OWNING CHURCH PROPERTY

SHELLEY ROSS SAXER*

INTRODUCTION

Theological disputes between local congregations and national or international denominations, most notably in recent times over same-sex marriage, have given rise to legal disputes over who owns religious property. In 1871, the U.S. Supreme Court, in *Watson v. Jones,* determined that courts could not resolve underlying theological controversies within church polity and doctrine.[1] However, following the Court's decision addressing church property disputes in *Jones v. Wolf*,[2] state courts have used one of two alternatives to respond to religious property litigation. Some states distinguish between hierarchical churches[3]

* Laure Sudreau Chair in Law, Pepperdine University Caruso School of Law. The author is indebted to those who have commented on this Article, including Robert Tuttle, Doug Laycock, David Han, and Daniel Dalton. The author is also grateful to Emily Olsen, Dylan Goodale, and Phillip Allevato for their excellent help in reviewing and editing this Article. Any mistakes belong to the author.

1. Watson v. Jones, 80 U.S. 679, 727-29 (1871).

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

3. The author uses the term "church" as a generic term to include all types of religious worship buildings including temples, synagogues, mosques, etc.

and congregational churches and generally defer to the highest authority within hierarchical denominations.[4] Other states use neutral (nontheological) principles to determine property ownership based on state law, documents, and other evidence.[5] States using a neutral principles approach may be informed by local and hierarchical church documents in what has been called a "hybrid" neutral principles approach, or courts may apply a "strict" neutral principles approach where state law and relevant local church documents are favored over the hierarchical entity's governing documents and policies.

In the 41 years since the *Jones v. Wolf* decision allowed states to choose between hierarchical deference and neutral principles in deciding church property disputes, lower court decisions have been inconsistent and disparate, reflecting the confusion created by *Jones*.[6] The U.S. Supreme Court again refused[7] to resolve these ongoing concerns about its jurisprudence governing breakaway church splits when it denied certiorari in *Episcopal Diocese of Fort Worth v. Episcopal Church*.[8] Petitioners urged the Court to grant certiorari and either limit or overrule *Jones v. Wolf*.[9] This Article proposes that lower courts can consistently apply the neutral-principles method so long as a hybrid neutral

4. *See, e.g.*, Cent. Coast Baptist Assn. v. First Baptist Church of Las Lomas, 171 Cal. App. 4th 822, 843-45, 855 (Cal. Ct. App. 2007) (interpreting the local church's reversionary clause ceding all of its property to the Central Coast Baptist association should the church ever "cease to be a Southern Baptist Church" and holding that because the church was congregational, when the local church members voted to merge with another nondenominational church at a proper meeting under the church constitution, it showed the church ceased to be a Southern Baptist Church, and thus the transfer of church property to Central Coast was valid); New v. Kroeger, 167 Cal. App. 4th 800, 815-16 (Cal. Ct. App. 2008) (noting that civil courts more severely restrict interference with the internal matters of a hierarchical rather than a congregational church); Classis of Cent. Cal. v. Miraloma Cmty. Church, 177 Cal. App. 4th 750, 767 (Cal. Ct. App. 2009) (explaining that California cases, such as *New*, do not apply a hierarchical approach, but instead use neutral principles as announced in the *Episcopal Church Cases* to resolve property and governance issues by examining, where applicable, deeds, local church articles of incorporation and bylaws, national church constitution and rules, and relevant state statutes).

5. *See* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 54, 62-63 (2007) (describing deference to the highest religious authority as "substantively neutral, because it avoids government resolution of internal religious disputes," while applying neutral principles to church property disputes permits "formal neutrality" because religion is not used as a category and "religious and secular examples of the same phenomenon are treated exactly the same").

6. *See* Reply Brief in Support of Certiorari at 1, Episcopal Church v. Episcopal Diocese of Fort Worth, 141 S. Ct. 1373 (2021) (No. 20-536),

7. *See* Protestant Episcopal Church in the Diocese of South Carolina v. The Episcopal Church, 806 S.E.2d 82 (S.C. 2017), *cert. denied*, 138 S. Ct. 2623 (2018) (mem.).

8. 602 S.W.3d 417, 423 (Tex. 2020), *cert. denied*, 141 S. Ct. 1373 (2021) (noting the Fort Worth Diocese believed that "TEC had embraced doctrine reflecting 'a substantial departure from the biblical and historic faith.' ").

9. Reply Brief in Support of Certiorari, *supra* note 6, at 10-12.

principles approach is used instead of a strict neutral principles approach.[10] Nevertheless, the viability of *Jones v. Wolf* as approving a neutral principles approach is in doubt,[11] just as the "neutral and generally applicable" approach to free exercise from *Employment Division v. Smith*[12] has come under attack, most recently in *Fulton v. City of Philadelphia*.[13] Perhaps the time has come for both *Jones* and *Smith* to fall. Applying judicial neutrality to actions affecting religious freedom is fraught with inconsistency and constitutional vulnerability.

Courts must resolve church property disputes in three situations. The first category of cases involves a local internal schism of congregants, possibly over doctrinal differences, but more often because of disagreement about the pastor's leadership or a fight for control of church governance. For example, in *Cole v. Holt*, the trustees of a Church of Christ congregation terminated the minister without obtaining congregational approval.[14] When the minister refused to vacate his position, the congregation voted not to recognize the trustees as church leaders and elected new leaders instead.[15] Litigation ensued. The appellate court recognized that while civil courts cannot resolve church disputes that require examining religious doctrine and practice, a court could apply the presumption that a majority of its members represent a congregational church but not a hierarchical church.[16] Thus, the court upheld the majority's decision because it was not a controversy over church doctrine or practice.[17] An interesting dispute

10. *See* 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. 399, 416 (2008) (noting the "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").

11. *See, e.g.*, Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 257 (2009) (discussing *Jones v. Wolf* and expressing concern that "we would get worse results under this neutral-principles rule than under the deference-to-religious-authorities rule" and then stating "[b]ut I had no idea how bad it was going to be"); 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, 305 (1987) (noting "the inconsistency of courts in applying the neutral principles analysis has introduced a new element of uncertainty" into church property disputes); *cf.* Eric G. Osborne & Michael D. Bush, *Rethinking Deference: How the History of Church Property Disputes Calls Into Question Long-Standing First Amendment Doctrine*, 69 SMU L. REV. 811, 842 (2016) (arguing for the demise of the deference rule from *Watson v. Jones* along with "versions of the neutral principles approach that turn *Jones v. Wolf* on its head and make it just another form of deference").

12. 494 U.S. 872 (1990).

13. 141 S. Ct. 1868, 1876-77 (2021) (declining to overrule *Smith* even though concurrences by Justices Alito and Gorsuch argued in favor of overruling *Smith*).

14. 725 N.E.2d 145, 146 (Ind. App. 2000).

15. *Id.*

16. *Id.* at 148 n.2.

17. *Id. See also*, Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 346 (D.C. 2005) (concluding that "neutral principles of contract law can be used to determine whether the

in Orange County, California, could fall into this first category as former members of the Vineyard Anaheim church sue the current pastors for fraud and misappropriating $62 million in church assets.[18]

The second category of cases includes church closures due to declining membership and a lack of resources to continue operations. In *First Baptist Church of Friendly [Church] v. Beeson*, the Church incorporated as a Maryland tax-exempt religious corporation, but in 1999, it severed its ties with the Baptist Convention, adopted a new constitution, and voted sixteen against thirteen to sell the Church property.[19] In 2002, the trustees sold the Church to another Baptist church and netted approximately $834,000.[20] The Church held a congregational meeting and a majority (sixteen) voted on how to distribute the net proceeds, with six members dissenting.[21] The trial court ordered the proceeds distributed according to the majority vote, but minority members brought a derivative suit to prevent any distribution that was contrary to corporate purposes.[22] The appellate court determined that the major dispute was over the disbursements made to the pastor and his evangelist son to pay off their personal mortgages – approximately $362,000.[23] The court classified these mortgage payments as "a form of Church property dispute" and remanded to determine whether the substantial sums paid to benefit the Church's pastor and a family member were fair and reasonable compensation fitting for the purposes of the Church.[24]

The final category of cases involves the breakaway of a local church from a larger denomination, generally based upon doctrinal differences but sometimes based on bad acts of either the local or the national institution. The Article will focus on this final category and discuss the U.S. Supreme Court's refusal to clear up the ongoing confusion regarding the resolution of church splits and property disputes by denying certiorari in *Episcopal Diocese of Fort Worth v. Episcopal*

Beth Din provision in the bylaws is an enforceable arbitration agreement and, if so, whether the parties' dispute falls within its scope"); Howard v. Johnson, 592 S.E.2d 93, 96 (Ga. Ct. App. 2003) (trial court did not exceed its authority to determine whether the pastor of the deacons represented the majority of church members because majority rule complies with church practice and the law applied to congregational churches).

18. Daniel Silliman, *Lawsuit: Vineyard Anaheim Exit was About Money, Not Holy Spirit*, CHRISTIANITY TODAY (Nov. 22, 2022 12:00PM), https://www.christianitytoday.com/news/2022/november/vineyard-anaheim-wimber-scott-lawsuit-dwelling-place.html [https://perma.cc/26XT-KHUE]. *See* Complaint, Wimber v. Scott, 2022 WL 16949537 (Cal. Super. Nov. 10, 2022).

19. 841 A.2d 347, 349 (Md. Ct. Spec. App. 2004) (the congregation had dwindled from a high of 127 members).

20. *Id.* at 350.

21. *Id.*

22. *Id.* at 349.

23. *Id.* at 353-54.

24. *Id.* at 355, 360.

Church.[25] The schism that precipitated the church property dispute between the National Episcopal Church and the local Fort Worth, Texas Diocese caused the Fort Worth Diocese to vote overwhelmingly in its 2007 and 2008 conventions to withdraw from the Episcopal Church (TEC) and enter into membership with the Anglican Province of the Southern Cone.[26] TEC sued in 2009, seeking control of the church property "and a declaratory judgment as to the true identity of the current Bishop and Trustees of the Corporation," which was incorporated in 1983 as a Texas non-profit corporation.[27] The litigation concluded in 2021 when the U.S. Supreme Court denied certiorari to review the Texas Supreme Court's decision to adhere to the neutral principles of law doctrine and find for the local withdrawing faction.[28]

Part I of this Article discusses the background of property ownership litigation in church breakaway cases and the confusion with other Free Exercise disputes over legal obligations involving religious institutions. The local church splits from national denominations involve doctrinal differences in nationwide social and religious controversies. However, not all national denominations require that a breakaway congregation relinquish control and ownership of local church property to the national church. For example, the United Church of Christ, a congregational denomination, provides that a Local Church may "withdraw by its own decision from the United Church of Christ at any time without forfeiture of ownership or control of any real or personal property owned by it."[29] Breakaway cases in such denominations may involve doctrinal differences, but courts need not decide property rights because they are typically not in dispute. Similarly, the Presbyterian Church in America (PCA) split from the Presbyterian Church U.S. (PCUS) in 1973 in opposition to theological liberalism, and partly because the PCUS required that the real property of each local church be held in trust for the national denomination.[30] The PCA drafted its Book of Church Order to specify that local congregations controlled their own property.[31]

25. 602 S.W.3d 417 (Tex. 2020), *cert. denied*, 141 S. Ct. 1373 (2021).

26. *In re* Salazar, 315 S.W.3d 279, 281 (Tex. App. 2010).

27. *Id.* at 281-82.

28. *Episcopal Diocese of Fort Worth*, 141 S. Ct. at 1373.

29. UNITED CHURCH OF CHRIST CONST. art. V, para. 18, https://www.new.uccfiles.com/pdf/UCC_Constitution.pdf [https://perma.cc/4U4E-HZ2F] (Oct. 3, 2023).

30. *See A Brief History of the Presbyterian Church in America,* PCA, pcanet.org/history/ [https://perma.cc/N2H2-ZST8](last visited Jan. 24, 2024); *see also* Comm'n of Holy Hill Cmty. Church v. Bang, No. B184856, 2007 WL 1180453, at *5 (Cal. Ct. App. 2007) (testimony of Dr. Daryl Fisher-Ogden).

31. THE BOOK OF CHURCH ORDER OF THE PRESBYTERIAN CHURCH IN AMERICA, art. 25-8 (2023).

While the history of doctrinal splits in religious organizations is complex and multifaceted, three historical splits seem to have generated much of the litigation over religious property. Most cases do not discuss the nature of the doctrinal differences; however, the first cases involved the social and doctrinal split over slavery. The second wave of cases resulted from concerns over integration and ordaining women and LGBTQ clergy. Indeed, in 2023, the Southern Baptist Convention (SBC) voted to expel two churches because female pastors held leadership roles.[32] One of the churches, Saddleback Church in Southern California, founded by Rick Warren, is "one of the biggest and most prominent churches in the country."[33] Other recent schisms have arisen from the same-sex marriage controversy at the beginning of this century.[34] The United Methodist Church, the second-largest Protestant denomination in the United States, has seen a quarter of its churches leave the denomination over LGBTQ policies.[35] Professor Michael McConnell identifies this third set of divisions to be "over issues of Biblical authority, Christology, and sexuality."[36]

Some may hail progressive doctrinal changes in church theology as responsive to social changes, but local denominations wishing to remain faithful to the original tenets of the national denomination face losing their property, even though local church members may have paid for and maintained it with limited support from the national denomination. If a court applies a "hybrid" neutral principles approach, the local congregation may lose their property if the court gives deference to hierarchical documents binding local churches. Alternatively, a "strict" neutral principles approach focuses on state law doctrines to interpret church governance and property ownership and favors local church autonomy over deference to national church policies.

Part I also briefly discusses some of the confusion in Free Exercise cases when applying neutral principles from *Jones* to church property disputes and either neutral principles from *Employment Division v. Smith* or ecclesiastical abstention or the ministerial exception from *Hosanna-Tabor* to legal obligation disputes. Although the focus of this

32. Geoff Bennett, *Southern Baptist Convention Bans Female Pastors, Ejecting Several Churches in the Process*, PBS NEWS HOUR (June 15, 2023, 6:40 PM EST), https://www.pbs.org/newshour/show/southern-baptist-convention-bans-female-pastors-ejecting-several-churches-in-the-process [https://perma.cc/ZY3L-QS2E].

33. *Id.*

34. *See* Newton Presbyterian Church v. Smith, 2017 WL 7053909, at *3 (Mass. Supp. 2017) (noting that the local church schism stemmed from a 2011 vote to allow LGBTQ members to be ordained and a 2015 vote to permit same-sex marriage).

35 Ruth Graham, *With a Deadline Looming, the United Methodist Church Breaks Up,* N. Y. TIMES (Dec. 19, 2023), https://www.nytimes.com/2023/12/18/us/the-united-methodist-church-schism.html [https://perma.cc/C6R3-XD3J].

36. Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 308 (2016).

Article is on church property disputes, as discussed in Section A, Section B demonstrates some of the difficulties lower courts are dealing with because of the Court's conflicting decisions addressing church autonomy and generally applicable legal rules that generate expectations as to fairness among private parties and religious institutions.

Part II describes how courts in different parts of the country have applied either the deference approach or the neutral principles approach.[37] When courts apply a neutral principles approach, they use various state rules, including trust law, property deeds and titles, corporate law, and contract law. By examining decisions that use a neutral principles approach, this Part explores whether the decisions are neutral in reality or whether conservative views tend to favor the breakaway faction over national church progressive reforms and liberal views tend to favor the national church reforms.

Part III shows how California and Texas both applied the neutral principles approach from *Jones v. Wolf* to church property disputes between breakaway congregations and the national Episcopal Church, with opposite results. It appears that Texas applied a "strict" neutral principles approach focusing only on state trust law, while California applied a "hybrid" neutral principles approach relying on local documents and state corporate law, giving deference to the national denomination's governing documents.

Part IV discusses other property disputes arising from schisms within local and national fraternal organizations. The decisions in these cases do not involve religious doctrine but are helpful to determine whether there is a better method for resolving local and national organization disputes without regard to doctrinal differences. It appears that courts resolve most of the local and national fraternal property disputes using a deference or hybrid neutral principles approach to favor the national organization. In order to preserve religious autonomy, courts should similarly give deference to national church governing documents when resolving church property disputes. The Article concludes by suggesting that even without becoming involved in religious doctrine, applying the "strict" neutral principles approach may let regional politics influence courts to favor the faction that best reflects the region's majority views. Both the "hybrid" neutral principles approach and the deference approach provide better tools for resolving church property disputes and more closely align with the

37. *See generally* Ashley Alderman, *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, (2005) (examining state decisions to illustrate the confusion resulting from vagueness in the Supreme Court's guidance for resolving religious property disputes and proposing a method to decide these cases with more consistency and predictability).

Court's approach to cases involving ministerial exceptions and preserving church autonomy.[38]

I. CHURCH PROPERTY DISPUTES, LEGAL OBLIGATIONS, AND FREE EXERCISE CONFUSION

The first U.S. Supreme Court case dealing with a church breakaway was *Watson v. Jones,* where the Court used the Constitution as a source of federal common law to establish three rules governing court decisions about church property disputes that fit within the separation of church and state theory.[39] The dispute arose after the General Assembly of the Presbyterian Church adopted a resolution at its annual meeting in 1863 "requiring persons from the southern states who wished to be employed as missionaries or ministers to state their opposition to slavery."[40] While most of the congregation in Louisville, Kentucky, supported this position, a minority faction elected their own trustees and elders, seized control of the church, and chose admission into the Presbyterian Church of the Confederate States.[41]

The Court held the case under advisement for a year, hoping that the Christian virtue of charity would reconcile the schism throughout Kentucky and Missouri that had divided Presbyterian churches.[42] However, by the time the Court took up the case, most of the Southern faction had left the church but persisted as parties in the suit.[43] Noting its disappointment that the dispute remained, the Court affirmed the Circuit Court decision enjoining the minority breakaway faction from using or controlling the church property.[44] The Court concluded, "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final."[45]

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38. *See generally* Trevor Fortenberry, *Intra-Church Property Disputes and the Failure of Neutral Principles: A Call for a Return to the Deference Standard*, 24 ECC. L.J. 38, 39 (2022) ("[A]rguing that the Supreme Court should revisit *Jones v Wolf* and return to the old standard of deference to the internal decision making of religious bodies in intra-church dispute cases").

39. Watson v. Jones, 80 U.S. 679, 725-29 (1871).

40. *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1154 (1962).

41. *Id.* at 1154.

42. *Watson*, 80 U.S. at 734-35.

43. Eric G Osborne & Michael D. Bush, *Rethinking Deference: How the History of Church Property Disputes Calls Into Question Long-Standing First Amendment Doctrine*, 69 SMU L. REV. 811, 817 (2016).

44. *Watson*, 80 U.S. at 699-700, 735.

45. *Id.* at 727.

A. Resolving Church Breakaway Disputes

The three rules established by *Watson* include: 1) "an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles";[46] 2) in the case of a congregational church or independent organization, governed within itself, property use and control is determined by majority vote—the principle governing voluntary associations;[47] and 3) where property is acquired for a religious congregation that is part of a larger religious denomination, the local congregation is bound by the orders and judgments of the larger and more important religious organization.[48]

The *Watson* Court used the third rule, deferring to the decisions adjudicated by the General Assembly of the Presbyterian Church where the controversy was strictly ecclesiastical.[49] Thus, the Court avoided "all the evils" associated with the approach taken by Lord Eldon in the English Courts that required the court to decide, "what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard."[50] This principle of deference became "firmly ensconced" as the standard method of determining religious property disputes, until almost fifty years after *Watson*, when the Court in *Presbyterian Church v. Hull Church* held that Lord Eldon's English rule was unconstitutional.[51] Over those fifty years, the Court resolved several religious property disputes, with the command from the First Amendment that civil courts decide religious property disputes without resolving religious doctrinal questions.[52]

In *Presbyterian Church v. Hull Church*, "two local churches withdrew from a hierarchical general church organization" because there

46. *Id.* at 723.

47. *Id.* at 724-25.

48. *Id.* at 726-27.

49. *Id.* at 733-34.

50. *Watson*, 80 U.S. at 727-28, 733-34 (citing Attorney-General v. Pearson, 3 Merivale 353 (Ch. 1817)) (noting that in this country, we have the freedom to believe any religious principle and the law does not support any dogma or sect).

51. Osborne & Bush, *supra* note 43, at 813; Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449-50 (1969).

52. *Presbyterian Church*, 393 U.S. at 447-49 (citing Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 116 (1952)) (converting the *Watson* principle into a constitutional rule); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 190-91 (1960) (reversing judgment of New York courts that transferred control of the local cathedral from the central governing authority of the Russian Orthodox Church to the Russian Church of America based on constitutional guarantees of religious freedom); Sch. Dist. Abington Twp. v. Schempp, 374 U.S. 203, 222-23 (1963) (noting that the government may not employ religious entities as an arm of the judiciary to interpret and apply state standards).

were doctrinal differences within the denomination.[53] A jury considered the resulting church property dispute under Georgia law to determine whether there was an implied trust of the local church property for the national/general church.[54] The court instructed the jury "to determine whether the actions of the general church 'amount to a fundamental or substantial abandonment of the original tenets and doctrines of the [general church].' "[55] If the general church did not adhere to its original tenets of faith and practice, Georgia law would not imply a trust to help the general church.[56] The jury found for the local churches, and the Supreme Court of Georgia affirmed the verdict that the implied trust had terminated and enjoined the general church from interfering with the local property.[57] The U.S. Supreme Court reversed, holding that under the First Amendment, a civil court may not apply a "departure-from-doctrine" element that requires the court to interpret church doctrines and weigh the importance of those doctrines to the religion.[58]

Subsequently, the Court in a per curiam decision in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.* provided guidance to states as to constitutional approaches to church property disputes.[59] The Court upheld as constitutional under the First Amendment a Maryland court's resolution of a church property dispute that did not involve inquiry into religious doctrine.[60] The Maryland court relied on statutory law, the deed language, the corporation charters, and the General Eldership constitution as to ownership of church property.[61] Justice Brennan, joined by Justice Douglas and Justice Marshall, concurred in the decision with guidance as to the approaches states may adopt to resolve religious property disputes.[62] These approaches included:

1. The *Watson* approach to enforce property decisions by majority vote in a congregational polity or by the highest authority rule in a hierarchical polity if the court does not resolve doctrinal questions or ask about religious policy. *Watson v. Jones*, decided in 1871.[63]

53. *Presbyterian Church*, 393 U.S. at 441.

54. *Id.* at 443-44.

55. *Id.*

56. *Id.*

57. *Id.* at 444.

58. *Id.* at 449-52 (noting "[e]ven if the general church had attempted to apply the state standard, the civil courts could not review and enforce the church decision without violating the Constitution").

59. 396 U.S. 367 (1970).

60. *Id.* at 367-68.

61. *Id.* at 367.

62. *Id.* at 368-70 (Brennan, J., concurring).

63. 80 U.S. 679 (1871); *Id.* at 368-70.

2. Neutral principles of law based on deeds, reverter clauses, and state corporate law, unless provisions for reversion of local church property to the general church require a departure-from-doctrine standard. *Presbyterian Church v. Hull Church,* decided in 1969.[64]

3. Special state statutes enacted to govern religious property provisions without state interference with doctrine and with church governing bodies having control of ecclesiastical policy. *Kedroff v. St. Nicholas Cathedral,* decided in 1952.[65]

The Court later confronted another doctrinal split and church property dispute from Georgia in *Jones v. Wolf*.[66] The question was "whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church."[67] Local church members contributed the funds to buy the local church property.[68] In 1973, a majority of the local members voted to separate from the national church, the Presbyterian Church in the United States (PCUS), and unite with another denomination, the Presbyterian Church in America (PCA).[69] Litigation in state court between the minority faction, and the majority withdrawing faction resulted in a judgment for the majority under a "neutral principles of law" approach, upheld by the Supreme Court of Georgia.[70]

The *Jones v. Wolf* Court upheld the States' right to adopt the neutral principles of law approach to resolve religious property disputes.[71] The majority acknowledged the dissent's preference for a rule of deference to the hierarchical polity rather than neutral principles to protect the free-exercise rights of a religious association.[72] However, the majority noted that before a dispute occurs, the loyal faction "can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church" so long as the parties' intention is in legal form.[73] Still, the Court remanded the decision to determine whether Georgia courts constitutionally applied a neutral-principles analysis to the facts.[74] The Court found that neither the trial court nor

64. *Id.* at 370.
65. *Id.*
66. 443 U.S. 595, 595 (1979).
67. *Id.* at 597.
68. *Id.*
69. *Id.* at 598.
70. *Id.* at 598-99.
71. *Id.* at 604.
72. *Id.* at 604-06.
73. *Id.* at 606.
74. *Id.* at 609-10.

the Supreme Court of Georgia stated it was adopting the rule of majority representation and that it was possible under Georgia law that determining the faction representing the "true congregation" of the local church could involve considering religious doctrine and polity.[75]

In expressly endorsing the neutral principles approach to resolving church property disputes, the *Jones* Court recognized that this approach might present difficulty when a civil court must examine religious documents in solely secular terms.[76] In cases where the civil court must resolve religious controversy in order to interpret ownership documents, the court must defer to the ecclesiastical body.[77] Although the *Jones* majority, led by Justice Blackmun, believed that, "the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application,"[78] this promise has not been realized.[79]

The current state of affairs for resolving religious property disputes in a hierarchical polity is that the English rule, which "awards the property to the faction that is the most orthodox," is no longer constitutionally permissible.[80] Instead, when resolving church property disputes between a local church and a hierarchical denomination, states have the freedom to choose the *Jones* "neutral principles" approach, the *Watson* "deference" to the highest authority approach, or the state statutory approach.[81] Courts addressing property disputes in congregational churches should enforce property decisions made by majority vote so long as they do not examine religious policy or resolve doctrinal questions.[82]

Following the *Jones* decision, "29 states adopted some version of the 'neutral principles' approach, while 9 retained the *Watson* approach, and 12 are unclear or undecided."[83] In addition, several large denominations amended their constitutions to create an express trust in the denominational church instead of letting the local congregation retain

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75. *Id.* at 608-10.

76. *Id*. at 604.

77. *Id*.

78. *Id*.

79. *See* Brief of Amici Curiae at 5, All Saints' Episcopal Church (Fort Worth) v. The Episcopal Church, 2020 WL 7060130 (noting that "[s]tate courts have taken widely divergent approaches in deciding church-property disputes based on purportedly neutral principles of law").

80. McConnell & Goodrich, *supra* note 36, at 315.

81. *Id.* at 317 (as identified in Justice Brennan's concurrence in Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368-70 (1970)).

82. 396 U.S. 367, 368-70 (1970) (Brennan, J., concurring).

83. McConnell & Goodrich, *supra* note 36, at 319 (citing Jeffrey B. Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property*, 35 PEPP. L. REV. 399, 457 App'x (2008)).

title.[84] In 1979, the Episcopal Church adopted the "Dennis Canon," which stated that all real and personal property will be held in trust for the general church, but it did not amend its constitution.[85] In 1983, the Presbyterian Church amended its constitution to provide that local congregational property be held in trust for the general Presbyterian Church (U.S.A.).[86] In 2000, The United Methodist Church amended its Book of Discipline to require that local church property be held in trust for the general denomination and it provided specific trust language for local congregations to incorporate into their deeds.[87]

With a majority of states adopting the neutral principles approach, some states apply a strict approach while a number of states use a hybrid approach.[88] The strict approach requires courts to "resolve church property disputes by applying ordinary principles of property, trust, or contract law to civil legal documents, such as deeds, trust agreements, or contracts," but not internal church rules.[89] The hybrid approach lets courts examine the requirements of state property, trust, or contract law, but internal church rules that govern property ownership disputes are dispositive in the resolution.[90] In their comprehensive article, *On Resolving Church Property Disputes*, Professor Michael McConnell and coauthor Luke W. Goodrich analyzed both of the neutral principles approaches and "argued that the strict approach, by enforcing ordinary principles of property, trust, and contract law, protects free exercise rights, prevents entanglement, and promotes clear property rights."[91] In contrast, this Article contends that only the deference approach and the hybrid neutral principles approach, not the strict neutral principles approach, sufficiently protect First Amendment constitutional rights.

The petition for certiorari filed by the Episcopal Church (TEC) in *Episcopal Diocese of Fort Worth v. Episcopal Church* asked the U.S. Supreme Court to resolve three questions following the Court's decision in *Jones v. Wolf*.[92] First, the states are split as to "whether state law can negate 'an express trust' that a church added to its governing

84. *Id.* at 319-20.

85. *Id.* at 320.

86. *Id.* at 320-21.

87. *Id.* at 320-21 (noting that neither the Episcopal Church nor the Presbyterian Church required such action at the local congregational level in terms of local property deeds).

88. *Id.* at 322-28.

89. McConnell & Goodrich, *supra* note 36, at 325.

90. *Id.* at 322.

91. *Id.* at 345.

92. Petition for Writ of Certiorari at i, 1-4, Episcopal Church v. Episcopal Diocese of Fort Worth, 602 S.W.3d 417 (Tex. 2020) (No. 20-536), 2020 WL 6259543 (discussing "the problems *Jones* has wrought" over the past four decades).

documents pursuant to *Jones*."[93] Second, the states are split as to "whether they can override a church's decision about its own internal 'polity' " in deciding which faction of a split congregation governs the local church and its property.[94] The petition noted that five states defer to the national church's decision as to who governs a local congregation after a schism, but three states apply state law to determine local leadership, even when it conflicts with the ecclesiastical decision.[95] This decision as to which faction is the "true church" is often the initial question that must be resolved in church property disputes.[96] Finally, the third question posed by the petition is whether "the Court should return to the deference rule from which *Jones* departed?"[97] TEC implored the Court to "grant the petition and set forth clear guidance about what the First Amendment requires" rather than subject religious organizations to decisions about their governing documents and highest tribunal decisions based "on idiosyncratic applications of the First Amendment in jurisdictions where disputes happen to erupt."[98]

The question as to which faction is the true church is, at times, the heart of the neutral principles of law approach.[99] For example, in *Church of God in Christ, Inc. v. L.M. Haley Ministries, Inc.,* the Supreme Court of Tennessee concluded that the local church's property was held in trust for the hierarchical religious organization.[100] The court then addressed the second question—which faction of the splintered local church could use and have the church property held in trust.[101] The court determined that it must defer to the hierarchical denomination's decision as to which faction the national church recognized.[102] Although civil courts may constitutionally resolve a church property dispute, they must not decide ecclesiastical questions and instead must defer "to the resolution of issues of religious doctrine or polity by the highest court of the hierarchical church."[103]

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93. *Id.* at 4 (with six states holding that an express-trust canon in the hierarchical organization establishes national ownership of the local property, and eight states enforcing these trust provisions only if they comply with the specific state's trust law).

94. *Id.* at 4-5.

95. *Id.*

96. *See supra* notes 64-75 and accompanying text.

97. Petition for a Writ of Certiorari, *supra* note 92, at 4-5.

98. *Id.* at 5-6.

99. *See, e.g.*, Episcopal Diocese of Fort Worth v. Episcopal Church, 602 S.W.3d 417, 420 (Tex. 2020) (noting that "[t]he central issue on appeal is narrow: which faction of the splintered Episcopal diocese is the 'Episcopal Diocese of Fort Worth'?").

100. Church of God in Christ, Inc. v. L.M. Haley Ministries, Inc., 531 S.W.3d 146, 172-73 (Tenn. 2017).

101. *Id.* at 173.

102. *Id.*

103. *Id.*

In the same way, opposing parties in *St. Mary's Knanaya Church, Inc. v. Abraham* contended that they owned the church property because they represented the "true church."[104] One faction alleged that the dispute was not ecclesiastical, but instead was related to improper filing of corporate documents and transferring church property, and could be resolved using a neutral principles of law approach.[105] Which faction is the "true church" was not before the trial court in its order to grant a preliminary injunction to preserve the status quo.[106] However, the reviewing court recognized that determining the underlying property ownership dispute "may inextricably be tied to which faction is the 'true church.' "[107]

Courts must decide which faction of a church schism is entitled to control the governance and property of the local church.[108] If the court relies on state law and refuses to recognize the national church's determination of which faction is the true church, it is interfering with the freedom of religious organizations to be independent from secular control.[109] This seems to result from what Professor McConnell calls a "strict" neutral principles approach, which he and some states, including Texas, prefer to the "hybrid" neutral principles approach, which "meld[s] the neutral principles approach with deference to church canons or denominational constitutions."[110]

B. Legal Obligations and Free Exercise Confusion

In *Employment Division v. Smith*, Justice Scalia favored a neutral principles approach to Free Exercise, declaring "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' "[111] The *Smith* Court reasoned that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'can-

104. St. Mary's Knanaya Church, Inc. v. Abraham, No. 1782 C.D. 2016, 2017 WL 5489703, at *1 (Pa. Commw. Ct., 2017).

105. *Id.* at *3.

106. *Id.* at *5.

107. *Id.*

108. McConnell & Goodrich, *supra* note 36, at 308-09.

109. *See* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 115-16 (1952) (extolling the *Watson v. Jones* decision for allowing religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

110. McConnell & Goodrich, *supra* note 36, at 309.

111. 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in judgment)).

not depend on measuring the effects of a governmental action on a religious objector's spiritual development.' "[112] In choosing a neutrality rule to evaluate religious burdens, the *Smith* decision, like the *Jones v. Wolf* decision, has been derided for its failure to protect religious freedom.[113]

The confusion between applying neutral principles to church property disputes under *Jones* or deferring to hierarchical church decisions under *Watson* mirrors the confusion lower courts face in applying neutral principles to legal obligations under *Smith* or deferring to church autonomy using the ministerial exception or ecclesiastical abstention under *Hosanna-Tabor*. For example, the amicus brief filed in support of the petition for certiorari challenging the church property decision in *Episcopal Diocese of Fort Worth*[114] argued that the Court has not extended the neutral principles approach developed in *Jones* to ministerial exception cases, such as *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*[115] and *Our Lady of Guadalupe School v. Morrissey-Berru*.[116] Instead, these ministerial exception cases have "invoked *Watson*—not *Jones*—to reiterate that 'the Religion Clauses' require courts to respect 'the general principle of church autonomy,' which includes 'independence in matters of faith and doctrine and in closely linked matters of internal government.' "[117] The challengers also emphasized the success of using *Watson*'s deference approach to resolve church property disputes before the *Jones* decision approved the alternative neutral principles approach.[118]

State decisions involving religious disputes also reflect the confusion between using the neutral principles approach from *Jones* or *Smith*, the ecclesiastical abstention doctrine developed from *Watson*,[119] and the ministerial exception in *Hosanna-Tabor* and *Our Lady of Guadalupe*. For example, in 2022, the North Carolina Supreme Court applied neutral principles from *Jones* to a dispute regarding a

112. *Id.* at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

113. *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring).

114. Brief for General Assembly of the Presbyterian Church (U.S.A.) et. al. as Amici Curiae Supporting Petitioners at 20, Episcopal Diocese of Fort Worth v. Episcopal Church, 602 S.W.3d 417 (Tex. 2020) (Nos. 20-534, 20-536), 2020 WL 7060130.

115. 565 U.S. 171, 195-96 (2012).

116. 140 S. Ct. 2049, 2055 (2020).

117. Brief of Amici Curiae, *supra* note 114, at 20 (quoting Our Lady of Guadalupe Sch. v. Morrissey-Berry, 140 S. Ct. 2049, 2061 (2020)).

118. Petition for Writ of Certiorari at 5, Episcopal Church v. Episcopal Diocese of Fort Worth, 141 S. Ct. 1373 (2021) (No. 20-536), 2020 WL 6259541 ("Rather than attempting to repair the holes in the *Jones* regime, the Court should return to the deference rule from which *Jones* departed.").

119. *See* Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment*, 11 STAN. J. CIV. RTS. & CIV. LIBERTIES 89, 99 (2015). Please note that the ecclesiastical abstention doctrine and the ministerial exception are beyond the scope of this Article.

pastor's termination.[120] In *Nation Ford Baptist Church v. Davis*, the governing board of the church terminated the pastor after receiving numerous complaints and suffering a sixty percent decline in church attendance.[121] The court stated that its role in resolving church disputes that may be spiritual or secular "is dictated by the nature of the dispute."[122] In this case, the pastor's employment dispute was secular in nature and the court allowed him to proceed on those claims that "can potentially be resolved solely by application of neutral principles of corporate, contract, and employment law."[123] However, the court dismissed the pastor's other claims, "which challenge the Board's judgment on grounds necessarily implicating Church doctrine and practice."[124]

The dispute in *Nation Ford Baptist Church* involved an employment dispute, not a church property dispute. Yet, the court applied neutral principles from *Jones* to address First Amendment concerns, rather than the "ministerial exception" from *Hosanna Tabor*.[125] The nature of the court's decision was to determine whether the court had jurisdiction to hear the pastor's employment claims consistent with the First Amendment, not whether the church could assert the ministerial exception as a defense against his claims. The court explained its decision not to use *Hosanna-Tabor* in a footnote as follows:

> We note that our analysis of the trial court's *jurisdiction* to adjudicate a dispute under the ecclesiastical abstention doctrine is distinct from the First Amendment ministerial exception doctrine, which "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar" and is not at issue in this case.[126]

In 2021, the Texas Supreme Court confronted a defamation claim, not a church property dispute in *In re Diocese of Lubbock*,[127] but unlike the North Carolina Supreme Court, the Texas court refused to apply neutral principles to adjudicate a deacon's claim that the Diocese defamed him and instead applied the doctrine of ecclesiastical abstention.[128] The defamation claim arose in the wake of wide accusations of

120. Nation Ford Baptist Church Inc. v. Davis, 876 S.E.2d 742, 752 (N.C. 2022).

121. *Id*. at 748.

122. *Id*. at 747.

123. *Id*. at 754.

124. *Id*.

125. *Id*. at 753 n.4.

126. Nation Ford Baptist Church Inc., 876 S.E.2d at 753 n.4. (emphasis in original) (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C, 565 U.S. 171, 195 n.4 (2012)) ("We conclude that the [ministerial] exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That is because the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear [the] case.' ").

127. In re Diocese of Lubbock, 624 S.W.3d 506 (Tex. 2021).

128. *Id.* at 509.

priestly sex abuse, when the Catholic Diocese in Lubbock responded by publishing a list of priests investigated for credible allegations of sexual abuse of a minor.[129] A deacon of the Diocese of Lubbock sued the Diocese for defamation for including his name on the list after it withdrew his diaconal duties under Canon Law.[130]

Citing *Jones* and other church property disputes, the Texas court explained that it "may exercise jurisdiction over a controversy if it can apply neutral principles of law that will not require inquiry into religious doctrine, interference with the free-exercise rights of believers, or meddling in church government."[131] Having not applied neutral principles outside of the church property context, the Texas Supreme Court rejected using neutral principles of tort law to address the defamation claim because it would require adjudicating "whether the Lubbock Diocese properly applied Canon Law" and would "encroach on the Diocese's decision to investigate its clergy consistent with its internal policies."[132]

Justice Boyd dissented in *In re Diocese of Lubbock*, insisting that when a court can resolve a claim such as defamation against a religious organization on "strictly *secular grounds*," it should do so.[133] In reviewing Texas precedent, Justice Boyd discussed the court's previous decisions involving church property disputes, including the *Episcopal Diocese of Fort Worth v. TEC* decision, and reiterated that courts can apply neutral principles when an issue—particularly property ownership—is not "entwined with or settled by" ecclesiastical findings.[134] Justice Boyd then turned to a detailed analysis of court decisions addressing "whether or when the ecclesiastical-abstention doctrine applies to defamation claims," even though he recognized that neither the U.S. Supreme Court nor the Texas Supreme Court has addressed this issue.[135] In concluding his dissent, Justice Boyd agreed with state and federal courts across the country that have consistently held that defamation claims can be resolved using "neutral principles without becoming entangled in ecclesiastical issues."[136]

129. *Id.*

130. *Id.* at 509-11.

131. *Id.* at 513 (noting that lower courts in Texas have applied neutral principles to non-church property disputes "in certain, narrow circumstances").

132. In re Diocese of Lubbock, 624 S.W.3d at 519.

133. *Id.* at 522 (Boyd, J., dissenting).

134. *Id* at 526.

135. *Id*.

136. *Id*. at 535.

Professor Christopher Lund explains that *Jones* and *Hosanna-Tabo*r apply to different types of cases.[137] *Jones* applies to a property case where the religion has assumed legal obligations and should be given deference to arrange its own autonomous relationships.[138] In contrast, *Hosanna-Tabor* involves legal obligations imposed on the church by employment laws.[139] Lund notes that those opposing the ministerial exception in *Hosanna-Tabor* argued that neutral principles of law under *Jones* could be applied to employment discrimination disputes, "[b]ut the Supreme Court in *Hosanna-Tabor* ignored that argument."[140]

Lund asserts that the goal of courts in resolving church property disputes under either the neutral principles approach from *Jones* or the organizational deference under *Watson* is to give effect to the understandings of the parties before a schism occurs as to which party will be entitled to ownership when it does occur.[141] When cases involve legal obligations imposed on religious organizations and private party disputes arise, the Court adopted a different approach in *Hosanna-Tabor* to resolve whether to apply legal rules that diminish church autonomy.[142] The Court in *Employment Division v. Smith* held that religious adherents were not exempt from generally applicable laws, thus encouraging courts to apply neutral principles to disputes involving religious observers and the government without special treatment under the Free Exercise Clause.[143] However, lower courts have struggled with applying legal rules under *Smith's* neutral principles to disputes between religious observers and have developed alternative rules such as ecclesiastical abstention and the ministerial exception.[144]

Given the confusion generated by the neutrality principles endorsed by *Jones v. Wolf* and *Employment Division v. Smith*, the U.S. Supreme Court needs to address how to square neutral principles with the ecclesiastical abstention doctrine and the ministerial exception it has applied in *Hosanna-Tabor*, *Our Lady of Guadalupe*, and most recently, in *Fulton v. City of Philadelphia*.[145] In *Fulton*, the Court applied strict scrutiny and held that the City violated the Free Exercise Clause by refusing to contract with a reli-

137. Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183, 1201 (2014).

138. *Id*.

139. *Id*.

140. *Id.*

141. *Id*. at 1229.

142. *Id*. at 1201.

143. Lund, *supra* note 137, at 1233 (citing *Smith*, 494 U.S. 872 (1990)).

144. *Id.*

145. 141 S. Ct. 1868 (2021).

gious foster care provider unless it agreed to certify same-sex couples as foster parents.[146] The Court declined to overrule *Smith*, even though concurrences by Justices Alito and Gorsuch argued in favor of doing just that.[147] Part II continues exploring the church breakaway cases based on existing principles of neutrality from *Jones* and deference or ecclesiastical abstention under *Watson*.

II. BREAKAWAY CHURCH PROPERTY DISPUTES

This Part will explore how courts in states other than California and Texas analyze church property disputes based on existing U.S. Supreme Court guidance. Section A discusses those decisions using the hierarchical deference (sometimes referred to as the principles of government approach) from *Watson v. Jones*. Note that in some of these decisions, the court analyzes the dispute under both a deference approach and a neutral principles approach to arrive at the same conclusion in favor of the national church. Because the outcome is the same under both approaches, it is likely that these decisions are applying a "hybrid" neutral principles approach rather than a "strict" neutral principles approach.[148] Section B explores those decisions applying a "hybrid" neutral principles approach and Section C discusses decisions applying a "strict" neutral principles approach.

The decisions discussed in Sections B and C use a neutral principles approach and reveal how the various state laws of trusts, property, corporate, contracts, and fiduciary duty laws, as well as church documents (considered without reference to religious doctrine), have been used to resolve church property disputes. Under the state law of trusts, courts have analyzed these disputes using the doctrines of express trusts, implied trusts, constructive trusts, and the revocability or irrevocability of trusts. Courts have also examined deeds and titles under property law to determine church property ownership. Courts have applied contract law, corporate statutes, and fiduciary duties to determine whether the local or national church controls leadership and property ownership when there is a schism, and which faction of a fractured membership is the "true" church. Unfortunately, these decisions do not lend themselves to classification based on the law applied because most of them use a combination of various state laws and church governing documents.

146. *Id.* at 1882.

147. *Id.* at 1876-77; *see also id.* at 1888 (Alito, J., concurring); *id.* at 1931 (Gorsuch, J., concurring).

148. *See, e.g.*, Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 819 (Iowa 1983) (Schultz, J., dissenting).

A. Watson v. Jones: Hierarchical Deference Approach

The Washington Supreme Court in *Presbytery of Seattle, Inc. v. Rohrbaugh* adopted the rule from *Watson v. Jones* that a court must defer to a hierarchical church in a church property dispute and accept the decision by the organization's highest tribunal as conclusive.[149] A Washington appellate court in *Presbytery of Seattle v. Schulz*, found that the compulsory deference approach used by the Washington Supreme Court in *Rohrbaugh* was appropriate because the Presbyterian Church is hierarchical.[150] Based on stare decisis and the U.S. Supreme Court's decision in *Jones v. Wolf* to allow states to defer rather than use neutral principles of law,[151] the court upheld the trial court's decision to follow *Rohrbaugh* and defer to the Presbyterian Church's finding that the local church property was held in trust to benefit the PCUSA.[152]

The Supreme Court of Iowa in *Fonken v. Community Church of Kamrar* used **both** approaches—compulsory deference and neutral principles—to resolve a church property dispute.[153] Because of the local church's membership in a hierarchical denomination, the court found that the church could not now argue that, in actuality, it functioned as an ecumenical church promoting general Christian principles.[154] The court would need to respond to this argument by deciding whether the local church functioned consistent with Presbyterian teachings, which would require an unconstitutional inquiry into religious doctrine.[155] The local church could disaffiliate from the denomination, but it could not take the property with it on leaving.[156] By voluntarily associating with the United Presbyterian Church (UPC), the local church must adhere to the national church's decisions under the compulsory deference approach.[157]

Under the neutral principles approach, the *Fonken* court concluded that it appropriately reached the same result.[158] Even though the local

149. Presbytery of Seattle v. Rohrbaugh, 485 P.2d 615, 619 (Wash. 1971).

150. Presbytery of Seattle v. Schulz, 449 P.3d 1077, 1087 (Wash. Ct. App. 2019).

151. *Id.* at 1083.

152. *Id.* at 1087; *cf.* Comment, Theodore G. Lee, *Reframing Church Property Disputes in Washington State*, 96 WASH. L. REV. 241, 270-72 (2021) (noting that Washington state uses the *Watson* deference approach to church decisions, but arguing that the state should instead apply the neutral principles approach it applies to property disputes between fraternal organizations when it respects their decisions on how their voluntary associations "will govern and be governed").

153. *Fonken*, 339 N.W.2d at 816.

154. *Id.* at 816-17.

155. *Id.* at 816.

156. *Id.* at 817.

157. *Id.*

158. *Id.* at 817-18.

church held title to the property, local decisions about church property were subject to national church approval as a condition of membership under the governmental relationship established by UPC's constitution.[159] Although UPC did not amend its constitution to provide for an express trust in local church property, the court found there was an implied trust to benefit UPC under its polity.[160] The dissent disagreed with the majority's use of the compulsory deference approach and suggested that the court should only use the neutral principles of law approach.[161] It also noted that it would have held for the local church under the neutral approach and that the majority used a deference approach in applying neutral principles.[162] Therefore, the dissent favored a strict neutral principles approach, while the majority applied either a compulsory deference approach or a hybrid neutral principles approach.[163]

In *Newton Presbyterian Church v. Smith*, a Massachusetts court addressed a church schism following the national church's vote in 2011 to let LGBTQ members be ordained and a majority vote in 2015 to permit same-sex marriage in PCUSA churches.[164] The court applied the ecclesiastical or deferential approach instead of the neutral principles approach because the issue as to which faction may use and have the church property "is inextricably intertwined with the question of which individuals hold authority to act on behalf of the church."[165] Recognizing the hierarchical structure of the PCUSA, the court concluded that the Presbytery of Boston had the authority to determine the "true church" and decide which faction was entitled to the church property.[166] The court did not find it necessary to consider the neutral principles approach, but noted that the result would likely be the same since the PCUSA governing documents imposed a trust on all property held by local churches for the use and benefit of PCUSA.[167] In fact, the Massachusetts Supreme Court in *Maffei v. Roman Catholic Archbishop of Boston* applied the neutral principles of law approach and affirmed a trial court decision awarding the local church property to the national church after it closed the local parish.[168]

159. *Fonken*, 339 N.W.2d at 810, 818-19.

160. *Id.* at 819.

161. *Id.* at 819 (Schultz, J., dissenting).

162. *Id.*

163. *Id.* at 817-18; *id.* at 819 (Schultz, J., dissenting); *See generally* McConnell & Goodrich, *supra* note 36, at 322-23 (discussing the hybrid neutral principles approach).

164. Newton Presbyterian Church v. Smith, No. SUCV20170804BLS2, 2017 WL 7053909, at *3 (Mass. Supp. Nov. 17, 2017).

165. *Id.* at *4.

166. *Id.* at *5.

167. *Id.*

168. Maffei v. Roman Catholic Archbishop of Boston, 867 N.E.2d 300, 305-10 (Mass. 2007).

In Kansas, an appellate court in *Heartland Presbytery v. Presbyterian Church of Stanley, Inc.* noted that Kansas had always applied the principle of hierarchical deference, but that even if it applied a neutral-principles approach, it would apply a hybrid rather than a strict approach.[169] Here, a church schism within the membership of a hierarchical church resulted in a dispute over the church property between the majority of local members voting to leave the general church and those wishing to stay.[170] Originally, the local church agreed to be bound by the PCUSA's Constitution and the religious tribunal let the staying faction retain the disputed property.[171] The appellate court affirmed the trial court's decision to defer to the decision of the highest ecclesiastical tribunal to award the disputed property to the minority membership, even though it respected "the right of the members of the leaving faction to freely exercise their religious beliefs."[172]

B. Jones v. Wolf: "Hybrid" Neutral Principles Approach

In *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, the Supreme Court of Georgia applied a neutral principles approach to a church property dispute and viewed Georgia statutes "as expressing this State's policy of looking to 'the mode of church government or rules of discipline' in resolving" such disputes consistent with *Jones v. Wolf*.[173] The court resolved the property dispute by referring to the governing documents of the local and national churches. It found that the local church's articles of incorporation with the state "unequivocally submit Timberridge and its property to the PCUSA as its governing authority."[174] Holding for the PCUSA, the court rejected the contention that using the neutral principles approach and considering church governing documents "creates a bias for the national church."[175] It explained that applying the neutral principles approach allowed the court to "enforce the intent of the parties as reflected in their own governing documents," which are in a legal form and do not implicate the church's religious doctrine.[176]

The Georgia Supreme Court applied neutral principles again in *Rector, Wardens and Vestrymen of Christ Church in Savannah v.*

169. Heartland Presbytery v. Presbyterian Church of Stanley, Inc., 390 P.3d 581, 598 (Kan. Ct. App. 2017).

170. *Id.* at 584.

171. *Id.* at 598.

172. *Id.*

173. Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc., 719 S.E.2d 446, 452 (Ga. 2011).

174. *Id.* at 454.

175. *Id.* at 457 (quoting Benefield, J., dissenting at 465).

176. *Id.* at 458.

Bishop of the Episcopal Diocese of Georgia, Inc., to find for the national church.[177] The court noted that like earlier cases, this case involved a trust implied under neutral principles of law based on the express trust language in the national church's governing documents, even though a trust was not created under Georgia's trust statutes.[178] The court found that throughout the 180 years before the current property dispute began, Christ Church operated consistently with the Episcopal Church's rule about property ownership, and the local church understood it could not leave the denomination with church property without its consent.[179] The Dennis Canon made explicit what had always been implicit, that the local church held property in trust for the parent church.[180]

In *In re Multi-Circuit Church Property Litigation*, the Virginia Circuit Court issued this Letter Opinion following the 2010 remand by the Virginia Supreme Court of *Protestant Episcopal Church in the Diocese of Virginia v. Truro Church*.[181] The litigation arose based on three major controversies from the 2003 General Convention of TEC: the election of a homosexual priest, the adoption of blessing same-sex unions, and the rejection of the "historic formularies of the Christian faith."[182] Subsequently, several congregations in Virginia voted to separate from TEC and affiliate with the Convocation of Anglicans in North America (CANA).[183] Litigation followed involving TEC, the Protestant Episcopal Church in the Diocese of Virginia (The Diocese), and seven local congregations as defendants and cross-plaintiffs.[184] Although the local congregations, not the TEC or the Diocese, paid for the land and buildings, the court held that such facts did not control the analysis.[185] Instead, the circuit court found compelling evidence "that TEC is a hierarchical church and that its dioceses, including the Diocese of Virginia, exercise control, supervision, and authority over each Episcopal local church and parish. That control, supervision, and authority absolutely extends to matters related to property, even when one excludes from consideration the trust canons."[186]

Using the neutral principles of law approach, the Virginia Circuit Court considered the applicable documents of TEC and the Diocese as

177. 718 S.E.2d 237, 255 (Ga. 2011).

178. *Id.* at 245.

179. *Id.* at 247.

180. *Id.* at 254.

181. In re Multi-Cir. Church Prop. Litig., 84 Va. Cir. 105, 105 (2012).

182. *Id.* at 107.

183. *Id.* at 107-08.

184. *Id.* at 109-17.

185. *Id.* at 197-98 (noting that this is not the law and if such were the case, the court would have no need to apply neutral principles, it would simply calculate which entity paid the most and award the property accordingly).

186. *Id.* at 188.

well as the "course of dealings between the parties" to conclude that the national church established "contractual and proprietary interests in the real and personal property of each of these seven churches."[187] The court found for TEC and the Diocese and ordered that the local churches convey the real properties to the Diocese and relinquish control.[188]

In 2013, the Supreme Court of Virginia in *Falls Church v. Protestant Episcopal Church in U.S.* recognized that Virginia applies neutral principles of law to resolve church property disputes between a hierarchical church and a local church.[189] Under Virginia statutory law, express trusts for hierarchical churches were invalid until 1993, when Virginia Code Section 57-7.1 allowed such trusts.[190] When TEC enacted the Dennis Canon in 1979 to respond to the Supreme Court decision in *Jones v. Wolf*, the former Virginia statute was in effect, making any express trusts created by the canon ineffectual.[191] However, the Virginia Supreme Court limited its finding of ineffectiveness to express trusts only, not implied trusts.[192] The *Falls Church* court found that the local church had agreed to be bound by TEC and Diocese constitutions and canons, including the Dennis Canon, and that the course of dealing between the local church and the national church showed that the property would be held in trust to benefit TEC and the Diocese.[193] The fiduciary relationship between the local and general churches was sufficient to impose a constructive trust, which the Falls Church congregation violated when it tried to withdraw.[194] Thus, "equity dictates that a constructive trust be imposed on the property for the benefit of TEC and the Diocese."[195]

In 2020, the Virginia Circuit Court decided another church property dispute in *Protestant Episcopal Church in Diocese of Southern Virginia v. Church of the Messiah*.[196] The Supreme Court of Virginia's decision in *Falls Church* guided the court in the neutral principles of law approach to church property disputes.[197] Relying on *Falls Church*, the court considered the parties' course of dealing, including the local parish's fiduciary duty regarding the church property and its breach of

187. *Id.* at 198-200.

188. *Id.* at 208 (finding that the disposition of the personal property of these local churches follows the disposition of real property and must transfer to the Diocese).

189. 740 S.E.2d 530, 537 (Va. 2013).

190. *Id.*

191. *Id.* at 539 (citing Jones v. Wolf, 443 U.S. 595, 606 (1979)).

192. *Id.*

193. *Id.* at 541-42.

194. *Falls Church*, 740 S.E.2d at 542.

195. *Id.*

196. Protestant Episcopal Church in Diocese of S. Va. v. Church of the Messiah, 104 Va. Cir. 268 (2020).

197. *Id.* at 273 (citing *Falls Church*, 740 S.E.2d at 537).

this duty by voting to disassociate from the Diocese and the Episcopal Church.[198] It noted that the local church is a dependent entity and "derives its identity from its relationship with the hierarchical church."[199] The court held for the Diocese and the Episcopal Church, and imposed a constructive trust on the local church after its leadership breached their fiduciary duty by trying to " 'acquire an interest' in the Property on behalf of a new congregation."[200]

According to the Virginia Circuit Court, a contractual relationship existed between the local and national denomination based on the Governing Documents of the Episcopal Church, including the Dennis Canon.[201] The course of dealing between the parties and the local parish's fee simple title to the church property did not change this contract.[202] Using a contractual approach to resolve a church property dispute is similar to how courts have resolved property disputes in splits between a local and national fraternal organization.[203]

Several other states have applied neutral principles of law to give effect to the governing documents of the national denomination. In *Episcopal Church in the Diocese of Connecticut v. Gauss*, the Supreme Court of Connecticut adopted the neutral principles of law approach for Connecticut courts resolving church property disputes.[204] It determined that when the local church agreed in 1956 to act under the Diocese and national church constitution and canons, it was bound by subsequently enacted rules, including the Dennis Canon.[205] In addition, the local parish members "have always acted as though the Episcopal Church held a trust interest in the property."[206] The court upheld the trial court's decision that there was an express trust for the Episcopal Church and Diocese.[207]

Likewise, the Colorado Supreme Court in *Bishop & Diocese of Colorado v. Mote*, adopted the neutral principles approach as the preferable method of resolving a church property dispute, finding support in several court of appeals decisions applying this approach.[208] Although the court agreed with the court of appeals to apply neutral principles of law, it disagreed with how the appeals court applied the standard.[209]

198. *Church of the Messiah*, 104 Va. Cir. at 273 (citing *Falls Church*, 740 S.E.2d at 537).
199. *Id.* at 280 (quoting *Falls Church*, 740 S.E.2d at 540 n.9).
200. *Id.* at 281.
201. *Id.* at 274-275.
202. *Church of the Messiah*, 104 Va. Cir. at 278.
203. *See infra* Part III.
204. Episcopal Church in the Diocese of Conn. v. Gauss, 28 A.3d 302, 316 (Conn. 2011).
205. *Id.* at 318-20.
206. *Id.* at 320.
207. *Id.* at 328.
208. 716 P.2d 85, 95-99 (Colo. 1986).
209. *Id.* at 99.

The lower court applied a presumptive rule of majority representation and found that the minority faction did not rebut the presumption, awarding the property to the majority faction of the local church that voted to secede from the national church.[210] The Colorado Supreme Court rejected the presumptive rule and looked instead to state statutory and common law.[211] Rather than remanding the case, the court elected to resolve the dispute given the record of facts from the trial court.[212] After viewing the local church's "articles of incorporation and bylaws, along with relevant provisions in the canons of the general church," the court concluded that the general church imposed a trust on the real and personal property of the local church to benefit the general church.[213]

New York adopted the neutral principles of law approach in *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States* (UPCUSA).[214] Holding in favor of the local church, the court applied neutral principles to find that the withdrawing church held record title and thus ownership of the church property.[215] Because the local church incorporated prior to 1828, the state Religious Corporations Law, requiring trustees of the local church to govern property disputes according to the UPCUSA Constitution, was not applicable.[216] This is one of the few cases decided under a hybrid neutral principles approach that favored the local congregation. As such, it illustrates the value of retaining the neutral principles approach to examine state common law and statutory rules, local church and national church documents, and the understanding of the parties to determine whether the local church intended to dedicate its property to the national church.[217] In this case, the fact that the local church had been in association with the denominational body for 200 years did not establish that there was an implied trust.[218]

Subsequently, the court in *Episcopal Diocese of Rochester v. Harnish* applied the neutral principles approach to find in favor of the national church.[219] The New York court did not find anything in the deeds, the local church's certificate of incorporation, or the state Reli-

210. *Id.*
211. *Id.* at 100.
212. *Id.* at 103.
213. *Id.* at 108.
214. 464 N.E.2d 454, 460 (N.Y. 1984).
215. *Id.* at 460-61.
216. *Id.* at 461.
217. *Id.* at 462.
218. *Id.* at 463.
219. Episcopal Diocese of Rochester v. Harnish, 11 N.Y.3d 340, 351 (N.Y. 2008).

gious Corporations Law that established an express trust for the national church.[220] However, the court reviewed the constitution of the national church and concluded that the Dennis Canon established an express trust in favor of the national church and that the local church, All Saints, agreed to abide by this trust at the time it incorporated or when the Rochester Diocese recognized it as a parish.[221] The court also found persuasive the fact that All Saints did not object to the Dennis Canon for over 20 years after the National Church adopted it.[222]

The Supreme Courts of Delaware, Kentucky,[223] and Tennessee have also employed the neutral principles of law approach to resolve church property disputes in favor of the national denomination, by giving effect to the local church's agreement to be subject to the governing documents of the national church. In *East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.*, the Supreme Court of Delaware affirmed the Court of Chancery holding for the general church as to the ownership and control of the local church property.[224] The Court of Chancery, using neutral principles and examining "the real property deeds, East Lake's certificates of incorporation, the Discipline, and the characteristics of the affiliation between East Lake and the Conference," found an implied trust for the hierarchical parent church.[225]

The Supreme Court of Tennessee in *Church of God in Christ, Inc. v. L.M. Haley Ministries, Inc.*, held that

> the ecclesiastical abstention doctrine, where it applies, functions as a subject matter jurisdictional bar that precludes civil courts from adjudicating disputes that are "strictly and purely ecclesiastical" in character and which concern "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[226]

However, it also acknowledged that not every church legal dispute requires abstention and a church property dispute may be resolved without addressing religious doctrine, polity, or practice.[227] The Tennessee court observed that most church property litigation has occurred

220. *Id.* at 924.

221. *Id.* at 924-25.

222. *Id.* at 925.

223. *See* Cumberland Presbytery of Synod of the Mid-W. of Cumberland Presbyterian Church v. Branstetter, 824 S.W.2d 417, 421-22 (Ky. 1992) (the Kentucky Supreme Court applied neutral principles of law to hold that the local church faction forfeited their right to the church property when they withdrew from the national church).

224. E. Lake Methodist Episcopal Church, Inc. v. Trs. of the Peninsula-Del. Ann. Conf. of the United Methodist Church, 731 A.2d 798, 800-01 (Del. 1999).

225. *Id.* at 809-10.

226. Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc., 531 S.W.3d 146, 159 (Tenn. 2017) (quoting Watson v. Jones, 80 U.S. 679, 733 (1871)).

227. *Id.*

where a hierarchical religious denomination provides in its governing documents that it holds local church property in trust for the national denomination, but the local church does not have a trust provision in its property deeds or documents.[228] The court noted that the majority of states adopted the neutral-principles approach to resolve church property disputes, but most apply a hybrid approach instead of a strict approach.[229] The hybrid neutral-principles approach, as applied by state courts, defers to the trust language in hierarchical religious governing documents rather than trust language, or lack thereof, in the local property deeds or the civil formalities required under state law.[230]

The Tennessee Supreme Court concluded in *Church of God in Christ* that the local church held its property in trust for the hierarchical organization, and it deferred to the national denomination's ecclesiastical decision regarding which faction of the local church could possess and control church property.[231] The court determined that the hybrid neutral-principles approach was the "most consistent with the analysis the Supreme Court reviewed and approved as constitutionally permissible in *Jones* and also most consistent with the analysis courts in this State have previously used when resolving church property disputes."[232]

Wisconsin follows a neutral principles approach based on a special state statute enacted to govern the disposition of religious property.[233] As discussed in Part I, the U.S. Supreme Court identified special state statutory provisions as one of the three allowable approaches to resolving church property disputes.[234] In *Wisconsin Conference Bd. Of Trustees of United Methodist Church, Inc. v. Culver*, the Wisconsin Supreme Court relied on Wis. Stat. §187.15 to judicially resolve the church property dispute.[235] It interpreted and applied the statute based on legal and secular terms, not doctrinal considerations.[236] The court addressed whether the local church's decision to withdraw from the national denomination over doctrinal differences caused it to be a defunct or dissolved local Methodist church within the meaning of statute.[237] Based on the local church's complete severance from the United Methodist Church (UMC), the court did not have to resolve schisms

228. *Id.* at 168.

229. *Id.* at 162, 168 (citing Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Prop. Disputes*, 58 ARIZ. L. REV. 307, 311, 322 (2016)).

230. *Id.* at 168-69.

231. *Id.* at 173.

232. *L. M. Haley Ministries, Inc.*, 531 S.W.3d at 170.

233. Wis. Conf. Bd. of Trs. of United Methodist Church, Inc. v. Culver, 627 N.W.2d 469, 475-76 (Wis. 2001).

234. *See supra* Part I.

235. 627 N.W.2d at 472.

236. *Culver*, 627 N.W.2d at 476.

237. *Id.*

between the local church and the UMC, but instead applied the statute designed to resolve disputed property rights.[238] The court granted summary judgment for the UMC based on the undisputed facts of the local church's withdrawal.[239] Dissenting opinions questioned the statute's constitutionality and suggested the court remand the case to resolve the dispute based on the express terms of the deed to the property rather than resorting to the statute.[240]

Recently, in *Hebron Community Methodist Church v. Wisconsin Conference Board of Trustees of the United Methodist Church, Inc.,* a local Wisconsin church severed its relationship with the UMC and sought to obtain ownership based on a common law right.[241] As in the *Culver* case above, the local church asserted several constitutional challenges against Wis. Stat. §187.15, which applied only to Methodist church property.[242] Without addressing the constitutional challenges, the federal district court determined that even if §187.15 was unenforceable, the court would apply the general property rule for Wisconsin religious organizations, Wis. Stat. §187.08, which requires that any property owned by a defunct religious society will be vested in the next higher religious denomination.[243] The court noted that even if it could apply none of the state statutes, "Wisconsin law directs this court next to look to 'the provisions in the constitution of the general church concerning the ownership and control of church property.' "[244] The UMC Book of Discipline has an express trust in its favor in case of disaffiliation of a local church, which would give title to the general church.[245] Finally, the court stated that even without the statutes and the Book of Discipline, it would turn to relevant neutral principles and find that under state trust law, the church property would be held in trust for the general church.[246] The court granted the UMC's motion to dismiss, although it noted that the constitutionality of Wisconsin's congregation-specific property statutes raised an interesting question, but not one relevant to this case.[247]

238. *Id.* at 479.
239. *Id.*
240. *Id.* at 482-83.
241. 616 F. Supp. 3d 861, 864-65 (W.D. Wis. 2022).
242. *Id.* at 868-71.
243. *Id.*
244. *Id.* at 869 (quoting Jones v. Wolf, 443 U.S. 595, 603 (2022)).
245. *Id.*
246. *Id.* at 870-71.
247. *Hebron Community Methodist Church,* 616 F. Supp. 3d at 872.

C. Jones v. Wolf: "Strict" Neutral Principles Approach

In their article, McConnell and Goodrich identified the Supreme Court of South Carolina's decision in *All Saints Parish Waccamaw v. Protestant Episcopal Church*[248] as "[a] good example of the strict approach."[249] In 1745, a trust deed granted to George Pawley and William Poole about sixty acres "forever in Trust For the Inhabitants On Waccamaw Neck for Use of A Chapel or Church for divine Worship of the Church of England established by Law."[250] The South Carolina General Assembly enacted legislation in 1880, providing that the South Carolina Episcopal Diocese (Diocese) would hold title to property belonging to inactive or dormant Episcopal churches in trust.[251] In response, the All Saints parish renewed their charter and obtained a quitclaim deed from the Diocese in 1903, conveying to the local congregation any property interest the Diocese might have had.[252] The Diocese amended its constitution and canons to include the Dennis Canon in 1987.[253] However, in 2004, most of the local church voted to amend the congregation's 1902 Certificate of Incorporation to sever its affiliation with the Episcopal Church United States of America (ECUSA) and the Diocese, amend its charter to withdraw from the Diocese and ECUSA, but keep its connection with the Anglican Communion by affiliating with the Episcopal Church of Rwanda.[254]

The *All Saints* court concluded that it could resolve the property dispute by applying neutral principles of property, trust, and corporate law.[255] First, it held that "when the Church Act of 1767 formed All Saints Parish, the Statute of Uses operated to execute the trust created by the 1745 Trust Deed and title vested in the intended beneficiary, the congregation of All Saints Parish."[256] Second, in 1903 when the Diocese executed the Quit Claim deed, title to the property vested in the All Saints Parish.[257] Finally, under South Carolina law, "a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another."[258] Because the All Saints Parish held

248. 685 S.E.2d 163 (S.C. 2009).
249. McConnell & Goodrich, *supra* note 36, at 326.
250. *All Saints*, 685 S.E.2d at 167.
251. *Id.* at 167–68.
252. *Id.*
253. *Id.* at 168.
254. *Id.* at 169.
255. *Id.* at 172.
256. *All Saints*, 685 S.E.2d at 174.
257. *Id.*
258. *Id.*

title to the property, the Dennis Canon did not legally affect title to the Parish's property.[259]

The *All Saints* decision no longer serves as a good example of the strict approach because in 2017, the Supreme Court of South Carolina overruled it in part in *Protestant Episcopal Church in Diocese of South Carolina v. Episcopal Church*.[260] In *Protestant Episcopal Church in Diocese of South Carolina*, the state religious organization sued the national religious organization to establish ownership of property on behalf of the state Diocese and thirty-six local churches that had disassociated from the national denomination.[261] There, the Supreme Court of South Carolina determined that the trial judge was mistaken in applying neutral principles of law under her interpretation of the court's earlier decision in *All Saints*.[262]

First, the *Protestant Episcopal Church in Diocese of South Carolina* court overruled the trial court's finding that TEC is a congregational church. It explained that the Episcopal Church (TEC) "organization is three-tiered, with the General Convention at the top, approximately one hundred dioceses created along geographical lines in the middle, and the individual parishes and missions affiliated with a particular diocese forming in the bottom tier" and is a hierarchical church.[263] Second, the court overruled *All Saints* as to its holding that TEC's Dennis Canon did not create a trust over the local church property and its misapplication of the neutral principles of law approach.[264] The court found that the *All Saints* decision for the local parish ignored the hierarchical church's authority to determine property ownership in a schism through trust terms in its ecclesiastical relationships and governing documents.[265]

Because the *All Saints* decision relied "on a false dichotomy between parish as ecclesiastical unit and parish as a corporate entity," it did not accept the ecclesiastical decision as to which faction was the "true vestry" entitled to the local church property.[266] In addition, the *All Saints* court omitted a dispositive state statute that provides "[i]f religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this chapter on the same subject, the

259. *Id.*

260. Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church, 806 S.E.2d 82 (S.C. 2017), *cert. denied*, 138 S. Ct. 2623 (2018) (mem.).

261. *Id.* at 84.

262. *Id.*

263. *Id.* at 85.

264. *Id.* at 88-90.

265. *Id.* at 88.

266. *Protestant Episcopal Church in the Diocese of S.C.,* 806 S.E.2d at 89-90.

religious doctrine controls to the extent required by the Constitution of the United States or the Constitution of South Carolina, or both."[267]

Following South Carolina's Supreme Court ruling in *Protestant Episcopal Church in Diocese of South Carolina*, the local Diocese and Parishes of South Carolina petitioned the U.S. Supreme Court for a writ of certiorari.[268] The question presented was "[w]hether the 'neutral principles of law' approach to resolving church property disputes requires courts to recognize a trust on church property even if the alleged trust does not comply with the State's ordinary trust and property law."[269] Eighteen law professors, including Professor McConnell, encouraged the Court to "grant certiorari to confirm that *Jones*'s neutral principles approach does not require courts to go beyond a pure application of secular and otherwise applicable state law."[270] The professors argued that the hybrid neutral principles approach is "inconsistent with core First Amendment principles,"[271] whereas a strict or "pure" neutral principles approach "better protects the religious liberty of denominations and congregations alike."[272] The Court denied certiorari.[273]

On remand to the Circuit Court, the appellate judge made rulings addressing each parish involved in the original lawsuit.[274] In 2022, South Carolina's Supreme Court reviewed its earlier decision in *Protestant Episcopal Church in Diocese of South Carolina* to determine whether its 2017 decision achieved a final disposition of real property held by twenty-nine Parishes.[275] The court concluded that the 2017 decision was not a final disposition and reviewed the "circuit court's 2020 Parish by Parish determination as to which entity owns the disputed property."[276] The extensive nature of this review reflects careful consideration of National Church and local parish canons, constitutions, bylaws, and documents as well as state laws of trust and trust revocation. In its conclusion, the court noted that it "was given the unwel-

267. *Id.* at 89 (citing S.C. CODE ANN. § 33-31-180 (2006)).

268. *See* Petition for Writ of Certiorari at *i, *Protestant Episcopal Church in the Diocese of S.C.*, 138 S. Ct. 2623 (2018) (No. 17-1136), 2018 WL 862449.

269. *Id.*

270. Brief for Professors Randy Beck et al. as Amici Curiae in Support of Certiorari at 15, Protestant Episcopal Church in the Diocese of S.C. v. The Episcopal Church 138 S. Ct. 2623 (2018) (No. 17-11136), 2018 WL 1556993.

271. *Id.* at *20 (claiming the hybrid approach "incentivizes denominations to become more hierarchical").

272. *Id.* at *4.

273. Protestant Episcopal Church in the Diocese of S.C. v. The Episcopal Church, 138 S. Ct. 2623 (2018) (mem.).

274. Protestant Episcopal Church in the Diocese of S.C. v. The Episcopal Church, 887 S.E.2d 508, 513 (2022).

275. *Id.*

276. *Id.*

comed task of interpreting the collective result of five separate opinions of the Justices of the 2017 Court–none of which gained a majority of votes."[277] In its final decision for each Parish, nineteen Parishes retained title to their real estate, and ten Parishes created a trust in favor of the National Church, but two revoked the trust.[278] In evident frustration, the court made clear that its decision "[was] not precedential in any future church property dispute,"[279] and declared, "[f]rom our decision today, there will be no remand. The case is over."[280]

While not all decisions discussed below illustrate a "strict" principles of law approach to resolving church property disputes, the Episcopal Church's petition for writ of certiorari in *Episcopal Diocese of Fort Worth v. Episcopal Church* (TEC) identified these cases as reflecting a split from decisions in Georgia, Connecticut, California, New York, Kentucky, and Tennessee applying the neutral principles doctrine.[281] The brief listed those states disagreeing with interpreting *Jones v. Wolf*[282] to "requir[e] the imposition of a trust whenever the denominational church organization enshrines such language in its constitution."[283]

For example, in *From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church*, the Maryland high court applied neutral principles of law to determine whether a valid trust was created and who was benefitted.[284] Citing Maryland state law, the court explained, "[a] trust exists where the legal title to property is held by one or more persons, under an equitable obligation to convey, apply, or deal with such property for the benefit of other persons."[285] Creation of a trust requires the settlor's intent to establish a valid trust, either expressly or by implication.[286] The party seeking to establish the trust has the burden of proof by clear and convincing evidence that an express trust exists.[287]

Under Maryland law, "the property of a local church is held in trust by the religious nonprofit corporation for the benefit of the local church

277. *Id.* at 526.

278. *Id.*

279. *Id.*

280. *Protestant Episcopal Church in the Diocese of S.C.,* 887 S.E.2d at 513.

281. Petition for a Writ of Certiorari, *supra* note 92, at 17-25.

282. 443 U.S. 595 (1979).

283. Petition for Writ of Certiorari, *supra* note 92, at 18, 21-23 (alteration in original) (identifying state high court decisions from Oregon, Maryland, Indiana, Arkansas, Pennsylvania, Alaska, and New Hampshire and noting "Texas has chosen the wrong side of the split").

284. From the Heart Church Ministries, Inc. v. Afr. Methodist Episcopal Zion Church, 803 A.2d 548, 565-66 (Md. 2002).

285. *Id.* at 566 (citing Milholland v. Whalen, 43 A. 43, 43-44 (Md. 1899)).

286. *Id.* at 566-67.

287. *Id.* at 567 (citation omitted).

congregation."[288] Noting that the local church titled the property acquired in its own name with no sign it was held in trust for the national church, the court found it insufficient to review the doctrine and polity of the denomination to resolve the property dispute.[289] The court held that the trial court, in holding for the national church, did not consider the relevant documents and instead deferred to the national church doctrine in error.[290] In addition, Maryland law states that a trust is revocable unless otherwise specifically provided, and even though the Book of Discipline provided for a trust for the national church, a trust is revocable as circumstances change.[291] The court found no sign that a trust for the national church was irrevocable, and there was no express provision discussing the control of church property when a local church breaks away from the national church.[292] Therefore, even if the local church consented to holding its property in trust for the national church while they were affiliated, this "does not automatically constitute consent to relinquishing that property once the affiliation terminates"—especially where the trust is revocable.[293]

Mississippi also declined to impose a trust when the denominational church's governing documents reflected such language. The Supreme Court of Mississippi in *Presbytery of St. Andrew v. First Presbyterian Church of Starkville (FPC)* acknowledged that the state applies the neutral principles of law approach to resolve church property disputes by relying on "objective, traditional concepts of trust and property law."[294] The court affirmed the chancellor's holding that PCUSA, as the parent church, never held a trust interest in FPC's property.[295] First, under traditional Mississippi trust law, the parties did not enter into an express trust, as there was no expression of intent to create a trust in any deed, nor was there a written trust instrument.[296] Second, although Mississippi recognizes constructive and resulting trusts by implication, there was no unjust enrichment requiring a constructive trust, and when the local church incorporated, there was no intention to create a trust as it wished to remain the property owner.[297] The local

288. *Id.*

289. *From the Heart Church Ministries, Inc.,* 803 A.2d at 568-69.

290. *Id.* at 569.

291. *Id.* at 571.

292. *Id.*

293. *Id.*

294. Presbytery of St. Andrew v. First Presbyterian Church PCUSA of Starkville, 240 So. 3d 399, 404 (Miss. 2018) (quoting Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So. 2d 200, 205 (Miss. 1998)).

295. *Id.* at 405.

296. *Id.*

297. *Id.* at 405-06.

church, FPC, bought the disputed property and PCUSA presented no evidence that it invested funds to acquire the property.[298]

The dissent in the Mississippi Supreme Court decision, *Presbytery of St. Andrew*, remarked that the "longstanding tradition" of the Presbyterian denomination was to hold local church property in trust for the national denomination in the event of a local church schism.[299] This tradition was present both before and after the merger of the Presbyterian Church in the United States (PCUS) and another Presbyterian denomination in 1983 to create the Presbyterian Church in the United States of America (PCUSA).[300] The dissent pointed out that when FPC affiliated with the PCUSA, the PCUS Book of Church Order had a trust provision for the denomination, which established a resulting trust interest in the FPC local church property.[301] The dissent asserted that the majority relied on an incorrect interpretation of the PCUSA rules about an opt-out provision.[302] It explained that the opt-out provision let a local church opt out of having "to obtain permission to buy, sell, or encumber property," but it did not let the local church opt out of the property trust provision for the national denomination.[303]

The Supreme Court of Arkansas in *Arkansas Presbytery of Cumberland Presbyterian Church v. Hudson* adopted the neutral principles of law approach to resolve church property disputes between a local church and the general church.[304] The court instructed that when reviewing documents, such as the church constitution, the documents "must be scrutinized in purely secular terms."[305] The court first reviewed the language of the deeds and determined that the local church held title to the property and that there was nothing in the deed language showing the property was held in trust for the general church.[306]

The Arkansas Court next considered the general church documents and applied the 1957 version of the National Church constitution, which was in effect when the property conveyances took place.[307] It found that the 1957 document did not expressly create a trust in church property for the National Church.[308] The language stated,

298. *Id.* at 405.

299. *Id.* at 409 (King, J., dissenting).

300. *Presbytery of St. Andrew,* 240 So. 3d at 409.

301. *Id.* at 409 (King, J., dissenting).

302. *Id.* at 406 (King, J., dissenting).

303. *Id.* at 409 (King, J., dissenting) (quoting Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc., 719 S.E.2d 446, 455-56 (Ga. 2011)).

304. Ark. Presbytery of Cumberland Presbyterian Church v. Hudson, 40 S.W.3d 301, 306 (Ark. 2001).

305. *Id.* at 307.

306. *Id.* at 307-08.

307. *Id.* at 308.

308. *Id.*

"[c]hurch property should be deeded to the trustees of the local presbytery for the benefit and use of the local church."[309] The court held that the 1984 amendment to the National Church constitution, imposing a trust on local church property for the National Church, was not applicable to property conveyances made in 1968 and 1977.[310] Instead, the Arkansas Supreme Court concluded that the trustees of the local church held exclusive title and control over the local church property.[311]

Not all cases applying the neutral principles approach, without deference to the national organizations governing documents, have resulted in decisions favoring the local church. Decisions in Oregon, Pennsylvania, Alaska, New Hampshire, and possibly, Indiana,[312] show that some courts applying a "strict" neutral principles approach will benefit the national church in a property dispute by applying state trust law. Perhaps, a strict neutral principles approach can be applied without the danger allegedly inherent in a hybrid approach where courts will have "discretion to decide how much weight to give to internal church rules, and how much to defer to denominations on the interpretation of those rules."[313] For example, in *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, the Oregon Supreme Court decided that the best rule to apply in church property disputes is the neutral principles of law approach (even though the appellate court chose the deference approach).[314] It found that "PCUSA's constitution declares an express trust in favor of the denominational church for property" with the local church holding legal title in its own name.[315]

The Oregon court then examined Oregon trust law principles to decide whether PCUSA held a trust over the local church property. Under Oregon law, the local church as owner of the property, must declare it holds the property as trustee for PCUSA and that it did not revoke that trust.[316] In 1983, the local congregation approved an amendment to its articles of incorporation that stated the local church "holds all

309. *Id.* at 309.

310. *Ark. Presbytery of Cumberland Presbyterian Church,* 40 S.W.3d at 309.

311. *Id.* at 310.

312. *See* Church of Brethren, S./Cent. Ind. Dist. v. Roann Church of Brethren, Inc., 20 N.E.3d 906, 915 (Ind. Ct. App. 2014) (noting that the *Presbytery of Ohio Valley* decision does not support the Denomination's position because it was a summary judgment decision with an issue of material fact to be decided. Here, "the trier of fact weighed the evidence and inferences, and it concluded that the Congregation did not intend to create a trust on its property").

313. McConnell & Goodrich, *supra* note 36, at 340.

314. Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.), 291 P.3d 711, 715-21 (Or. 2012).

315. *Id.* at 722.

316. *Id.* at 722-23.

property as trustee" for the PCUSA.[317] Unlike Texas trust law, which requires an express written statement to create a trust or allow for its revocation,[318] Oregon trust law allows "written or spoken words or . . . conduct" to establish intent to create a trust.[319]

The local church argued that even if it created a trust for the PCUSA, it had authority to revoke the trust because under Oregon trust law it was not "expressly" irrevocable.[320] The Oregon Supreme Court noted that Oregon enacted the trust statute in 2005, and it does not apply to a trust instrument executed before this date.[321] Here, the trust was created in 1983 and applying common law in effect before 2006, "the trust is irrevocable unless the settlor, Hope Presbyterian, reserved the power of revocation."[322] Because there was no evidence that Hope Presbyterian, as the local church, reserved the power of revocation, the irrevocable trust could not be revoked without the consent of the settlor and all beneficiaries, and PCUSA as a beneficiary did not consent.[323] Thus, under "strict" neutral principles of law, the national church prevailed because the local church held its property in trust for the PCUSA.

In re Church of St. James the Less, the Supreme Court of Pennsylvania acknowledged that it adopted the neutral principles of law approach in *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*,[324] to resolve church property disputes.[325] Under state law, the court noted "that a member of a voluntary association is bound by amendments to the association's rules so long as the amendments (1) are duly enacted; and (2) do not deprive the member of vested property rights without the member's explicit consent."[326] Here, so long as the amendment meets these two requirements, the Dennis Canon binds the local church, even if it did not expressly agree to the canon.[327] After analyzing the relevant provisions and facts, the court found that "St. James clearly intended to place its property in trust for the Diocese prior to the enactment of the Dennis Canon and consequently, the

317. *Id.* at 724.

318. *See Episcopal Diocese of Fort Worth,* 602 S.W.3d at 433.

319. 291 P.3d at 724 (finding local church intended to hold property in trust for PCUSA based on amendments to the articles of incorporation, congregational bylaws, and the relationship between the parties).

320. *Id.* at 726. As discussed below, *infra* Section III.C., this was a successful argument by the local Episcopal Church in *Fort Worth* under Texas law.

321. *Id.* at 726.

322. *Id.*

323. *Id.* at 727.

324. Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church, 489 A.2d 1317, 1323 (Pa. 1985).

325. *In re* Church of St. James the Less, 888 A.2d 795, 805-06 (Pa. 2005).

326. *Id.* at 807-08.

327. *Id.* at 808.

Dennis Canon does not deprive St. James of its vested property rights."[328]

The Supreme Court of Alaska in *St. Paul Church, Inc. v. Board of Trustees of Alaska Missionary Conference of United Methodist Church, Inc.* affirmed that the local church property was held in trust to benefit the Alaska Missionary Conference (AMC) of the United Methodist Church (UMC).[329] The trial court examined "the deeds to the church property, the charter of the local church, the book of order or discipline of the general church organization, and the state statutes governing the holding of the church property" to assess the intentions of the parties as to the property ownership dispute.[330] The Alaska Supreme Court viewed "the relationship between St. Paul and UMC as a whole in order to discern intent."[331] Although the local St. Paul church held title to the disputed properties, the court found that evidence of intent to create a trust for the UMC was sufficient to rebut any presumption based on title.[332] The intent of the local church to create a trust is based on the UMC Discipline, which states that when a local church uses "the name, customs, and polity" of the UMC, a trust is inferred, and St. Paul continued to affiliate with the UMC after buying the properties in dispute.[333]

In *Berthiaume v. McCormack*, the Supreme Court of New Hampshire adopted the neutral principles of law approach approved in *Jones v. Wolf* and announced that it "will first consider only secular documents such as trusts, deeds, and statutes" to settle church property disputes.[334] If the court cannot determine which party should prevail based on these secular documents, it will consider religious documents, including provisions that govern church property, but it will not opine as to the level of deference given to these church documents.[335] After interpreting the statutes and deeds involved in the dispute between the Roman Catholic Bishop of Manchester (RCBM) and the local parishioners, the court concluded that RCBM owned the land and buildings.[336]

The Supreme Court of Indiana in *Presbytery of Ohio Valley, Inc. v OPC, Inc.* also applied a neutral principles approach to resolve a prop-

328. *Id.* at 810.

329. St. Paul Church, Inc. v. Bd. of Trs. of Alaska Missionary Conf. of United Methodist Church, Inc., 145 P.3d 541, 544 (Alaska 2006).

330. *Id.* at 553.

331. *Id.*

332. *Id.* at 554.

333. *Id.* at 555-56.

334. Berthiaume v. McCormack, 891 A.2d. 539, 547 (N.H. 2006).

335. *Id.*

336. *Id.* at 550.

erty dispute between a local church congregation (OPC) and the national Presbyterian Church (PCUSA).[337] In 2006, 98% of the local congregation voted to disassociate from the PCUSA and the trial court found for the local congregation as to the property ownership on a summary judgment motion.[338] Indiana law required that "when an attempt is made to impress a trust upon real property when legal title is held by another," the one claiming to benefit from the trust must prove that the trust was created.[339] Here, the court agreed with the local congregation's argument that it did not intend "to create an express trust on its property in favor of the PC(USA)."[340] As to PCUSA's claim that an implied trust was imposed on the local church property, the court determined that PCUSA's intent was supported by the creation of trust provisions in the 1981 Book of Order.[341] However, the local congregation's intent to create a trust was unclear because it remained a member of the national church for almost twenty-five years after PCUSA inserted the trust provision in the Dennis Canon.[342] Thus, neither party could show undisputed facts regarding an implied trust, so summary judgment was improper because a genuine issue of fact remained for trial on the implied trust claim.[343]

Because the *Presbytery of Ohio Valley* decision involved disputed facts that foreclosed the grant of summary judgment, it is uncertain whether Indiana courts will defer to denominational governing documents in resolving a church property dispute. The Indiana Court of Appeals in *Church of the Brethren, South/Central Indiana District v. Roann Church of Brethren, Inc.*, affirmed the trial court conclusion that the local church did not intend to create a trust on its property for the national church denomination.[344] The national church argued that the trial court should have imposed a trust over the local church's property based on the "nature and duration of the parties' relationship with one another," but the reviewing court found that the trial court properly weighed the evidence and inferences to find that there was no trust language in the property deeds.[345]

337. Presbytery of Ohio Valley, Inc. v. OPC, Inc., 973 N.E.2d 1099, 1103, 1107 (Ind. 2012).

338. *Id.* at 1111-12.

339. *Id.* at 1109 (quoting Matthews v. Adoniram Grand Lodge, 154 N.E.2d 806, 809 (1958)).

340. *Id.* at 1112-13 (finding that local congregation was entitled to partial summary judgment as to PCUSA's claim of express trust).

341. *Id.* at 1113.

342. *Id.*

343. *Id.*

344. Church of Brethren v. Roann Church of Brethren, Inc., 20 N.E.3d 906, 915 (Ind. Ct. App. 2014).

345. *Id.*

As to the normative concern that the state's choice of an approach to analyzing church property disputes reflects a political leaning, a rudimentary analysis of the decisions discussed here does not indicate a clear trend in either direction. The decisions in Part II A & B and Part III A apply either a deferential or a hybrid neutral principles approach to church property disputes. All except one decision[346] have found in favor of the national church over the breakaway local church. However, the decisions from ten states purportedly applying a "strict" neutral principles approach as described in Part II C and Part III B are equally split between finding for the national church and finding for the local church. The political leanings of the states in this category do not appear to govern the local or national outcome as three conservative states found for the local church and two conservative states found for the national church.

Rough political and religious indicators do not support the normative theory that the "strict" neutral principles approach favors local breakaway churches based on conservative political leanings. However, as one commentator has pointed out, the U.S. Supreme Court from 1871 until 1979 "consistently took a deferential approach" and likewise required civil courts to defer to a hierarchical church's decision making.[347] In contrast, the neutral principles approach adopted by the Court in *Jones v. Wolf*, has led to "very different decisions in Episcopal Church property cases as to what exactly constitutes the said neutral principles."[348] Whether conservative or liberal leanings are responsible for the differences in these opinions across states or are just the happenstance of "the facts on the ground," these contradictory outcomes create inconsistency and unpredictability when addressing religious freedom issues.[349] The Court has deferred to religious bodies in recent employment cases involving intra-church disputes; perhaps it should do the same for church property disputes.[350]

Alternatively, courts can give deference to religious organizations in church property disputes without rejecting the States' use of the neutral-principles method as approved by the Court in *Jones v. Wolf*.[351] Part III will discuss why states should use the hybrid neutral-principles approach applied in *Episcopal Church Cases*, which requires at

346. *See* First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States, 464 N.E.2d 454, 460-61 (N.Y. 1984) (holding in favor of the local church based on its incorporation before 1828 and before state law was enacted to hold church property in trust for the general church).

347. *See* Fortenberry, *supra* note 38, at 38.

348. *Id*. at 39.

349. *Id*.

350. *Id*.

351. 443 U.S. 595, 597 (1979) (answering the question of "whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church").

least some deference to the national church organization, instead of using the strict neutral principles approach that was applied in *Episcopal Diocese of Fort Worth*.

III. NEUTRAL PRINCIPLES IN CALIFORNIA AND TEXAS

A majority of states apply the neutral principles approach to church property disputes.[352] This Part focuses on the Episcopal Church property disputes in California and Texas to explore whether a "strict" neutral principles approach will favor the local congregation while the "hybrid" neutral principles approach will favor the national church denomination. The California Episcopal cases favored the national denomination and the Texas Episcopal cases favored the local congregation. Since both California and Texas use the neutral principles approach, is the difference in outcome due to a strict versus hybrid approach, a difference in the state laws, or the proclivity of the judges and political leanings of the state?

The normative aspect of this Article questions whether the "strict" approach allows local churches to retain the disputed property against national churches in states retaining conservative values, whereas the "hybrid" approach defers to the national churches in states favoring progressive changes in religious doctrine. California's decision to award disputed religious property to the progressive national church and Texas's award to the conservative local church reflects the possibility that political and religious values undergird these "neutral principles." Although courts rarely discuss the doctrinal differences leading to schisms between local and national churches in the church property disputes, these differences may subconsciously animate how courts decide cases.[353]

A. California Episcopal Church Cases

In 2009, the California Supreme Court decided the *Episcopal Church Cases* using the neutral principles of law approach to conclude that the local church property was held in trust for the national church.[354] When the local church disaffiliated, it could not take the

352. *See* Heartland Presbytery v. Presbyterian Church of Stanley, Inc., 390 P.3d 581, 598 (2017).

353. *See also* Fortenberry, *supra* note 38, at 54 (noting that the Texas Supreme Court in both *Episcopal Diocese of Fort Worth* and *All Saints Parish Waccamaw* "stress[ed] the importance of maintaining deference when ecclesiastical questions were at stake, [but] then jumped through multiple logical hoops in order to achieve its preferred outcome by stating that the case at issue simply did not involve an ecclesiastical question").

354. Episcopal Church Cases, 198 P.3d 66, 70 (Cal. 2009).

church property with it.[355] Recognizing that secular courts cannot resolve church property disputes based on religious doctrine or practice, the California court adopted the neutral principles approach from *Jones v. Wolf*.[356] It concluded that a "court should consider sources such as the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property, such as [California] Corporations Code section 9142."[357]

The California court examined both the majority and dissent positions in *Jones v. Wolf* and determined that the majority opinion approved a neutral principles approach that requires a secular court to defer to the general denomination decisions when a local church submits itself to a greater authority.[358] The court used a hybrid neutral principles approach and found that the Dennis Canon, added by the Episcopal Church after *Jones v. Wolf*, created an express trust for the national church.[359] In addition, California enacted Corporations Code section 9142 shortly after *Jones v. Wolf* to govern the holding of property by religious corporations.[360]

Justice Kennard concurred in the outcome of *Episcopal Church Cases* because the California Corporations Code compelled the decision for denominational ownership, even though the local church held the deed to the property since 1950.[361] However, she disagreed with the majority as to the approach identified, contending that the majority used a "principle of government" rather than a "neutral principles" approach.[362] A "unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner" would not be a trust under secular principles.[363] Indeed, Justice Kennard suggested that if the court applied

355. *Id.* at 70-71.

356. *Id.* at 79.

357. *Id.* at 70. *See also*, CAL. CORP. CODE ANN. § 9142(c) (West 2023). No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies:

(1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by resolution of its board of directors to so hold those assets in trust.

(2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.

(3) Unless, and only to the extent that, the donor expressly imposed a trust, in writing, at the time of the gift or donation.

358. *Episcopal Church Cases*, 198 P.3d at 80.

359. *Id.* at 81-82.

360. *Id.* at 81.

361. *Id.* at 84-86 (Kennard, J., concurring and dissenting).

362. *Id.* at 85-86.

363. *Id.* at 86.

neutral principles of law approach, the local church would likely prevail because the Dennis Canon would have no legal effect.[364] Justice Kennard favored a "strict" and not a "hybrid" neutral principles approach.[365] She viewed Corporations Code section 9142 as displaying the "principle of government" approach to let a hierarchical church impose a trust on local church property.[366]

Harkening back to *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, which guided states as to constitutional approaches to church property disputes,[367] Justice Brennan identified the third approach as the reliance on special state statutes enacted to govern religious property provisions without state interference with doctrine.[368] In addition to Justice Kennard's concerns expressed in her dissent in *Episcopal Church Cases* above, others have criticized California's enactment of Corporations Code Section 9142 after *Jones v. Wolf* as constituting the unconstitutional establishment of religion.[369] In particular, subsection (c)(2) violates the Establishment Clause as not neutral toward religion because it allows "a trust of local church property in favor of a hierarchical church [to] be created simply by an express declaration of that trust in the 'governing instruments of a superior religious body or general church' of which a local church is a part."[370]

B. Episcopal Diocese of Fort Worth v. Episcopal Church

Over ten years later, the Texas Supreme Court decided a church property dispute favoring local congregations in *Episcopal Diocese of Fort Worth v. Episcopal Church* (TEC).[371] The court applied neutral principles to undisputed facts and found that the resolution did not require reference to religious doctrine, and instead, the governing documents supported a finding of property ownership in the withdrawing faction.[372] The Fort Worth Diocese formed as an unincorporated association in 1982, after it divided from the Episcopal Diocese of Dallas.[373]

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364. *Episcopal Church Cases*, 198 P.3d at 86.

365. *See* McConnell & Goodrich, *supra* note 36, at 322-27 (distinguishing between hybrid and strict neutral principles).

366. *Episcopal Church Cases*, 183 P.3d at 86.

367. 396 U.S. 367, 368-70 (1970) (Brennan, J., concurring).

368. *Id.* at 370.

369. Calvin Massey, *Church Schisms, Church Property, and Civil Authority*, 84 ST. JOHN'S L. REV. 23, 24 (2010).

370. *Id.* at 45-46 (noting that because trust law does not allow the putative beneficiary to create a trust by unilateral declaration, the statute "grants a unique benefit to hierarchical churches" that is not allowed for other putative charitable trust beneficiaries).

371. Episcopal Diocese of Fort Worth v. Episcopal Church, 602 S.W.3d 417, 420 (Tex. 2020).

372. *Id.*

373. *Id.* at 421.

From inception, its constitution stated that the Corporation of the Episcopal Diocese of Fort Worth would hold church property and, upon dissolution, the property shall revert to the Corporation for use by the Diocese.[374] The TEC admitted the Fort Worth Diocese into union in 1982 and the Fort Worth Diocese accepted TEC's constitution and canons, which included the Dennis Canon, in effect since 1979.[375] The Dennis Canon imposed a trust on all church property for TEC.[376] In 1983, the Fort Worth Diocese incorporated the Diocesan Corporation as a Texas nonprofit organization and in 1989, it "repudiated any trust imposed by the Dennis Canon by amending its canons to expressly disclaim the existence of a trust for TEC's benefit."[377]

A schism between the local Diocese and TEC over doctrinal differences compelled the Diocesan Corporation to remove all references to TEC in 2006 by amending its articles and bylaws.[378] It withdrew from TEC based upon voting in its 2007 and 2008 conventions, and TEC sued the withdrawing majority congregation to recover church property and endowment funds.[379] The Texas Supreme Court held that Texas courts must use a "neutral principles of law" approach and not the "deference" approach, which defers to the decision of the highest authority of the ecclesiastical body.[380] Under the neutral principles of law method, the court may consider "evidence such as deeds to the properties, terms of the local church charter (including articles of incorporation and [bylaws], if any), and relevant provisions of governing documents of the general church."[381]

Both sides in the Fort Worth litigation agreed that the neutral principles of law approach governed the property dispute, but they disagreed as to how the court should apply these principles.[382] Historically, courts employed three approaches to resolve church property disputes involving hierarchical religious organizations.[383] The U.S. Supreme Court in *Jones v. Wolf* rejected the English rule, also known as the departure-from-doctrine method.[384] The two remaining approaches, deference (principle of government) and neutral principles, are constitutional and a state may adopt either methodology.[385] The majority of

374. *Id.*

375. *Id.* at 422.

376. *Id.*

377. *Episcopal Diocese of Fort Worth,* 602 S.W.3d at 422.

378. *Id.*

379. *Id.* at 423.

380. *Id.* at 423-24.

381. *Id.* at 424 (quoting Masterson v. Diocese of Nw. Tex., 422 S.W.3d 594, 603 (Tex. 2013)).

382. *Id.* at 426.

383. *Episcopal Diocese of Fort Worth,* 602 S.W.3d at 427.

384. *Id.*

385. *Id.*

states have adopted the neutral principles approach, including Texas.[386]

The Texas court identified the advantages and disadvantages of the neutral principles approach outlined in *Jones v. Wolf* and observed that in some cases, courts must defer to an ecclesiastical resolution of the dispute, which essentially determines the property rights at issue.[387] For example, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, the U.S. Supreme Court reversed a state court ruling that the Mother Church in Russia exceeded its authority under church law when it removed Bishop Milivojevich as head of the diocese and reorganized the diocese.[388] The Court explained that the case was less about a church property dispute than about a religious dispute resolved by the ecclesiastical body.[389] The Texas Supreme Court, in partial harmony with *Milivojevich*, observed:

> [W]hat happens to the *relationship* between a hierarchical religious organization and a subordinate unit after a vote to disassociate "is an ecclesiastical matter over which civil courts generally do not have jurisdiction." "But what happens to the property **is not**, *unless the [local entity's] affairs have been ordered so that ecclesiastical decisions effectively determine the property issue*."[390]

The question at bottom is which faction of the Fort Worth Diocese holds title to the disputed property, the majority that voted to withdraw from TEC or the minority that remained true to the general denomination? The Texas Supreme Court distinguished between TEC's ecclesiastical resolution "as to which faction is the true diocese loyal to the church and which congregants are in good standing," to which the court must defer, and the question of property ownership, which the court can determine under neutral principles based on the Fort Worth Diocese organizational documents.[391] Concluding that nothing in the national church's documents prevented the local diocese from "amendments rescinding an accession to or affiliation with TEC," the court held "that the majority faction is the Fort Worth Diocese and parishes and missions in union with that faction hold equitable title to the disputed property under the Diocesan Trust."[392] The U.S. Supreme Court denied certiorari to address the issue.[393]

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386. *Id.*

387. *Id.* at 428.

388. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698 (1976).

389. *Id.* at 709, 713.

390. *Episcopal Diocese of Fort Worth*, 602 S.W.3d at 429 (footnote omitted) (quoting Masterson v. Diocese of Nw. Tex., 422 S.W.3d 594, 607 (Tex. 2013)).

391. *Id.* at 432-33.

392. *Id.* at 433.

393. Episcopal Church v. Episcopal Diocese of Fort Worth, *cert. denied*, 141 S. Ct. 1373, 1373 (2021) (mem).

C. Comparing Neutral Principles under California and Texas Law

In contrast to the *Episcopal Church Cases*, where the California court held that the Dennis Canon created an express trust over the local church property for the national church, the Texas court held that even if the Dennis Canon created a valid trust, it was revocable. Thus, the local church's Diocesan Constitution and Canons amendment in 1989, twenty years before the property dispute, successfully revoked the trust created for the Fort Worth Diocese.[394] The Texas Property Code provided that a trust is revocable unless it is expressly irrevocable.[395] Even if a court could construe the Dennis Canon to *imply* that the trust was irrevocable, such an implication would be unacceptable under Texas law requiring *express* terms.[396]

The Fort Worth Diocese's organizational documents prohibited the local church from adopting canons inconsistent with TEC's constitution and canons.[397] Still, the court found that the 1989 amendment to the local constitution and canons that revoked TEC's Dennis Canon was consistent with a revocable trust.[398] The St. James Parish at issue in the California *Episcopal Church Cases* also promised to adhere to TEC's constitution and canons.[399] The California court framed the issue as to "which prevails—the fact that St. James Parish holds record title to the property, or the facts that it is bound by the constitution and canons of the Episcopal Church and the canons impress a trust in favor of the general church?"[400]

Both Texas and California applied the neutral-principles approach to resolve the church property dispute. The *Episcopal Diocese of Fort Worth* decision relied on the Texas Property Code to find that TEC's trust over local church property was revocable by the local church because TEC did not *expressly* make it irrevocable.[401] The *Episcopal Church Cases* relied upon the California Corporations Code to find that a trust created by a general church, of which the local corporation is a member, may only be altered or dissolved by amending the creating instrument, the denominational church's governing instruments.[402] The result under Texas law favored the withdrawing church over TEC because even if the Dennis Canon validly created a trust,

394. *Episcopal Diocese of Fort Worth,* 602 S.W.3d at 434.

395. *Id.* at 433.

396. *Id.*

397. *Id.* at 434.

398. *Id.* (noting that in the twenty years between the 1989 amendment and the property dispute, TEC never objected to the amendment).

399. Episcopal Church Cases, 198 P.3d 66, 79 (Cal. 2009).

400. *Id.*

401. *Episcopal Diocese of Fort Worth,* 602 S.W.3d at 434.

402. *Episcopal Church Cases*, 198 P.3d at 81-82.

without an express written declaration that the trust was irrevocable, the local church could revoke TEC's trust.[403] Conversely, the result under California law favored the national church over the local parish because the Episcopal Church's adoption of the Dennis Canon created a valid trust that only the general church that created the trust could amend or revoke.[404]

California considered TEC's constitution and canons, based on California statute, and Texas looked at TEC documents and challenged the validity of its canons under the Texas state law of trusts. Because Texas gave no deference to the national religious organization's constitution and canons over state law principles, it appears to have applied a "strict" neutral-principles approach, while California's deference to TEC's constitution and canons based on the California Corporations Code reflects a "hybrid" neutral-principles approach.

In order to help shape the appropriate framework for resolving church property disputes, it is appropriate to explore how courts have resolved non-religious group property disputes, such as those between local and national fraternal organizations. Part IV examines how courts, without religious and political overtones clouding their resolution of local and national church property disputes under the First Amendment, use either a deference approach or a "hybrid" neutral-principles method giving deference to the national body.

IV. NON-RELIGIOUS GROUP OWNERSHIP OF PROPERTY

When local and national fraternal organizations face internal disputes over property ownership, courts generally defer to the national organization.[405] While inquiry into neutral principles may inform a court's decision, the national organization's constitution and bylaws ultimately control the final resolution. Giving deference to national fraternal organizations stands in stark contrast to the lack of deference given to national churches in courts that apply a "strict" neutral principles approach to church property disputes. Part IV discusses local versus national non-church property disputes and compares how courts resolve them with how courts resolve church property disputes. This comparison reveals that some courts give national fraternal or-

403. *Episcopal Diocese of Fort Worth,* 602 S.W.3d at 433-35.

404. *Episcopal Church Cases*, 198 P.3d at 81-82.

405. *See, e.g.,* National Grange of Order of Patrons of Husbandry v. Cal. Guild, 226 Cal. Rptr. 3d 398, 400-01 (Cal. Ct. App. 2017); High Rd. on Dawson v. Benevolent & Protective Order of Elks, 608 S.W.3d 869 (Tex. App. 2020).

ganizations more deference than they do national religious organizations, even though judicial deference is the way to avoid First Amendment entanglement with religion.[406]

Both religious groups and non-religious groups may benefit from being associated with national hierarchical organizations that can help with the start-up and ongoing operation of the local organization. Fraternal benefit societies are "permeated with a spirit of brotherhood and characterized by a lodge system, ritualism, and representative government."[407] Because they are not-for-profit enterprises, fraternal organizations may receive a tax exemption granted to "cooperatives, labor unions, and religious organizations."[408] With tax exemptions available to charities, both religious organizations and fraternal organizations benefit from formalizing charitable activities as primary purpose activities for a charitable purpose.[409]

In forming these local and national relationships to benefit religious and charity purposes, conflicts may arise between and among these organizations. The Article reviewed church disputes above and now discusses disputes between local and national fraternal organizations. Starting with the TEC religious disputes in California and Texas, this Part compares how state courts resolve religious property disputes with how they resolve fraternal disputes.

The following two fraternal property disputes arose in California and Texas. Both decisions referenced their state supreme court's church dispute precedent from the *Episcopal Church Cases* in California and from *Episcopal Diocese of Fort Worth* in Texas, respectively. It is instructive to observe from the detailed discussion of these cases below that the California court followed the hybrid neutral principles approach used in the *Episcopal Church Cases* and found for the National Grange organization. However, the Texas court distinguished its decision in favor of the local church in *Episcopal Diocese of Fort Worth* using strict neutral principles and found for the National Elks over the local lodge in deference to the hierarchical association.[410]

In *National Grange of the Order of Patrons of Husbandry v. California Guild*, a California appellate court upheld the trial court decision to award the local State Grange property to the National Grange

406. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 185-87 (2012) (discussing church property disputes to support deference to a church's employment decision without citing to *Jones v. Wolf's* approval of the neutral-principles method).

407. *Taxable Status of Fraternal Insurance*, 47 YALE L.J. 965, 965 (1938).

408. *Id.* at 979.

409. Evelyn Brody, *All Charities are Property-Tax Exempt, but some Charities are more Exempt than Others*, 44 NEW ENG. L. REV. 621, 636-39 (2010).

410. *Cf.* McConnell & Goodrich, *supra* note 36, at 325 (arguing in support of the strict neutral principles approach to resolve church property disputes "just like property disputes within other voluntary associations").

organization when it revoked the State Grange's charter in 2013.[411] The national fraternal organization has represented the interests of American farmers since its formation in 1867.[412] The National Grange granted a charter to the California State Grange in 1873 and it remained a member of the national Order until 2012, even though it incorporated as a nonprofit under California law in 1946.[413] The California State Grange constitution as of 2011 provided that:

> [T]he State Grange, as a chartered division of the National Grange, shall have the right and power, as the good of the Order requires, to adopt laws for the organization, administration and regulation of the affairs of the various divisions of the State Grange, including laws limiting, defining, and regulating the powers of the various Granges of the divisions of the State Grange, so long as they do not conflict with the laws of the National Grange.[414]

The National Grange voted to suspend the Master/president of the California State Grange in 2012 based on misconduct, and when the State Grange refused to acknowledge the National Grange's authority, the National Grange suspended the State Grange charter for violating the law of the Order.[415] The National Grange filed this complaint for declaratory and injunctive relief when the State Grange refused to honor the suspensions.[416]

The court in *National Grange* applied the neutral principles approach used by the California Supreme Court in *Episcopal Church Cases* for religious property disputes and determined that the fact that the California State Grange was the record titleholder to the property on which its headquarters are located was not dispositive.[417] The appellate court reviewed the local entity's articles of incorporation and verified that the State Grange's constitution states that it must follow the rules of the National Grange.[418] It then looked at the National Grange's constitution and bylaws, which stated that the real and personal property owned by a State Grange, when its Charter is revoked, would become the property of the National Grange to hold in trust for a reorganized State Grange.[419]

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411. Nat'l Grange of Ord. of Patrons of Husbandry v. Cal. Guild, 226 Cal. Rptr. 3d 398, 400-01 (Cal. Ct. App. 2017).

412. *Id.* at 401.

413. *Id.* at 402.

414. *Id.*

415. *Id.* at 403-04

416. *Id.* at 404.

417. *Nat'l Grange of Ord. of Patrons,* 226 Cal. Rptr. 3d at 412-17 (citing Episcopal Church Cases, 198 P.3d 66, 70 (Cal. 2009)).

418. *Id.* at 417.

419. *Id.* at 417-18.

Finally, the court considered two provisions of the California Corporation Code for nonprofits and concluded that:

> [N]o California statute precludes us from construing together all of the various provisions set forth above from the old California State Grange's articles of incorporation, constitution, and bylaws, and from the Order's constitution and the National Grange's bylaws, to determine whether they required the property of the old California State Grange to pass to the National Grange upon revocation of the old California State Grange's charter, notwithstanding the presumption arising from the fact that record title to the headquarters property is held in the name of the Old California State Grange.[420]

The court applied the neutral principles approach and found that when the National Grange revoked the California State Grange's chapter, the property titled in the State Grange's name was held in trust by the national organization awaiting a newly organized State Grange as part of the Order.[421]

Another property dispute involving a national fraternal organization and a local chapter came before a Texas appellate court in *High Road on Dawson v. Benevolent & Protective Order of the Elks*.[422] High Road, representing the local lodge, argued that the Texas Supreme Court decision in *Episcopal Diocese of Fort Worth v. Episcopal Church* supported its argument that "the National Elks does not have equitable title to the Dawson Road property because High Road holds legal title to the property." High Road contended that in order for the National Elks "to establish equitable title, it must prove that it is the beneficiary of an irrevocable express trust that complies with sections 112.004 and 112.051(a) of the Texas Property Code."[423]

The appellate court rejected this argument, stating that performance of a contract requiring a property transfer may result in obtaining equitable title to real property.[424] Even though no documents created an express trust in the National Elks over the local lodge, principles of equitable title let the title pass to National Elks.[425] The court held that under the National Elks Rules of Order, the local lodge was contractually required to transfer its assets to the National Elks when it revoked the local lodge charter.[426] This revocation vested equitable title to the local lodge's real property in the National Elks.[427]

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420. *Id.* at 420.

421. *Id.* at 423-24.

422. High Rd. on Dawson v. Benevolent & Protective Ord. of Elks, 608 S.W.3d 869 (Tex. App. 2020).

423. *Id.* at 883.

424. *Id.* at 884.

425. *Id.*

426. *Id.*

427. *Id.*

The appellate court observed that the Texas Supreme Court, in a footnote in *Episcopal Diocese of Fort Worth*, clarified the special legal status of lodges under sections 23.104(c) and 23.110 of the Texas Business Organizations Code.[428] Under those sections, a local body is subject to the control of its grand body, which may revoke the warrant or charter, resulting in the transfer and vesting of the local body property in the grand body.[429] The Texas Supreme Court in *Episcopal Diocese of Fort Worth* recognized that "there is authority that such entities cannot disaffiliate even under majority rule," but it noted that there was not a comparable provision governing unincorporated associations.[430] The Court's reliance on the special status of lodges and masons in this footnote was in response to the TEC's argument that "a subordinate unit of a hierarchical organization *cannot* be governed by majority rule under Texas law."[431] The appellate court in *High Road* relied on this footnote from *Episcopal Diocese of Fort Worth* to dismiss the local lodge's argument that it kept its property after the National Elks revocation.[432]

It is noteworthy that although TEC admitted the Fort Worth Diocese into the union in 1982 as an unincorporated association, the local Diocese incorporated in 1983.[433] The corporate bylaws stated, "the affairs of this nonprofit corporation shall be conducted in conformity with the Constitution and Canons of the Episcopal Church in the United States of America and the Constitution and Canons of the Episcopal Diocese of Fort Worth, as they may be amended or supplemented from time to time."[434] Because the Fort Worth Diocese incorporated, the Texas Supreme Court should have applied the same rule it applies to lodges and masons to preclude local units of a hierarchical organization from using majority rule to disaffiliate.[435]

The *High Road* court relied heavily upon *District Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones*,[436] an opinion adopted by the Supreme Court of Texas[437] to support its conclusion that the

428. *High Rd.*, 608 S.W.3d at 884-85 (citing *Episcopal Diocese of Fort Worth*, 602 S.W.3d at 432 n.66).

429. *Id.*

430. *Episcopal Diocese of Fort Worth*, 602 S.W.3d at 432 n.66 (citing Tex. Bus. Orgs. Code §§ 23.104(c) & 23.110).

431. *Id.*

432. *High Rd.*, 608 S.W.3d at 884-85.

433. *Episcopal Diocese of Fort Worth*, 602 S.W.3d at 422.

434. *Episcopal Diocese of Fort Worth*, 602 S.W.3d at 422.

435. *Id.* at 432 n.66. *But see id.* at 430, where the court, after explaining that the Fort Worth Diocese incorporated in 1983, stated that "[t]he Fort Worth Diocese is an unincorporated association formed and operating in Texas."

436. Dist. Grand Lodge No. 25 Grand United Ord. of Odd Fellows v. Jones, 160 S.W.2d 915 (Tex. Comm'n App. 1942); *see also High Rd.*, 608 S.W.3d at 879 (noting that the opinion in *District Grand Lodge* had been "adopted by the Supreme Court of Texas").

437. *High Rd.*, 608 S.W.3d at 879.

National Elks revocation of the local charter vested equitable title to the local charter's real property in the National Lodge.[438] In *District Grand Lodge*, a local lodge became defunct and the court held that equitable title to its property vested in the national organization of Odd Fellows based on the constitution and bylaws of the national organization.[439] The local lodge argued that the Odd Fellows Grand Lodge's constitution and bylaws were contrary to public policy because the Grand Lodge did not incorporate.[440] The *District Grand Lodge* court held that "[t]his statute plainly manifests the legislative intent that a fraternal benefit society already in being should be regarded as an entity and protected by law, although it should not incorporate, just as one that elected to incorporate would be."[441] The statute relied upon in *District Grand Lodge* is virtually the same statute the Texas Supreme Court discussed in the *Episcopal Diocese of Fort Worth* footnote, where it stated there was no such provision that applied to unincorporated associations.[442] As noted above, however, it was irrelevant in the *Episcopal Diocese of Fort Worth* decision that the Texas Business Code may not apply to unincorporated associations because the Fort Worth Diocese incorporated in 1983. Even though the National Lodge in the *District Grand Lodge* case did not incorporate, the Texas Supreme Court adopted the court's conclusion that pursuant to the Texas Business Code the National Elks' revocation of the local charter vested equitable title to the local charter's real property in the National Lodge.[443]

It seems incongruous that courts will honor the contractual relationship between a national and local fraternal organization regarding property ownership but not when a religious organization is involved. The Texas Supreme Court's decision in *Episcopal Diocese of Fort Worth* purported to apply neutral principles to resolve a church property dispute but discounted the governing documents of a national religious organization. The court noted that a nonreligious local entity, such as a lodge, was not allowed to disaffiliate from a grand body by majority rule under the Texas Business Code, but nevertheless applied neutral principles to hold that the local church was the "majority faction" and was entitled to the disputed property without deference to the national religious organization.[444]

438. *Id.* at 881.

439. *Id.*

440. *Id.*

441. *Id.* at 882 (quoting *Dist. Grand Lodge*, 160 S.W.2d at 921).

442. *Id.* at 882 n.10 (noting that although article 1403 relied upon in *Dist. Grand Lodge* was repealed, "the Texas legislature enacted a successor statute that is almost identical to article 1403," which is section 23.110(a) of the Texas Business Organizations Code).

443. Dist. Grand Lodge No. 25 Grand United Ord. of Odd Fellow v. Jones, 160 S.W.2d 915, 923 (Tex. Comm'n App. 1942).

444. *Episcopal Diocese of Fort Worth*, 602 S.W.3d at 432 n.66 & 433.

Other fraternal property disputes use the neutral-principles method by analogy to the church property disputes. For example, in *Bressler v. American Federation of Human Rights*, the Tenth Circuit applied "principles of Colorado law governing property disputes within fraternal and religious societies."[445] The property dispute arose between the Order of International Co-Freemasonry Le Droit Humain (the International Order) and the American Federation of Human Rights (AFHR), which received a Charter from the Supreme Council of the International Order in 1910.[446] The site for AFHR's headquarters in Larkspur, Colorado was purchased in 1916 and the ownership of this property, now worth about $1 million, was in dispute as between these two entities.[447]

The International Order claimed property ownership and relied on previous cases decided on the basis of express language found in the organizations' documents.[448] For example, the court in *Grand Aerie, Fraternal Order of Eagles v. National Bank of Washington, Kent Branch*,[449] concluded that property held in the name of the subordinate lodge becomes property of the Grand Lodge upon suspension or revocation of the local lodge, "*if the constitution so provides*, as it does in the case before us."[450] In contrast, neither the International Order's Constitution nor the AFHR's Charter contained language of express trust, reversion or forfeiture language at Charter revocation, or language addressing secession.[451] However, AFHR's By-Laws stated that "[t]he Grand Council of Administration shall have exclusive control of all funds and properties of the Federation."[452]

The *Bressler* court turned to *Bishop & Diocese of Colorado v. Mote*,[453] a church property dispute case, to understand how the neutral principles of law should be applied under Colorado law to disputed property.[454] In *Bishop*, the Colorado Supreme Court outlined the analytical method using "instruments of conveyance, church documents, and other relevant evidence [to] establish that the general church has

445. Bressler v. Am. Fed'n of Hum. Rights, 44 F. App'x 303, 306 (10th Cir. 2002).

446. *Id.* at 309-12.

447. *Id.* at 313-18.

448. *Id.* at 320.

449. Grand Aerie, Fraternal Ord. of Eagles v. Nat'l Bank of Wash., Kent Branch, 124 P.2d 203 (Wash. 1942).

450. *Bressler*, 44 F. App'x at 322 (quoting *Grand Aerie*, 124 P.2d at 204, 205 (emphasis added by 10th Cir.)); *see also* Golden Lodge No. 13, Indep. Ord. of Odd Fellows v. Grand Lodge of Indep. Ord. of Odd Fellows of Colo., 80 P.3d 857, 860 (Colo. App. 2003) (upholding trial court decision that national organization properly revoked local charter and the local charter's property vested in the Grand Lodge).

451. *Bressler*, 44 F. App'x at 322.

452. *Id.*

453. Bishop & Diocese of Colo. v. Mote, 716 P.2d 85 (Colo. 1986), *cert. denied*, 479 U.S. 826 (1986).

454. *Bressler*, 44 F. App'x at 323-25.

rights of ownership or control over the disputed church property."[455] The *Bressler* court then applied neutral principles of law to both AFHR's documents and the International Order's Constitution, which it found to be silent as to property rights, and concluded that the provisions instead showed that AFHR retained ownership and control over the disputed property.[456]

The Tenth Circuit in *Bressler* recognized that the Colorado Supreme Court decision in *Horst v. Traudt*[457] remains helpful precedent to resolve church property disputes under Colorado law.[458] The *Bressler* court cited the Colorado Supreme Court's decision in *Moses v. Diocese of Colorado*[459] as confirmation that *Horst* provides general guidance for analyzing legal issues involving church disputes like other voluntary and fraternal organizational disputes.[460] The Tenth Circuit found that "Colorado cases involving church property disputes provide a helpful analogy in resolving property disputes involving fraternal organizations."[461]

Local religious and fraternal organizations benefit from their association with national organizations. A social impact study reviewing the economic and social capital generated by the fraternal system, explains the fraternal model:

> The infrastructure embodied in the fraternal benefit society model reflects their unique structure and historical legacy that unites members with a common bond and brings them together in local lodges with deep traditions of service to others. This historical legacy cannot be recreated and comes about through the combination of the tax treatment that provides resources to support fraternal activities and the extensive local infrastructure and leveraging power of community-based lodges. The long-standing policy decision to support the fraternal structure provides extensive societal benefits through the mix of local involvement and national support that brings together people with like-minded interests and beliefs in support of their communities and beyond.[462]

Religious affiliations historically carried legal property limitations, such as in North Carolina and New York, where smaller religious sects

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455. *Id.* at 323 (quoting *Bishop*, 716 P.2d at 99-100).

456. *Id.* at 325.

457. 96 P. 259 (Colo. 1908).

458. *Bressler*, 44 F. App'x at 330 (citing *Horst* for the view that "once incorporated, a society is governed by the civil law of Colorado and not some higher authority").

459. 863 P.2d 310 (Colo. 1993).

460. *Bressler*, 44 F. App'x at 330.

461. *Id.*

462. Phillip L. Swagel, *Economic Contributions of Fraternal Benefit Societies: A Five Year Perspective*, AM. FRATERNAL ALL. 5 (July 2014), https://static1.squarespace.com/static/60ff13a7b4c26d7bf72e587a/t/61d84c4995b83f02175c4002/1641565257947/Fraternal+Economic+Social+Impact+Study.pdf [https://perma.cc/6DBH-582V].

were limited in the land they could purchase and income they could receive.[463] Modernly, the benefits of affiliating with a national religious organization, not only to acquire tax benefits and sometimes, statutory exemptions, are similar to the benefits enjoyed by fraternal organizations. However, for religious organizations, limiting government interference with the choice of leaders and organizational structure, are essential to the preservation of religious freedom.

> In short, limiting government meaningfully in spiritual matters requires barring more than just certain government inquiries or theological judgments. It also requires protecting in substance an independent sector of religious organizations with freedom to organize themselves and define and express their beliefs and mission. Government intrusion in those core matters is improper in general, not only when it is based on certain improper judgments or inquiries.
>
> Precisely how far this freedom extends can be complicated to determine. The religious sector is of course limited itself, and church and state jurisdictions may overlap. But, as the conflicts from the medieval to Communist eras suggest, a crucial feature of an independent religious sector is the ability of religious organizations to choose their leaders according to their own standards. From Holy Roman emperors to today's Chinese leaders, civil officials have regularly sought to control or influence the selection of bishops. For the state to interfere in such decisions wrongly makes it the "coauthor" of faith; thus, the ministerial exemption is among "the entailments of the jurisdictional limitations that the Establishment Clause places on the state's role."
>
> The same can be said for the other core matters of organizational autonomy described above. In order to remain independent from the state, a church or other religious organization needs to be able to define and limit its membership without state interference, because whether or not members have formal decision-making authority, they are sure to affect the organization's direction. The church must be able to choose its organizational form and promulgate its teaching to its members and staff.[464]

When local fraternal chapters or local congregations affiliate with a national organization, they voluntarily submit themselves to the governing documents of the hierarchical structure. While the national level may amend governing documents, the local organization will be bound to those amendments if they remain affiliated with the national group. Treating national fraternal organizations more favorably than national religious organizations when resolving a property dispute

463. Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 325-30 (2014).

464. Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J. L. & PUB. POL'Y 165, 175-76 (2009) (quoting Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1815 (2004)).

from a schism, dishonors First Amendment protection for religious doctrine.

The failure of courts to acknowledge the original contract between a local and national religious organization for resolution of a non-doctrinal dispute such as property ownership is not a principled application of the neutral principles of law doctrine. This "strict" neutral principles approach appears to prefer local conservative breakaway churches dealing with national liberal religious reforms, such as the ordination of women and LGBTQ clergy and the allowance of same-sex marriage. Because courts can no longer decide which parties are adhering to the true standard of faith,[465] some courts and scholars have applied a neutral principles approach in a way that disregards the governing documents of the religious denomination to which the local church originally agreed to be bound.

CONCLUSION

Using a "strict" neutral principles doctrine is not a principled approach to resolving church property disputes between local congregations and national denominations. Discounting the governing documents of national religious organizations by resorting to state law concepts of trust, property, and contract law impermissibly interferes with the religion's autonomy to choose its organizational form. When national religious denominations face overlapping state jurisdiction as to corporate form and authority over local church leadership and assets, the governing documents of the national church must prevail over conflicting state law determinations. As emphasized by the Rutherford Institute in its *Episcopal Diocese of Fort Worth* amicus brief to the Supreme Court, "[r]eligious organizations are thus required to draw up their global governing documents to accommodate secular legal standards—which themselves vary from state to state. That burden, standing alone, is at odds with the First Amendment's religion clauses, as interpreted in *Watson* and its progeny."[466]

By denying certiorari in *Episcopal Diocese of Fort Worth*, the U.S. Supreme Court again bypassed the opportunity to clarify the doctrinal approach to apply in church property disputes involving breakaway local congregations.[467] A neutral principles approach must include deference to the national denomination in a hierarchical organization, where the local churches have benefited from their inclusion in the

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

466. Brief of the Rutherford Institute as Amicus Curiae Supporting Petitioners at 5-6, All Saints' Episcopal Church (Fort Worth) v. Episcopal Diocese of Fort Worth, 141 S. Ct. 1373 (2021) (No. 20-534), 2020 WL 7060129.

467. *See* McConnell & Goodrich, *supra* note 36, at 310 (noting that the Court denied certiorari on this issue twelve times from 2010 to 2016).

organization, and cannot operate in opposition to governing documents regarding civil matters such as property ownership. This so-called "hybrid" approach is superior to a "strict" approach, which elevates state law doctrines over the religious organization's autonomy as to church leadership and church assets. States should choose to either give deference to the highest authority of a hierarchical religious organization in any intra-denominational church property dispute relying on *Watson*, or adopt a "hybrid" neutral principles approach approved of in *Jones*.

The Court recently stated in *Our Lady of Guadalupe School v. Morrissey-Berru*, "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[468] It is instructive to note that the Court in this second sentence of its opinion quoted from *Kedroff v. Saint Nicholas*, a church property decision awarding local church property to an international church in Russia. In *Kedroff*, the Court determined there was "no schism over faith or doctrine between the Russian Church in America and the Russian Orthodox Church" and that "[e]ven in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls."[469] Thus, the Court in *Our Lady of Guadalupe School* used the deference method from a church property dispute, which preceded the Court's approval of the neutral-principles method in *Jones v. Wolf*. The Court applied the "ministerial exception" to an employment dispute to preclude any judicial review in strict deference to the religious body.[470]

The Court in *Our Lady of Guadalupe School v. Morrissey-Berru* relied on *Watson v. Jones* and two other church property dispute decisions to support "the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government."[471] Notably missing was any reference to *Jones v. Wolf*.[472] In their Petition for Writ of Certiorari, the petitioners argued, *Jones* "has become even more of an outlier in the Court's Religion Clause jurisprudence."[473] It pointed to the Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*, which "relied on Watson - not Jones - to hold that courts must defer to 'a church's determination of who can act as its ministers' " and

468. 140 S. Ct. 2049, 2055 (2020) (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North *America*, 344 U.S. 94, 116 (1952)).

469. *Kedroff*, 344 U.S. at 120-21.

470. *Our Lady of Guadalupe School,* 140 S. Ct. at 2055.

471. *Id.* at 2061.

472. 443 U.S. 595 (1979).

473. Petition for Writ of Certiorari, *supra* note 118 at 20.

"to reiterate that 'the Religion Clauses' require courts to respect 'the general principle of church autonomy.' " [474]

Courts should honor the relationship established between local chapters and national organizations regardless of whether the organization is religious or not. So long as the court is not required to examine religious doctrine and practice to determine the structural relationship, the only principled approach to resolving intra-organizational disputes is to defer to a national organization's governing documents as applied to a local chapter that has voluntarily associated with the national group. Unless deference to the national organization's governance is contrary to public policy, a court should uphold any contractual agreement between local and national entities as expressed in the national governing documents.

Most of the fraternal organizational property disputes have been resolved by reference to the national organization's governing documents. Courts should similarly honor the governing documents of a national religious body asserting authority over a local church that has voluntarily affiliated with the national denomination. Elevating state law doctrines of trust, property, or contract above the national denomination's authority over its leadership, organizational structure, and assets, denies religious freedom and autonomy.

The Court in *Watson* stated:

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.[475]

It is time for the U.S. Supreme Court to clarify *Jones v. Wolf* and require courts to give deference to the governing documents of national denominations in church property disputes involving breakaway factions. States should be able to choose whether to apply deference or neutral principles of state law when deciding who owns church property, but States should not ignore church governance documents by applying a "strict" neutral principles approach and should instead apply a "hybrid" neutral principles approach.

474. *Id.* at 20 (*quoting* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 185 (2012) and Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S.Ct. 2049, 2061).

475. Watson v. Jones, 80 U.S. 679, 727 (1871).