 34-35.

219. *See Barker*, 171 Cal. Rptr. at 555. Even in denominations with a relatively representative form of governance, an adoption by the national church of an amendment adding a trust clause to its constitution may not be of sufficient legal force to bind individual congregations. Lunceford notes that

> [i]n the Presbyterian Church (USA) . . . the adoption of amendments to the denomination's constitution occurs by vote of a requisite number of regional presbyteries, rather than by a vote of local churches. And it is often stated within the denomination that the individuals who participate in a presbytery vote do not act in a representative capacity on behalf of a local church.

Lunceford, *supra* note 26, at 35.

220. Hansen, *supra* note 36, at 301.

221. *See supra* notes 217-20 and accompanying text.

general church constitution. Indeed, such a methodology has been proposed in the wake of the adoption of trust clauses and their failure to conclusively resolve church property disputes.[222] This church constitution-focused approach could yield three possible outcomes: first, the church constitution could be made to specify that civil courts should defer to the determinations of the ecclesiastical body; second, the constitution could be made to list certain documents to which civil courts would be allowed to look in determining the property ownership; and third, the constitution could be left silent on the issue.[223] One commentator argues that such an approach would allow civil courts to enforce contractual agreements between the parties in the first two cases, and to enforce state property law in the third.[224]

The first outcome suffers from the same inherent weaknesses as reliance on denominational trust clauses, namely, the lack of mutual intent of the parties to create a trust. These criticisms also apply on a more general level to all three possibilities: because local congregations have little influence over the amendment of denominational constitutions, restricting the scope of the civil court inquiry to only whatever is permitted by those constitutions renders the contract rationale almost wholly inapposite.[225] Local parishes, particularly those representing a minority view in the denomination, will be unable to influence the amendment process, and because most general churches require only a majority to enact constitutional changes, a local church may be attacked based on a provision it strongly opposed—a principle which may work well for democratic government, but which completely fails a contract analysis.[226] Further, any restriction of the inquiry to the general church constitution would ignore the "facts on the ground": who bought or donated the property, who maintained the property, and so forth. Regardless of what provisions the general church decides to adopt, the approach essentially becomes a stand-in for hierarchical deference[227] and completely forsakes the courts' interest in equal treatment of the parties.

d. Neutral Principles, but Limited to Secular Documents

If limiting the courts' inquiry to only church documents is not workable, would a version of the neutral-principles approach that did the opposite better address the issues implicated in church property disputes? What if courts seeking to discern the parties' intent were forbidden from considering

222. Alderman, *supra* note 98, at 1055-63.

223. *See id.* at 1057-59.

224. *Id.* at 1060.

225. *See supra* notes 216-219 and accompanying text.

226. *See supra* notes 216-19 and accompanying text.

227. *See* Alderman, *supra* note 98 at 1061 ("Even if the effect of these changes is a de facto deference regime, it will be deference at the choice of the church and not the court.").

any religious documents, including church constitutions, but were permitted to examine only secular documents such as "deeds, corporation papers, and other legal documents"?[228] Would such a test, proposed by Professor Sirico and premised on the idea that courts often lack the competence to ascertain the details of church structure and particularly the parties' intent,[229] provide a workable standard?

There are at least a few drawbacks to a secular-documents approach. The first is that applying the test to situations in which the relationship was established before the secular-documents approach was even contemplated might lead to "very unfair results," because the parties might have organized their affairs under the assumption that all relevant documents would be considered in any later controversy.[230] A further issue is suggested by Professor Sirico's own admission that the secular-documents test contains a bias in favor of the general churches, arising from their technical sophistication in drafting secular documents.[231] Viewed in another light, however, it seems that there is at least an equal chance of a bias in the other direction. Faced with the prospect of the implementation of a secular documents test, general churches, which up to now had relied upon such devices as denominational trust clauses, would be forced to attempt to adopt, or force local congregations to adopt, secular documents reflecting the principles the general churches insisted were always in effect. Particularly in light of the current strife within the mainline churches, it seems unlikely that local parishes would willingly accede to such attempts.

e. Free Speech Protection as Substitute or Shortcut?

Another intriguing possibility is raised by the trial court's joint resolution of the three cases in California under the name of *Rasmussen v. Bunyan*,[232] now on appeal as *In re Episcopal Church Cases*, which presented a new "twist" on church property disputes, under which the defendant party files a special motion to strike, alleging that the lawsuit is being brought to

228. Sirico, *supra* note 170, at 357.
229. *Id.* at 358.
230. Greenawalt, *supra* note 13, at 1886.
231. Sirico, *supra* note 170, at 358.
232. Rasmussen v. Bunyan, No. 04CC00647, slip op. (Cal. Super. Ct. Orange County Sept. 9, 2005); Adair v. Poch, No. BC321101, slip op. (Cal. Super. Ct. L.A. County Sept. 9, 2005); O'Halloran v. Thompson, No. BC321102, slip op. (Cal. Super. Ct. L.A. County Sept. 9, 2005), *all rev'd sub nom. In re* Episcopal Church Cases, 61 Cal. Rptr. 3d 845 (Ct. App. 2007), *review granted*, (Sept. 12, 2007). The cases were consolidated as *Rasmussen v. Bunyan* for adjudication by the Orange County Superior Court.

limit its right to free speech or petition.[233] The parishes seeking to leave the Diocese of Los Angeles filed a special motion to strike the Diocese's cause of action, alleging the suit was intended to muzzle the parishes' public statements about their religious reasons for disaffiliating and, thus, a "strategic lawsuit against public participation" ("SLAPP") barred by California statute.[234] California allows challenges to alleged SLAPPs, and the lawsuit in question will be dismissed if (1) the court finds it is intended to stop or punish acts "in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue" and (2) the plaintiff is unlikely to prevail on the merits.[235] The trial court in *Rasmussen* found that both prongs were met and granted the local churches' special motion to strike.[236]

As commentary following the *Rasmussen* decision has noted, several states in addition to California, including Georgia, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Rhode Island, Utah, and Washington have similar anti-SLAPP provisions.[237] It is conceivable that local churches in these states might make anti-SLAPP arguments, particularly given the success of the tactic in *Rasmussen*, at least at the trial court level. A further wrinkle is that in some states, such as Louisiana, the anti-SLAPP statute includes a provision allowing for the awarding of reasonable attorney fees and costs for a party filing a successful anti-SLAPP motion.[238]

However, the trial-court anti-SLAPP success of the *Rasmussen* plaintiffs may be merely a short-lived aberration. As noted above, on appeal the decision of the trial court was reversed, and in addition to rejecting the constitutional standard employed by the trial court to resolve the second anti-SLAPP prong, the appellate panel held that the anti-SLAPP statute did not even apply to the matter.[239] The court took particular pains to reject the notion that the parishes' reasons for disaffiliation could be the basis for an anti-SLAPP motion in what was essentially a pure question of property control:

---

233. Yaw, *supra* note 98, at 833.

234. CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2007).

235. § 425.16(b)(1).

236. *Rasmussen*, No. 04CC00647 at 1. It is important to note that the granting of an anti-SLAPP motion is not a recognition by the granting court of a free-speech right in the parish to withdraw from a denomination with its property intact. Rather, it is a finding that but for the expressive actions taken by parishes wishing to publicly disassociate themselves from the general church's views, the lawsuit would not have been filed. *Id.* at 8. The court in *Rasmussen* found that "[t]he root of the instant controversy is defendants' public disaffiliation from the Church over doctrinal issues rather than simply an alleged change in the control of the property." *Id.*

237. Yaw, *supra* note 98, at 837 & n.203.

238. *See, e.g.*, LA. CODE CIV. PROC. ANN. art. 971(B) (2005).

239. *In re* Episcopal Church Cases, 61 Cal. Rptr. 3d 845, 852 (Ct. App. 2007) ("The trial court therefore erred in concluding that the first prong was satisfied."), *review granted*, (Sept. 12, 2007).

> [I]t makes no difference *why* the defendants are disaffiliating, the point is they are being sued for asserting *control over the local parish property* to the exclusion of a *right to control asserted by the plaintiffs*. The fact that a religious controversy may have prompted the dispute over the right to control the property does not mean the defendants are being sued for the "protected activity" of changing their religion.
>
> . . . .
>
> . . . This complaint could stand alone as a simple dispute over who controls certain real property, and hence does not implicate any protected activity on the part of the local church.[240]

The parishes asked the California Supreme Court to review the Court of Appeal's decision, and the petition was unanimously granted on September 12, 2007.[241] Thus, the fate of anti-SLAPP motions as applied to California church property disputes remains unresolved for now, but may be settled in the coming months. An affirmation of the Court of Appeal's reasoning would essentially close the door on this novel application, and provide strong ammunition in the form of persuasive authority for parties seeking to defend against anti-SLAPP motions in other jurisdictions that allow them.

Even if courts take the approach of the *Rasmussen* trial court and find that suits by general churches against parishes disaffiliating out of religious protest are indeed SLAPPs, "anti-SLAPP motions" are unlikely to change the eventual outcome, as courts ruling on them are still required to weigh the plaintiff's chance of success.[242] Making such a determination requires the court to make a full examination of the substantive questions governed by the jurisdiction's chosen standard from *Watson* or *Jones* just as it would in ruling on a motion for summary judgment or summary dismissal.[243] Accordingly, although local churches seeking the protection of an anti-SLAPP motion may be able to draw on another argument—abridgement of free-speech protections—that argument is insufficient on its own to ward off

---

240. *Id.* at 851-52 (emphases in original).

241. Docket (Register of Actions) for *In re Episcopal Church Cases*, No. S155094, (Sept. 12, 2007), http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=484283&doc_no=S155094.

242. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2007).

243. *See, e.g., In re Episcopal Church Cases*, 61 Cal. Rptr. 3d at 849.

the claims made by the general church. Of course, the anti-SLAPP motion is also only available to defendants alleging that the suit is being brought in response to an assertion of free speech rights, and thus will likely not be relevant in circumstances where the procedural posture of the parties is different (namely, where the suit is brought by the local congregation rather than the general church).

f. Abandoning the Current Regime Entirely

Rather than choosing from among the current options, perhaps with evidentiary restrictions such as those proposed above, some have suggested moving entirely away from civil court adjudication of church property disputes.[244] The proposal is grounded in the idea that taking an arbitration-based approach relying on the mutual consent of the parties will achieve the religious value of avoiding protracted confrontation and the antagonism that frequently results, while steering clear of First Amendment issues that arise whenever a civil court considers a church property dispute.[245] Moving the dispute out of the civil courts allows for the discussion of a wider range of ideas, including those of a theological nature, recourse to experts more intimately acquainted with the nature of the parties and possibly their respective intents, and the promise of resolutions which civil courts have the power to enforce.[246] However, moving to arbitration as the preferred method of resolving such disputes would also require the parties to move toward a more corporate footing, one based more on the suspicion inherent in arm's-length dealing than the hopeful trust and good will which would seem to fall within the reasonable expectations of parties with shared religious beliefs.

C. The Best Proposal: Strict Neutral Principles Only

Each of the models discussed above has its own strengths and weaknesses. In a more perfect world, religious organizations would be able to manage their own affairs and structure the terms of their own relationships. Although disputes between religious entities might still arise, civil courts would not have to resolve them and thus the litany of First Amendment concerns addressed above would never become an issue. Of course, this ideal is seldom seen in practice because of diverse factors that prevent such foresight in structuring relationships, including differing historical understandings, shifting constitutional standards and a reluctance

244. *See, e.g.*, Michael William Galligan, Note, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007, 2035-38 (1983).

245. *Id.*

246. *Id.* at 2037.

by religious groups to acknowledge the likelihood or even the possibility of conflict. The final conclusion one reaches as to which approach courts should follow likely depends in large part on which competing concern one considers most important: consistency, or most accurately reflecting the interests of the parties. The position one takes as to the rights of the parties at the outset also appears to have a significant influence.[247] This also presumes that church property disputes are an appropriate area for civil adjudication, which some constitutional scholars dispute.[248]

There is also the very real danger that the parties' arguments will be clouded by self-interest. In the particular circumstances in which American mainline Protestant churches find themselves, traditionalist local congregations and commentators (who more generally favor the autonomy of religious bodies and restrictions on the influence of secular government over religion) may realize secular courts are their last recourse in the face of denominations that have evolved theologically in spite of protest.[249] This might lead them to espouse the approach that gives them the best chance of retaining the property they have been using, despite the consequences for church-state relations more broadly. At the same time, national churches

247. *Compare, e.g.*, Alderman, *supra* note 98, at 1061 ("Finally, [general] churches . . . will most likely *lose property* to local break-away congregations . . . . When these churches begin to *lose their property*, the general church or denomination will quickly want to change the constitution.") (emphases added), *with* Gerstenblith, *supra* note 100, at 541 n.177 ("For these three [local] churches, therefore, the statute was considered inapplicable, and those churches were permitted to *keep their property* upon disaffiliation.") (emphasis added).

248. Some commentators, including Douglas Laycock, argue that, at least as to internal matters, the voluntary and sectarian nature of religious organizations in America should render conflicts between constituent parts of those groups totally beyond the competence of secular civil authority. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1403-04 (1981). Although Professor Laycock's argument is quite compelling in most instances (including church labor relations—the focus of his article), it appears to rest on the same "implied consent" foundation as Justice Powell's dissent in *Jones v. Wolf*, *see supra* notes 153-154 and accompanying text, and thus is subject to the same criticisms. *See, e.g.*, *supra* notes 164-165 and accompanying text (criticizing the application of the "implied consent" rationale for church autonomy to church property disputes).

249. *See* Posting of Professor Thomas C. Berg, TCBERG@stthomas.edu, to religionlaw@lists.ucla.edu (Feb. 8, 2007) (http://lists.ucla.edu/pipermail/religionlaw/2007-February/022368.html) ("The breakaway congregations, now and in the earlier rounds, have tended to be conservatives unhappy with liberal denominational moves. If they succeed in court against the larger organizations to whose decisions they object, they tend to make law such as *Jones v. Wolf* that is harmful to the protection of religious organizational autonomy against state (in this case court) interference. Yet conservative faiths also tend to have the most conflicts between their organizational autonomy and government regulation in other contexts, such as suits by clergy, other employees, or members . . . . [S]uccesses by conservative Christians in the property cases hurts [sic] the freedom of conservative Christians in other cases, where *Jones v. Wolf* has had more effect." (citing Jones v. Wolf, 443 U.S. 595 (1979))).

that are generally less hostile to interaction with civil government may see that a more deferential standard best protects their perceived interests, and invoke the hierarchical-deference or hybrid approaches in hopes of retaining or gaining an interest in the property at issue.

That said, the current patchwork of hierarchical-deference and neutral-principles standards, variously applied, is problematic, and in the long run, probably untenable. The hierarchical-deference approach requires courts to apply a contractual view of affiliation, based on unconditional implied consent, that is likely out of touch with the real expectations of local churches. This disparity probably gives rise to enough concerns about the burdening of the free exercise rights, property ownership rights, and corporate autonomy of congregations to rule out both hierarchical deference and its close cousin, the hybrid approach.

Ultimately, the most cogent and even-handed approach is the strict-neutral-principles approach described above, advocated by Professor Gerstenblith.[250] Its rejection of "implied trusts" and corresponding requirement of express trusts best protects the interest of equal treatment of the parties, while also avoiding "problematic connections" with the unconstitutional English (departure-from-doctrine) rule.[251] Under this rationale, finding an implied trust does not make sense without the English rule, because it requires speculation as to the grantor's intent.[252] Historically, the grantor's continuing intent could be scrutinized by examining the general church's faithfulness (or lack thereof) to the doctrine held at the time of the grant; if the church had maintained the same beliefs, the intent was likely still in effect, and vice versa.[253] Because courts are now barred under the First Amendment from making such an inquiry,[254] finding an implied trust requires a presumption that the grantor's intent was permanently established regardless of any change the general church/beneficiary might make.[255] In Professor Gerstenblith's words, "[t]here is no reason to assume that a donor wished to devote the property in perpetuity to the purposes of the hierarchy rather than to the purposes of the individual church, because both . . . are free to change their interpretations and practice of religious doctrine."[256] Instead, civil courts should only

250. *See supra* notes 112-122 and accompanying text.

251. Gerstenblith, *supra* note 43, at 333-42; *see also supra* note 130. The English rule is discussed in detail in the text accompanying *supra* notes 44-51.

252. Gerstenblith, *supra* note 43, at 334.

253. *Id.*

254. *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450-52 (1969).

255. Gerstenblith, *supra* note 43, at 334-35.

256. *Id.* at 335.

recognize trusts that meet the standard for express trusts.[257]

There are several objections to reading the neutral-principles analysis to disallow trusts unless there is a clear expression of intent to create one. First, many general churches claim the trust clauses adopted after the *Jones* decision merely recognize longstanding principles of connectionalism between national and local churches, and that applying a strict-neutral-principles test allows disaffected parishes to escape the obligations of prior commitments.[258] This contention is disputed, however, by those who contend that a historical examination of both theological and organizational principles reveals that the trust clauses are actually a break from prior practice.[259] Lloyd Lunceford notes that "[i]f a binding trust asserted by the national church in favor of itself over all local church property is essential to Presbyterian connectionalism, it is curious that John Knox, John Calvin, and the *Book of Confessions* are silent on the subject."[260]

Furthermore, it could be argued that the relative lack of legal sophistication in many religious groups, particularly on the local level, might result in documents intended by the parties to create an express trust but which would fall short of that level, in which cases courts would be compelled to award the property contrary to the intent of the parties.[261] However, local churches are often incorporated under state law, and thus have had occasion to retain counsel or otherwise increase their legal sophistication. As church property lawsuits become more commonplace, it is likely that local churches will pay greater heed to the effect of the documents they draft and adopt, so this objection may be much weaker than it first appears.

Adopting an approach that emphasizes uniformity of result, such as strict hierarchical deference or the hybrid model, may allow both general and local parties to more accurately predict the results of disaffiliation and any accompanying litigation; however, such consistency comes at the price of substantial unfairness to the parties, especially to local congregations which under either of those approaches may be precluded from having their arguments heard. Although all parties interested in minimizing government involvement in religious affairs should be wary of standards that increase

257. *Id.* at 336-37; *see also id.* at 322 n.42 (citing numerous decisions of courts strictly applying neutral principles of law, and describing the ways in which they determined the intent of the settlors).

258. Dague & Stephens, *supra* note 35, at 134.

259. *See, e.g.*, Lunceford, *supra* note 17, at 73-77.

260. *Id.* at 76.

261. Hansen, *supra* note 36, at 301-02.

government scrutiny of internal matters, civil courts may be the only arbiters who can resolve church property disputes on anything like neutral grounds,[262] and the strict-neutral-principles approach appears to comport best with that conception of the forum.

IV. FUTURE TRENDS & IDEAS

Do the internal disputes of semi-hierarchical religious organizations like the mainline Protestant denominations really matter? The answer appears to be a qualified "yes." Membership and average worship attendance statistics for these bodies have been declining steadily since the mid-Twentieth Century,[263] and the trend has continued in recent years.[264] That said, the historical significance of these denominations and their unique organizational structures suggest that they are still at least moderately influential in, or at least of interest to, American culture, and extensive news coverage of their internal conflicts seems to confirm this. Given this conclusion, it is worth devoting a few words to examining the current state of affairs to see what the legal theories detailed above might yield.

A. Signs of an Impending Legal Tidal Wave

As noted above, the disaffiliation of individual congregations from mainline Protestant churches is not at all a new trend, but there are some signs suggesting that a more sizable wave of departures may be getting underway, particularly in the context of The Episcopal Church. Apart from the California lawsuits now before the Supreme Court of California and the

---

262. For example, Justice Dennis, then of the Louisiana Supreme Court and currently a judge on the Court of Appeals for the Fifth Circuit, noted that

> [r]efusal to adjudicate a dispute over property rights or contractual obligations, even when no interpretation or evaluation of ecclesiastical doctrine or practice is called for, but 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 Cmt'y. Church v. Hitchens, 419 So. 2d 445, 447 (La. 1982) (citing Arlin M. Adams & William R. Hanlon, Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980)).

263. Benton Johnson, Dean R. Hoge & Donald A. Luidens, *Mainline Churches: The Real Reason for Decline*, FIRST THINGS, March 1993, at 13 ("But in the early 1960s [the mainline denominations'] growth slowed down, and after the middle of the decade they had begun to lose members . . . . By 1990 these denominations had lost between one-fifth and one-third of the membership they claimed in 1965 and the proportion of Americans affiliated with them had reached a twentieth-century low.").

264. *See, e.g.*, PERRY CHANG, PRESBYTERIAN CHURCH (U.S.A.), RECENT CHANGES IN MEMBERSHIP AND ATTENDANCE IN MAINLINE PROTESTANT DENOMINATIONS 6 (2006); C. KIRK HADAWAY, THE EPISCOPAL CHURCH CENTER, IS THE EPISCOPAL CHURCH GROWING (OR DECLINING)? 6 (2004).

Virginia lawsuits currently pending,[265] there are signs that the national church is preparing to take a more active role in asserting claims over the property of departing congregations. The most recent previous Presiding Bishop, Frank T. Griswold, had stated that as a matter of policy, property disputes were a matter for resolution between local churches and their regional dioceses.[266] However, in November 2006, David Booth Beers, Chancellor to new Episcopal Presiding Bishop Katharine Jefferts Schori, gave a presentation at a national gathering of a progressive Episcopal group, at which he detailed ten recent cases in which TEC as a national body asserted control over local church property, and predicted final judgment in TEC's favor in every pending and future case.[267] In February 2007, in response to calls from the international Anglican community to end lawsuits filed against disaffiliating American parishes, Mr. Beers reiterated TEC's stance that all parish property is held in trust and refused to suspend litigation.[268] During the same period, seven regional dioceses have requested some form of representation at international Anglican gatherings apart from the official TEC delegation, which they contend is unable to speak for them, and attempts to work out a compromise have failed repeatedly.[269]

Although conflict within the PC(USA) may not have reached the same level, there has been widespread criticism of some of the actions of the most recent General Assembly in June 2006. The decision to allow local exceptions to official standards which prohibit practicing gay and lesbian clergy and other church officers was particularly controversial.[270] In response, a number of churches have decided to disaffiliate, and some observers expect a further increase in departures in light of a vote by traditionalists within the PC(USA) to "realign" with the Evangelical Presbyterian Church (EPC). The EPC is a separate denomination which in June 2007 approved the creation of "transitional, non-geographic

265. *See supra* notes 4-12 and accompanying text.

266. *Dennis Canon Diocesan Issue, Presiding Bishop Says*, LIVING CHURCH, May 15, 2006, http://www.livingchurch.org/publishertlc/viewarticle.asp?ID=1991.

267. Steve Waring, *Chancellor: Episcopal Church Will Prevail in Communion and Courts*, LIVING CHURCH, Nov. 28, 2006, http://livingchurch.org/publishertlc/printarticle.asp?ID=2735.

268. *Chancellor: Cessation of Lawsuits Must be Part of Comprehensive Agreement*, LIVING CHURCH, Feb. 27, 2007, http://www.livingchurch.org/publishertlc/viewarticle.asp?ID=3103.

269. George Conger & Steve Waring, *Consensus on APO Requests Still Elusive*, LIVING CHURCH, Sept. 16, 2006, http://www.livingchurch.org/publishertlc/viewarticle.asp?ID=2485.

270. David E. Anderson, *Vote Signals Changes for Presbyterians*, TIMES UNION (Albany, N.Y.), June 24, 2006, at B8.

presbyteries" to receive formerly PC(USA) congregations.[271] One prominent example occurred in August 2006, when the governing session of the 2,800-member Kirk of the Hills, a PC(USA) congregation in Tulsa, Oklahoma, voted to leave the denomination.[272] The Eastern Oklahoma Presbytery of the PC(USA), to which Kirk of the Hills had belonged, had anticipated such a move and had already claimed the church's property in March 2006 affidavits.[273] After the August vote, Kirk of the Hills filed suit in civil court to quiet title.[274] The PC(USA) has prepared two legal memoranda, dated December 2005, for the use of presbyteries seeking to keep control of the property of departing congregations.[275] These documents lay out the legal background, emphasize the hierarchical method as preferable, and offer suggestions for implementing policies that will favor the national church.[276]

Some of the earliest cases concerning departures of or determination of property rights[277] in both Episcopal and Presbyterian parishes in response to recent events have already been decided, including actions in Alaska, California, Louisiana, New York, North Carolina, Pennsylvania, and South Carolina.[278] The widely varying results in these cases demonstrate the

---

271. *Exodus of Churches, Members from the PCUSA*, THE LAYMAN ONLINE, July 26, 2007, http://www.layman.org/layman/news/2007-news/exodux-of-churches-members.htm.

272. Bill Sherman, *Kirk Suit to Remain in District Court*, TULSA WORLD, Oct. 27, 2006, at A1.

273. *Id.*

274. *Id.* The trend of large and prominent PC(USA) churches voting to depart the congregation appears to be continuing; in January 2007, 2,000-member Signal Mountain Presbyterian Church in Signal Mountain, Tennessee, voted by a margin of 1,172 to 10 to depart the PC(USA) and affiliate with the Evangelical Presbyterian Church. Clint Cooper, *Signal Church Votes for Ouster*, CHATTANOOGA TIMES/FREE PRESS, Jan. 29, 2007, at B2. Both the local church and the PC(USA) are making claims to the property, so it seems likely that the matter will end up in court. *Id.*

275. John H. Adams, *PCUSA Documents on Property: 'True Church' vs. 'Schismatics'*, THE LAYMAN ONLINE, Aug. 9, 2006, http://www.layman.org/layman/news/2006-news/pcusa-documents-on-property.htm.

276. *Id.*

277. Occasionally, local or general churches will bring suits seeking declaratory judgment as to the property rights of the parties. This is not always in preparation for a departure from the denomination—often, banks will be hesitant to lend money for expansion and other capital projects where ultimate ownership of the property being offered as security is disputed or otherwise unclear.

278. St. Paul Church, Inc. v. Bd. of Trs. of the Alaska Missionary Conference of the United Methodist Church, Inc., 145 P.3d 541, 551 (Alaska 2006) (finding for general church); Rasmussen v. Bunyan, No. 04CC00647 (Cal. Super. Ct. Orange County Sept. 9, 2005), Adair v. Poch, No. BC321101 (Cal. Super. Ct. L.A. County Sept. 9, 2005), and O'Halloran v. Thompson, No. BC321102 (Cal. Super. Ct. L.A. County Sept. 9, 2005) (finding for parish), *all rev'd sub nom. In re* Episcopal Church Cases, 61 Cal. Rptr. 3d 845 (Ct. App. 2007), *review granted*, (Sept. 12, 2007); First Presbyterian Church of the City of Baton Rouge v. Presbytery of South La., 19th Jud. Dist. Ct., Parish of E. Baton Rouge (Stipulated final judgment, Nov. 6, 2006), *available at* http://www.fpcbr.org/client_files/editor_files/Judgment(1).pdf (finding for parish); Presbytery of Hudson River of the Presbyterian Church (U.S.A.) v. Trs. of the First Presbyterian Church and Congregation of Ridgeberry, 821 N.Y.S.2d 834, 837 (N.Y. Sup. Ct. Aug 16, 2006) (finding for parish); Daniel v. Wray, 580 S.E.2d 711 (N.C. Ct. App. 2003) (finding for general church); *In re*

unpredictability across jurisdictions engendered by the current state of the law.

B. An Issue for the Supreme Court?

Although matters of property, trust, and contract law are generally matters of state concern, the prevalence of religion in conflicts over church property means that consideration by a civil court is likely to at least raise federal issues about the application of the First Amendment.[279] Further, the methods adopted by the U.S. Supreme Court to avoid First Amendment problems have been criticized as vague and in practice have given rise to apparently inconsistent results among state courts purporting to apply the same standard.[280] Although states are free to differ in their application of legal standards, the standards involved here derive from relatively recent Supreme Court precedent. The constitutional principles at issue, combined with the likelihood of a burgeoning docket of church property dispute cases, suggest that it is at least possible that the Court might be presented with a challenge to either hierarchical deference, neutral principles, or both in the near future.

Several years ago, an expert in the area examined the jurisprudence of the members of the Rehnquist Court in light of a hypothetical certiorari petition in a church property case, to determine whether those justices would be satisfied with the balance struck by *Jones v. Wolf* (allowing both hierarchical-deference and neutral-principles-of-law), or whether, in light of the commendation of the neutral-principles-of-law approach in that case, there might be sufficient votes to totally jettison the hierarchical-deference standard.[281] His conclusion was that it was possible, given the Court's personnel in 2000, that "a properly framed case before the Court might result in the total abandonment of *Watson* in favor of neutral-principles."[282]

Church of St. James the Less, 888 A.2d 795 (Pa. 2005) (finding for general church); All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., 595 S.E.2d 253 (S.C. Ct. App. 2004) (vacating in part and reversing in part summary judgment in favor of parish).

279. Even application of the strict-neutral-principles approach raises questions, because courts will be required to determine which documents it may examine and which are inescapably religious or doctrinal in nature.

280. *See supra* notes 170-73 and accompanying text.

281. Kenneth E. North, Church Property Disputes: A Constitutional Perspective, Presentation at the Duquesne University School of Law Jubilee International and Ecumenical Canon Law Conference (Feb. 4-5, 2000), at 23, *available at* http://www.canonlaw.org/article_church%20property%20disputes.htm.

282. *Id.*

However, the relative rarity of high federal courts ruling on church property disputes meant that only two justices, Chief Justice Rehnquist and Justice Stevens, had had an opportunity to vote in such a case (both were in the majority in *Jones*, which favored neutral principles, and in dissent in *Milivojevich*, in which the majority favored hierarchical deference).

Given the arrival of Chief Justice Roberts and Justice Alito in place of Chief Justice Rehnquist and Justice O'Connor, respectively, it is possible that a reconsideration of Mr. North's projection is warranted. Chief Justice Roberts did not decide any cases concerning church property during his time as a judge on the Court of Appeals for the D.C. Circuit, and the Third Circuit heard only one substantive church property dispute case during Justice Alito's relatively lengthy tenure, and Justice Alito was not on the panel.[283] Were a church property case to reach the Supreme Court, the constitutionally acceptable standards could be restricted, expanded, or redirected, and, depending on the result, could lead to clarification—or to further confusion. The apparent trend in recent religion-clause jurisprudence toward giving the states more flexibility in protecting or restricting religious behavior[284] might suggest that the Court would continue to be comfortable with a diversity of approaches.

C. *The Possibility of Alternative Resolution*

Despite the heated rhetoric and continued legal struggles between traditionalist and progressive factions in semi-hierarchical denominations, there have been several high-profile instances of agreements to resolve property issues. One of the first was a deal between Christ Church Episcopal (Overland Park, Kansas) and the Episcopal Diocese of Kansas, under which the traditionalist 2,200-member congregation agreed to pay the progressive diocese over $1 million over a ten-year period in exchange for the property.[285] Others followed, including 2,000-member Christ Church (Plano, Texas)[286] and All Saints' (Dale City, Virginia), the latter departure involving a transfer of title of the existing church facilities to the Diocese of Virginia, followed by a five-year nominal lease of that property while the congregation builds a new facility on land it had previously acquired, to

283. The case was *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78 (3d Cir. 1996).

284. *See supra* note 156 and accompanying text.

285. *Parish Will Separate from the Episcopal Diocese and Denomination*, ASSOCIATED PRESS NEWSWIRES, Apr. 17, 2005.

286. George Conger, *Christ Church, Plano, Leaves The Episcopal Church*, LIVING CHURCH, Sept. 15, 2006, http://www.livingchurch.org/publishertlc/viewarticle.asp?ID=2484 (traditionalist parish departing traditionalist diocese).

which the Diocese agreed to relinquish any claim.[287] It should be noted that these agreements were reached in the shadow of either pending or threatened litigation and represent a de facto settlement based on each side's evaluation of the other's case, in light of the facts at issue and the approach taken by the relevant jurisdiction.

In a more preemptive and structural development, one generally traditionalist diocese, the Diocese of the Rio Grande, which encompasses most of New Mexico and parts of West Texas, proposed a plan to allow congregations to depart with their property by paying a graduated declining annual assessment for a period of years.[288] Although the plan failed to garner enough votes at the Diocesan Convocation,[289] it does represent a concerted effort to find a means of resolving potential future disputes that does not require civil court involvement, and might provide a model for preemptive dispute resolution going forward. Further, such means of dispute resolution are consistent with scriptural teachings that all Christians at least purportedly share, urging the avoidance of the civil courts in disputes between Christians: "Is it so, that there is not among you one wise man who will be able to decide between his brethren, but brother goes to law with brother, and that before unbelievers? Actually, then, it is already a defeat for you, that you have lawsuits with one another."[290]

D. Significant External Matters

Several significant external factors that will profoundly impact the future shape of semi-hierarchical religious groups in the United States bear mention here. Obviously, the first of these is the underlying theological disputes between advocates of the traditionalist and progressive positions with regard to the interpretation and authority of scripture, and particularly its implications for the role of gays and lesbians in TEC, the PC(USA), and other semi-hierarchical religious bodies. Although these issues are hotly

---

287. Patrick Getlein, *Diocese, Virginia Parish Reach Agreement on Property*, LIVING CHURCH, Nov. 10, 2006, http://www.livingchurch.org/publishertlc/printarticle.asp?ID=2744 (traditionalist parish departing a diocese generally seen as moderate).

288. Episcopal Diocese of the Rio Grande, Resolution Five: "For Those Departing the Episcopal Church" *in* Journal of the Fifty-Fourth Annual Convocation of the Episcopal Church in the Diocese of the Rio Grande 38-39 (2006), http://www.dioceserg.org/index.php?option=com_docman&task=doc_download&gid=146.

289. Press Release, 54th Convocation of the Diocese of the Rio Grande (Oct. 15, 2006) (on file with the author).

290. *1 Corinthians* 6:5-7.

disputed,[291] they are by definition questions of religious doctrine, and thus outside the jurisdiction of and improper for adjudication by American civil courts.

Particularly for those in the Anglican tradition, the current debate also involves a dispute over whether to reorganize along doctrinal as opposed to exclusively geographic lines. Historically, each geographic area (whether national or trans-national province, regional diocese, or local parish) was under the jurisdiction of one officially recognized Anglican structure, and leaders of other such structures were not permitted to exercise authority outside their own borders. The congregations that have departed TEC have not become strict congregationalists; rather, they have voted to place themselves under the oversight of foreign bishops, such that, for example, the parishes that left the Diocese of Los Angeles in 2004[292] have aligned with the Diocese of Luweero in the Anglican Church of Uganda.[293] In a similar manner, the eleven parishes departing the Diocese of Virginia in late 2005 and early 2006[294] have joined the Convocation of Anglicans in North America (CANA), a missionary effort of the Anglican Church of Nigeria.[295] Whether these arrangements are valid or have historic precedent is a matter of no small debate in the Anglican world, and will profoundly impact the shape of the global Anglican Communion in the decades ahead.

Finally, the steep numerical decline in the mainline denominations, perhaps exacerbated by the departures of more dissatisfied congregations, shows no signs of abating.[296] If the trend continues, as appears likely, it will have an increasing impact on the relevance of the mainline churches and their disputes to American culture at large, and the legal system in particular.

V. CONCLUSION

Church property disputes will never be the bread and butter of the civil courts, but that does not mean controversies do not arise on a regular basis. In 1998, Professor Greenawalt noted that courts have issued reported decisions in an average of about 119 church property cases each decade since 1948.[297] The numbers reflect slight increases during periods of

291. *See, e.g.*, *supra* notes 1-2 and accompanying text.

292. *See supra* notes 4-6 and accompanying text.

293. Bob Williams, *Presiding Bishop Conveys Concern about Pastoral Boundaries, Affirms L.A. Bishop's Ministry of Reconciliation*, EPISCOPAL NEWS SERVICE, Aug. 25, 2004, http://www.episcopalchurch.org/3577_49191_ENG_HTM.htm; *Diocesan Digest—Los Angeles: Bishop Responds to Parishioners' Alignment with Uganda*, EPISCOPAL NEWS SERVICE, Feb. 16, 2006, http://www.episcopalchurch.org/3577_71902_ENG_Print.html (second item).

294. *See supra* notes 7-12 and accompanying text.

295. Walker, *supra* note 9.

296. *See supra* notes 263-64 and accompanying text.

297. Greenawalt, *supra* note 13, at 1844 n.1. Professor Greenawalt's findings are as follows:

particular doctrinal disputation. In the decade since Professor Greenawalt's tabulation, there were approximately 91 church property cases heard in the U.S.;[298] this figure is consistent with earlier trends and may suggest the number of cases might be rising again, perhaps in response to the increase in intradenominational strife described above.

Most commentators point out that churches, both general and local, could most easily avoid being dragged into civil court in the first place by rewriting their documents to more clearly express their intent should there be a dispute over property. Churches have not ordered their affairs in ways that lend themselves to easy civil court resolution. There are at least two reasons churches have not done so. First, because courts are using and will probably continue to use two standards and many more variants, all of different vintage and some of which are changed by courts from time to time, churches are unsure how to structure their relationships in a manner that would allow them to avoid going to court. The second reason has more to do with the nature of religious belief, and more particularly an inherent element that stands in stark contrast to secular corporations and other nonreligious organizations. Most secular organizations unabashedly weigh the possibility of failure when deciding on a course of action. In contrast, an integral part of the nature of the belief systems of religious communities is the hope that their shared beliefs will make their temporal unity lasting and secure. Even when history suggests that schism is more likely than not, such a pessimistic view, however realistic, is a terrible starting point for any religious group.

Contemporary reports continue to suggest a deep and increasing tension between general churches and local congregations who disagree with the direction in which their parent bodies are tending.[299] Parties on both sides

> The following data show the approximate number of reported cases in both federal and state courts over a period of fifty years (amassed through a Westlaw search). The numbers reflect each time a different court had to address the issue of church property; thus, appeals are counted separately. From 1948 to 1957, there were approximately 166 cases; from 1958-1967, roughly 109; from 1968-1977, 115 cases; from 1978-1987, 123 cases; from 1988-1997, 81. (This search was done in Oct. 1998, in the "Allcases" database).

Id.

298. This search was conducted in January 2007, using the criteria discussed in the previous note. It reflects only nine years rather than a full decade, and thus will almost certainly under-represent the actual figure for the ten years following Professor Greenawalt's search.

299. *See, e.g.*, Ann Rodgers, *Churches Looking to Leave Presbytery*, PITTSBURGH POST-GAZETTE, Mar. 4, 2007, at A-1 (describing plans being laid by six churches in Allegheny County, as part of a broader movement within the PC(USA), to leave that denomination and affiliate with the more traditionalist Evangelical Presbyterian Church).

are realizing that the unspoken truce on the question of property ownership, though perfectly adequate in more harmonious times, may soon be broken. The competing claims of the parties may soon be put to the test before a judge who in any case is constitutionally barred from understanding and weighing the fullness of the disagreement.

These lawsuits, which often sap the resources of religious institutions and make adversaries of people who have long been fellow worshippers, may sometimes seem all but inevitable. If this is so, the courts should resist the urge to seize upon the hierarchical-deference standard for the sake of predictability at the cost of fairness to all the parties involved. Instead, courts should choose the neutral principles approach and strictly apply it, thereby charting a course that keeps the parties on equal footing whenever possible in resolving past ambiguities, but also encourages those now formulating or reformulating their relationships to be realistic about what might lie ahead, and come to a consensus on the outcome in the event a schism occurs. In doing so, both courts and religious organizations would be acknowledging the inherent limitations of all human institutions—perhaps especially those in which mere mortals seek to be faithful to a higher calling.

Jeffrey B. Hassler[300]

300. J.D. Candidate, Pepperdine University School of Law, May 2008. The author is a former member of Truro Church, Fairfax, VA. I would like to thank Professor Robert Cochran of Pepperdine for his encouragement, mentorship, and outstanding editorial influence; Lloyd J. Lunceford of Taylor, Porter, Brooks & Phillips, Baton Rouge, LA, who in addition to his very helpful book graciously offered both his time and invaluable guidance on the field of church property disputes in general and the intricacies of relevant Louisiana case law in particular; Eric Sohlgren of Payne & Fears LLP, Irvine, CA, to whom I am indebted for copies of the otherwise unobtainable decisions in the recent California trial court decisions, a most helpful explication of California law and issues facing civil courts in the cases on appeal as of this writing, and a thorough manuscript review; Raymond Dague, Syracuse, NY for his chapter on Episcopal particulars and a tremendously influential dinner conversation in San Antonio; Professor Kristine Knaplund of Pepperdine for generously volunteering her advice and her time; Professors Mark Scarberry and Douglas Kmiec of Pepperdine, as well as Professor Joel Nichols, now of the University of St. Thomas School of Law, for their helpful input during the topic selection phase; Professor Eugene Volokh of UCLA for a brief but illuminating series of e-mails; Elliot Anderson and Isaac Fong for their friendship as well as their insightful counsel; my parents, David and Rosane Hassler, for their unflagging support in all endeavors; and most of all my wife Lyric, whose patience is amazing, whose indulgence is undeserved, and whose companionship is more than I could ever hope to ask.

APPENDIX

CHURCH PROPERTY DISPUTES: STATE INTERPRETATIONAL APPROACHES AND KEY CASES

Alabama	Strict-Neutral-Principles	**Trinity Presbyterian Church of Montgomery v. Tankersley, 374 So. 2d 861, 865-66 (Ala. 1979).** **Harris v. Apostolic Overcoming Holy Church of God, Inc., 457 So. 2d 385, 387 (Ala. 1984).**
Alaska	Hybrid	**St. Paul Church, Inc. v. Bd. of Trs. of the Alaska Missionary Conference of the United Methodist Church, Inc., 145 P.3d 541, 551 (Alaska 2006) (finding that neutral-principles analysis of local church's actions indicated its consent to be subject to the general church).**
Arizona	(undecided)	*See* Paradise Hills Church, Inc. v. Int'l Church of the Foursquare Gospel, 467 F. Supp. 357 (D. Ariz. 1979) (federal district court applying Arizona law, finding that result would be the same—in favor of national church—under either deference or neutral-principles-of-law standard).
Arkansas	Neutral-Principles[†]	**Gipson v. Brown, 706 S.W.2d 369 (Ark. 1986) (recognizing neutral-principles-of-law approach).** **Ark. Presbytery of the Cumberland Presbyterian Church v. Hudson, 40 S.W.3d 301, 304 (Ark. 2001) (explicitly adopting neutral-principles-of-law approach).**

[†] The courts of states categorized as "Neutral-Principles" rather than "Strict-Neutral-Principles" or "Hybrid" have expressly adopted (in the case of state supreme courts) or espoused (in the case of inferior state courts) the neutral-principles approach, but have not issued a ruling that makes clear whether they fall into the "Strict-Neutral-Principles" or "Hybrid" categories.

California	Split	Presbytery of Riverside v. Cmty. Church of Palm Springs, 152 Cal. Rptr. 854 (Ct. App. 1979) (neutral-principles). Protestant Episcopal Church in the Diocese of L.A. v. Barker, 171 Cal. Rptr. 541, 547 (Ct. App. 1981), cert. denied, 454 U.S. 864 (1981) (strict-neutral-principles). Cal.-Nev. Annual Conference of United Methodist Church v. St. Luke's United Methodist Church, 17 Cal. Rptr. 3d 442, 449 (Ct. App. 5 Dist. 2004) (strict-neutral-principles). Korean United Presbyterian Church v. Presbytery of the Pac., 281 Cal. Rptr. 396 (Ct. App. 2 Dist. 1991) (hybrid). Guardian Angel Polish Nat. Catholic Church of L.A., Inc. v. Grotnik, 13 Cal. Rptr. 3d 552 (Ct. App. 2 Dist. 2004) (hybrid). In re Episcopal Church Cases, 61 Cal. Rptr. 3d 845 (Ct. App. 2007) (hierarchical-deference).
Colorado	Hybrid	**Bishop and Diocese of Colo. v. Mote, 716 P.2d 85, 90 (Colo. 1986).**
Connecticut	Hybrid	**N.Y. Annual Conference of the United Methodist Church v. Fisher, 438 A.2d 62, 68 (Conn. 1980) (showing deference within the context of neutral principles).** **Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church, 620 A.2d 1280, 1282 (Conn. 1993) (confirming previous approach).**
Delaware	Neutral-Principles	**E. Lake Methodist Episcopal Church, Inc. v. Trs. of Peninsula-Del. Annual Conference of United Methodist Church, Inc., 731 A.2d 798, 806 (Del. 1999).**
District of Columbia	Neutral-Principles	**Williams v. Bd. of Trs. of Mount Jezreel Baptist Church, 589 A.2d 901, 908 (D.C. 1991).**
Florida	Strict-Hierarchical-Deference	**Mills v. Baldwin, 362 So. 2d 2, 6-7 (Fla. 1978), *vacated and remanded*, 443 U.S. 914 (1979), *reinstated*, 377 So. 2d 971 (Fla. 1979), *cert. denied*, 446 U.S. 983 (1980).** **Townsend v. Teagle, 467 So. 2d 772, 775 (Fla. Dist. Ct. App. 1985) (following Mills).**

Georgia	Strict-Neutral-Principles	**Presbyterian Church v. E. Heights Church, 167 S.E.2d 658 (Ga. 1969) (adopting neutral principles in response to the United States Supreme Court's overturning of Georgia's prior departure-from-doctrine approach, later endorsed by the Supreme Court as a constitutional alternative to the deference approach).** **First Evangelical Methodist Church v. Clinton, 360 S.E.2d 584 (Ga. 1987).**
Hawaii	(undecided)	
Idaho	(undecided)	
Illinois	Neutral-Principles	**York v. First Presbyterian Church of Anna, 474 N.E.2d 716 (Ill. 1984).**
Indiana	Hybrid	Grutka v. Clifford, 445 N.E.2d 1015, 1019 (Ind. Ct. App. 1983). Hinkle Creek Friends Church v. W. Yearly Meeting of Friends Church, 469 N.E.2d 40, 43 (Ind. Ct. App. 1984) (finding implied trust under neutral-principles approach). Emberry Cmty. Church v. Bloomington Dist. Missionary & Church Extension Soc'y, Inc., 482 N.E.2d 288, 293 (Ind. Ct. App. 1985) (same as Hinkle Creek).
Iowa	Hybrid	**Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810 (Iowa 1983) (applying both deference and neutral principles, finding that both led to same result under circumstances).**
Kansas	(undecided)	
Kentucky	Strict-Neutral-Principles	**Bjorkman v. Protestant Episcopal Church in the U.S. of the Diocese of Lexington, 759 S.W.2d 583, 584 (Ky. 1988).**
Louisiana	Neutral-Principles	**Fluker Cmty Church v. Hitchens, 419 So. 2d 445, 447-48 (La. 1982) (determining that adopting the neutral-principles-of-law approach was required under the federal and state constitutions).**
Maine	Neutral-Principles	**Graffam v. Wray, 437 A.2d 627, 634 (Me. 1981).**

Maryland	Hybrid	**Presbytery of Balt. of the United Presbyterian Church v. Babcock Mem'l Presbyterian Church, 449 A.2d 1190, 1192 (Md. Ct. Spec. App. 1982), *aff'd*, 464 A.2d 1008 (Md. 1983).**
Massachusetts	Hybrid	**Antioch Temple, Inc. v. Parekh, 422 N.E.2d 1337, 1341 (Mass. 1981) (adopting neutral principles as valid but not exclusive).** **Fortin v. Roman Catholic Bishop of Worcester, 625 N.E.2d 1352, 1356-57 (Mass. 1994) (applying neutral principles while noting that it is not the only valid approach).** **Episcopal Diocese of Mass. v. Devine, 797 N.E.2d 916, 921-22 (Mass. 2003) (denying review of a case in which the appellate court declined to apply neutral principles only because the dispute was not separable from internal religious issues).**
Michigan	Strict-Hierarchical-Deference†	Bennison v. Sharp, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982). Calvary Presbyterian Church v. Presbytery of Lake Huron of the United Presbyterian Church in the U.S., 384 N.W.2d 92, 95 (Mich. Ct. App. 1986).
Minnesota	Strict-Neutral-Principles	**Piletich v. Deretich, 328 N.W.2d 696, 701 (Minn. 1982).**
Mississippi	Neutral-Principles	**Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So. 2d 200, 206 (Miss. 1998).**
Missouri	Neutral-Principles	**Presbytery of Elijah Parish Lovejoy v. Jaeggi, 682 S.W.2d 465, 467 (Mo. 1984).**
Montana	Neutral-Principles	**Miller v. Catholic Diocese of Great Falls, Billings, 728 P.2d 794, 796 (Mont. 1986).** **Hofer v. Mont. Dept. of Pub. Health & Human Servs., 124 P.3d 1098, 1107 (Mont. 2005).** **Second Int'l Baha'i Council v. Chase, 106 P.3d 1168, 1173 (Mont. 2005).**
Nebraska	(undecided)	

† *But see supra* note 101 (noting that some commentators believe Michigan precedent places it in the "Strict-Neutral-Principles" category, at least with regard to property issues).

Nevada	Strict-Hierarchical-Deference	**Tea v. Protestant Episcopal Church in Diocese of Nev., 610 P.2d 182, 184 (Nev. 1980).**
New Hampshire	Strict-Neutral-Principles	**Reardon v. Lemoyne, 454 A.2d 428, 431-32 (N.H. 1982).** **Berthiaume v. McCormack, 891 A.2d 539, 544-47 (N.H. 2006) ("[W]e will first consider only secular documents such as trusts, deeds, and statutes. Only if these documents leave it unclear which party should prevail will we consider religious documents, such as church constitutions and by-laws, even when such documents contain provisions governing the use or disposal of church property. We reserve our opinion as to what level of deference should be given to church pronouncements regarding the proper interpretation of those documents.").**
New Jersey	Strict-Hierarchical-Deference	**Protestant Episcopal Church in the Diocese of N.J. v. Graves, 417 A.2d 19, 23-24 (N.J. 1980), *cert. denied sub nom.* Moore v. Protestant Episcopal Church, 449 U.S. 1131 (1981).** **Diocese of Newark v. Burns, 417 A.2d 31, 33 -34 (N.J. 1980).**
New Mexico	(undecided)	
New York	Strict-Neutral-Principles	**First Presbyterian Church of Schenectady v. United Presbyterian Church in the U.S., 464 N.E.2d 454, 459-60 (N.Y. 1984) (explicitly adopting neutral-principles-of-law approach).** **Avitzur v. Avitzur, 446 N.E.2d 136, 138-39 (N.Y. 1983) (applying neutral principles).**
North Carolina	Strict-Hierarchical-Deference	Daniel v. Wray, 580 S.E.2d 711, 717 (N.C. Ct. App. 2003).
North Dakota	(undecided)	

Ohio	Strict-Neutral-Principles	**Serbian Orthodox Church v. Kelemen, 256 N.E.2d 212, 215 (Ohio 1970) (adopting neutral principles based on U.S. Supreme Court ruling in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969)).** Christensen v. Roumfort, 485 N.E.2d 270, 273 (Ohio Ct. App. 1984). S. Ohio State Executive Offices of Church of God v. Fairborn Church of God, 573 N.E.2d 172, 180 (Ohio Ct. App. 1989).
Oklahoma	Strict-Hierarchical-Deference	**Presbytery of Cimarron v. Westminster Presbyterian Church of Enid, 515 P.2d 211, 216-17 (Okla. 1973) (applying hierarchical deference).**
Oregon	(undecided)	**Philomath Coll. v. Wyatt, 37 P. 1022 (Or. 1894).**
Pennsylvania	Strict-Neutral-Principles	**Presbytery of Beaver-Butler v. Middlesex Presbyterian Church, 489 A.2d 1317, 1322-23 (Pa. 1985).** **In re Church of St. James the Less, 888 A.2d 795, 810 (Pa. 2005) (applying neutral principles and finding for national church based on the circumstances).**
Rhode Island	(undecided)	
South Carolina	Neutral-Principles	**Pearson v. Church of God, 478 S.E.2d 849, 853 (S.C. 1996).**
South Dakota	Strict-Neutral-Principles	**Foss v. Dykstra, 319 N.W.2d 499, 500 (S.D. 1982), *aff'd on reh'g*, 342 N.W.2d 220 (S.D. 1983).**
Tennessee	(undecided)	

Texas	Strict-Hierarchical-Deference[†]	**Brown v. Clark, 116 S.W. 360, 363 (Tex. 1909) (examining factors used by courts applying neutral-principles-of-law).** Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc., 710 S.W.2d 700, 705-07 (Tex. Ct. App. 1986) (relying on Brown v. Clark in applying strict hierarchical deference). Hawkins v. Friendship Missionary Baptist Church, 69 S.W.3d 756, 759 (Tex. Ct. App. 2002) (finding that dispute involved matters in which religious doctrine was inextricably intertwined with secular principles, thus precluding adjudication under neutral-principles-of-law). Greanias v. Isaiah, No. 01-04-00786-CV, 2006 WL 1550009, at *8 (Tex. Ct. App. June 8, 2006) (same as Hawkins).
Utah	(undecided)	
Vermont	(undecided)	
Virginia	Hybrid	**Norfolk Presbytery v. Bollinger, 201 S.E.2d 752, 754-55 (Va. 1974) (interpreting state statute dealing with church splits).** **Green v. Lewis, 272 S.E.2d 181, 186 (Va. 1980).** **Reid v. Gholson, 327 S.E.2d 107, 112-13 (Va. 1985).**
Washington	Strict-Hierarchical-Deference	Southside Tabernacle v. Pentecostal Church of God, 650 P.2d 231, 235 (Wash. Ct. App. 1982) (finding hierarchical structure dispositive).
West Virginia	Strict-Hierarchical-Deference	**Church of God of Madison v. Noel, 318 S.E.2d 920, 923-24 (W. Va. 1984).**
Wisconsin	Neutral-Principles	**Wis. Conference Bd. of Trs. of United Methodist Church, Inc. v. Culver, 627 N.W.2d 469, 475 (Wis. 2001).**
Wyoming	(undecided)	

[†] *But see supra* note 101 (noting that some commentators believe Texas precedent places it in the "Strict-Neutral-Principles" category, at least with regard to property issues).