WELCOME TO THE EPISCOPAL CHURCH, NOW PLEASE LEAVE: AN ANALYSIS OF THE SUPREME COURT'S APPROVED METHODS OF SETTLING CHURCH PROPERTY DISPUTES IN THE CONTEXT OF THE EPISCOPAL CHURCH AND HOW COURTS ERRONEOUSLY IGNORE THE ROLE OF THE ANGLICAN COMMUNION

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I. INTRODUCTION

It is settled constitutional law that internal church disputes involving faith, doctrine, governance, and polity are outside of the purview of civil courts.[1] The Supreme Court stated that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[2] When a dispute erupts into schism, however, serious questions arise as to who owns church property and "[t]he state has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively."[3] Thus, the Supreme Court held that, while church property disputes come under the scrutiny of the First and Fourteenth Amendments, civil courts can resolve such conflicts so long as the underlying controversy does not involve determining religious doctrines or ecclesiastical issues.[4]

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1. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–20 (1976); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449–52 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679, 728–729 (1871); *see* Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d, 648, 655 (10th Cir. 2002).

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

3. Jones v. Wolf, 443 U.S. 595, 602 (1979).

4. Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville, 250 A.D.2d 282, 285 (N.Y. App. Div. 1999); *see also Jones*, 443 U.S. at 618; *Serbian E. Orthodox Diocese*, 426 U.S. 696; *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at

The Supreme Court approved two different methods that a court may use in determining church property disputes: the Deference/Church Autonomy Approach[5] and the Neutral Principles of Law Approach.[6] The Court noted, however, that "a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[7] "While both approaches have their adherents, neither is applied with great consistency, and legal scholars have written extensively about how difficult it is for local parishes to order their affairs in the face of this analytical quagmire."[8] Further, despite the broad authority to apply a variety of approaches, "courts frequently disregard seemingly fundamental questions such as what funds were used to purchase the property and how the relationship between the church and [local parish] operates on a day to day basis."[9] What has emerged is a body of case law that is contradictory and often unjust.

> Since the theological and ecclesiological tensions have developed over the election of a bishop living in a same-sex relationship and the authorization in parts of the [Anglican] Communion of a public Rite of Blessing of same-sex unions, enormous strains have also arisen in the [Anglican] Communion regarding the pastoral care of those parishes and dioceses within the Episcopal Church that have been alienated from the life and structures of the Episcopal Church because of those developments . . . .In response to these developments, some primates[10] and bishops of other Prov-

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5. The Deference/Church Autonomy Approach was first espoused by the Supreme Court in *Watson*, 80 U.S. 679. Professor Douglas Laycock is widely credited with popularizing the use of the phrase "church autonomy doctrine" in his article, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). Andrew Soukup, Note, *Reformulating Church Autonomy: How Employment Division v. Smith Provides a Framework for Fixing the Neutral Principles Approach*, 82 NOTRE DAME L. REV. 1679, 1680 n.6 (2007).

6. The Neutral Principles of Law Approach was approved by the Supreme Court in *Jones*, 443 U.S. at 602.

7. *Id.* (quoting Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennen, J., concurring)).

8. Kathleen E. Reeder, *Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits*, 40 COLUM. J. L. & SOC. PROBS. 125, 129 (2006). Ms. Reeder also notes other scholarly work on this topic. *Id.* at 127 n.6.

9. *Id.* at 126.

10. "The use of the title PRIMATE in the context of meetings of the Anglican Communion denotes the chief archbishop or bishop of a province of the Anglican Episcopal family of churches." *See* The Anglican Communion, Instruments of Communion: Primates Meetings,

> inces have been drawn into ad hoc arrangements assuming or claiming differing levels of pastoral and Episcopal authority for such ministry. This has created a complex pattern of parishes which are opting out of the life and structure of the Episcopal Church.[11]

This interventionist structure is particularly significant to church dispute cases because Dioceses of the Episcopal Church are suing to retrieve church property from groups they consider to have left the church.[12] "In addition, it is becoming clear that around half a dozen dioceses are likely to withdraw from the Episcopal Church if their leadership continues in their conviction that the Episcopal Church has departed from a proper understanding of the Christian faith as received by Anglicans."[13] Given this situation, the Anglican Primates have urged "the representatives of The Episcopal Church and of those congregations in property disputes with it to suspend all actions in law arising in this situation."[14] It is not likely that churches are heeding that call.

If a parish in a hierarchical church splits from that church structure, who gets the property? Should it make a difference that the church is hierarchical in name but congregational in reality? Should it matter if the church belongs to an international church that operates in a congregational form in name but hierarchical structure in reality? If a court defers to the highest church tribunal in matters of doctrine and polity, what standard should be used to determine what the "highest" court is? Can neutral principles of law be applied justly if a court ignores inherently religious documents that also specify how church property is distributed? Should the court become involved in resolving church property disputes when the church itself has

http://www.anglicancommunion.org/communion/primates/definition.cfm (last visited Feb. 20, 2007).

11. The Report of the Joint Standing Committee to the Archbishop of Canterbury on the Response of The Episcopal Church to the Questions of the Primates articulated at their meeting in Dar es Salaam and related Pastoral Concerns 9–10 (Oct. 2, 2007) [hereinafter THE REPORT], *available at* http://www.dncweb.org/Report_of_Jt_Standing_Comm.pdf.

12. *See* Episcopal Diocese of Rochester v. Harnish, No. 2006/02669, 2006 WL 4809425 (N.Y. Sup. Ct. Sept. 13, 2006) (holding that, where a parish broke from the Episcopal Church and realigned itself with the Anglican Church of Uganda, the church property belonged to the Episcopal Church).

13. THE REPORT, *supra* note 11, at 10.

14. The Key Recommendations of the Primates, The Communiqué of the Primates' Meeting in Dar es Salaam 11 (Feb. 19, 2007) [hereinafter THE COMMUNIQUÉ], *available at* http://www.anglicancommunion.org/communion/primates/resources/downloads/communique2007_english.pdf.

not resolved that issue?

This Article first explores the two approaches the Supreme Court has authorized for resolution of church property dispute cases. It will then critique the application of those approaches to the unique polity structure in the Episcopal Church and the Anglican Communion. The Article then reviews a selection of church dispute cases involving the Episcopal Church from around the country. Finally, the Article concludes with a new suggested framework for courts to consider when dealing with church property disputes that involve a church that is both hierarchical and congregational at both national and international levels.

II. THE DEFERENCE/CHURCH AUTONOMY APPROACH

The Supreme Court announced the Deference/Church Autonomy Approach by stating "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding on them."[15]

A. The Origins and Development of the Deference/Church Autonomy Approach[16]

The Deference/Church Autonomy Approach originates from the seminal Supreme Court decision in *Watson v. Jones*.[17] This case involved two factions of a Presbyterian church in Kentucky disputing whether to follow the anti-slavery policy of the national church's highest tribunal.[18] The majority of the congregation disagreed with the church tribunal's stance.[19] The anti-slavery group sued in federal

15. Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871).

16. Kent Greenawalt, *Hands Off! Civil Court Involvement In Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1849 (1998) (noting that the *Watson* court initially divided church property disputes into three categories: churches with deeds/wills that by express terms provide that it is devoted to some form of religious belief or doctrine, the second category includes property held by a church that is strictly independent of a general/national religious organization (i.e., a congregational church), and the third category relates to a parish holding the property who is a subordinate member of a general/national church). This Article shall focus almost exclusively on the third category.

17. 80 U.S. (13 Wall.) 679.

18. *Id.* at 715–17.

19. *Id.* at 691–92.

court to determine who would control the church's property.[20] The Court described the congregation as "a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control . . . over the whole membership of that general organization."[21] The Court then declined to resolve the conflict and instead noted that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final . . . ."[22] The Supreme Court gave three reasons for its decision. First, it explained that "[i]t is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance . . . ."[23] Second, it was famously noted that "[i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith" as those within the church's tribunals.[24] "It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so."[25] And third, deference to the highest tribunal would protect the boundaries of church and state.[26] The Supreme Court noted:

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care . . . . This principle would deprive these bodies of the right of construing their own church laws . . . .[27]

Relying on *Watson*, the Supreme Court later invalidated a New York statute as unconstitutional in *Kedroff v. Saint Nicholas Cathedral*.[28] Fearing control of the Russian Orthodox Church in America by anti-religious Soviets, New York enacted a statute that transferred

20. *Id.* at 694 (explaining that the minority pro-slavery faction included some residents of Indiana, and therefore, they were able to claim diversity of citizenship as their basis for federal jurisdiction).

21. *Id.* at 722–23.

22. *Id.* at 727.

23. *Id.* at 729.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 733–34.

28. Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952).

control of a cathedral from Russian-based religious leaders to the American church officials.[29] The Court said that churches have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[30] It is a principle emanating from the Free Exercise Clause.[31]

The Deference/Church Autonomy Approach was then broadened to include cases in which a court is called upon to determine which doctrines and practices are faithful to tradition. "The Supreme Court evidenced unusual unanimity for a religion case when, in 1969, it decided" another Presbyterian Church conflict.[32] In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, several Georgia congregations withdrew from the national church because the actions and policies of the national church had departed from the doctrine in force at the time of the congregations' affiliation with the national church.[33] The Georgia courts employed an approach that held an implied trust existed so long as the national church had not departed from the doctrine in force at the time of the congregations' affiliation.[34] The Supreme Court disagreed, stating that "[s]pecial problems arise . . . when [property] disputes implicate controversies over church doctrine and practice."[35] For a court to engage in a departure from doctrine approach, the court must "determine matters at the very core of religion" which would "[inhibit] the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[36]

The principles of *Watson* and *Mary Elizabeth Blue Hull Memorial Presbyterian Church* were then extended to church polity cases. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Supreme Court reversed a decision by the Illinois Supreme Court.[37] The Illinois Supreme Court invalidated the Serbian Eastern Orthodox Church's defrocking of an American Bishop and reorganizing his diocese into

29. *Id.* at 97–98.

30. *Id.* at 116.

31. *See* Soukup, *supra* note 5, at 1687 n.62 (noting disagreement among scholars about whether the Deference/Church Autonomy Approach is rooted in the Free Exercise Clause or the Establishment Clause of the First Amendment).

32. Greenawalt, *supra* note 16, at 1855.

33. 393 U.S. 440, 442 (1969).

34. *Id.* at 443–44.

35. *Id.* at 445.

36. *Id.* at 449–50.

37. 426 U.S. 696 (1976).

three separate dioceses.[38] The Illinois Supreme Court held that the actions were invalid because the church had not followed its own law in accordance with its constitution.[39] The Supreme Court reversed, noting that the Illinois Supreme Court had "substituted its interpretation of the . . . Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation."[40] That substitution was unconstitutional because, "[t]o permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church policy] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine."[41]

Thus the line of cases emanating from the logic of *Watson* stand for the proposition that:

> Where resolution of the [church property] disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.[42]

B. The Deference/Church Autonomy Approach Critiqued

Justice Rehnquist dissented in *Serbian Eastern Orthodox Diocese*: "[T]o make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would . . . itself create far more serious problems under the Establishment Clause."[43]

The Deference/Church Autonomy Approach "focuses primarily on the organizational structure of the church in question, i.e., whether the local church is congregational (independent) or whether it is a subordinate unit of a hierarchical organization."[44] If the congregation is hierarchical, then a civil court must defer to the highest ecclesiasti-

38. Serbian E. Orthodox Diocese v. Milivojevich, 328 N.E.2d 268, 281 (Ill. 1975).

39. *Id.* at 281–82.

40. *Serbian E. Orthodox Diocese*, 426 U.S. at 721.

41. *Id.* at 709 (quoting Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 369 (1970) (Brennen, J., concurring)).

42. *Id.*

43. *Id.* at 734 (Rehnquist, J., dissenting).

44. Bishop and Diocese of Colo. v. Mote, 716 P.2d 85, 92 (Colo. 1986).

cal tribunal.[45] If a local church is congregational in nature, that is, governed independently of any other ecclesiastical body, "the rights of [conflicting groups] to the use of the property must be determined by the ordinary principles which govern voluntary associations."[46]

"Such blind deference [to a hierarchical church], however, is counseled neither by logic nor by the First Amendment."[47] As Kathleen Reeder noted, such an approach is unjust "because it cedes the role of adjudicator to church tribunals who are themselves a party in the dispute."[48] Additionally, such blind deference "imputes a relationship of implied trust between national and local churches that does not necessarily reflect a congregation's intent or expectations."[49] Is it always the case that a spiritually hierarchical church is also hierarchical in terms of property?

Nathan Belzer, a scholarly defender of the Deference/Church Autonomy Approach, has described it as the "lesser of two constitutional evils . . . because it violates fewer First Amendment principles than other judicial approaches."[50] However, even if one accepts that this is the lesser of two evils, it certainly comes at a great expense. This approach violates the Establishment Clause because it requires courts to blindly defer to the decisions of a church tribunal and, by doing so, courts are placing the force of governmental authority behind a particular religious group.

The Deference/Church Autonomy Approach also ignores the reality that churches are often a mixture of both congregational and hierarchical polity. By assuming a church is entirely hierarchical simply because it looks that way, the hierarchy is given an easy opportunity to dismiss the long held expectations of local congregations.[51] Kathleen Reeder notes that "[t]he deference approach often assumes that local churches have given implied consent to the church hierarchy, even though this assumption is not necessarily based on any understanding of the realities of everyday church operations."[52] In deter-

45. Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871).

46. *Id.* at 725.

47. *Serbian E. Orthodox Diocese*, 426 U.S. at 734 (Rehnquist, J., dissenting).

48. Reeder, *supra* note 8, at 129.

49. *Id.*

50. Nathan Belzer, *Deference in the Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 139 (1998).

51. Presbytery of Beaver-Butler v. Middlesex Presbyterian Church, 489 A.2d 1317, 1324–25 (Pa. 1985).

52. Reeder, *supra* note 8, at 136.

mining local church intent, courts often look to practices such as use of standard liturgy, participation in conferences, use of a denominational name, etc. However, do those sorts of factors really prove the intent of a local congregation or even the intent of a remote figure who donated property decades or even hundreds of years ago?

Another question that the Deference/Church Autonomy Approach fails to answer is how a court determines who the final authority is on all questions. In the case of the Episcopal Church, should the final authority rest within the national church or should a court look at the opinions of the international Anglican Communion? Michael Galligan has urged that "some churches resemble a federation of autonomous groups rather than a totally integrated entity. Even when a church is essentially hierarchical, agreements of union between specific churches and the central body may modify the amount of power granted church authorities."[53] There is evidence that modern courts are beginning to treat some churches as spiritually hierarchical and not hierarchical in terms of church property.[54] This change reflects that courts are beginning to understand the realities of modern church polity.

Writing an important dissent in *Serbian Eastern Orthodox Diocese*, Justice Rehnquist, joined by Justice Stevens, argued that the lower court was not implementing its own religious views but simply asking "if the real Bishop of the American-Canadian Diocese would please stand up."[55] For the dissent, this was important. While a court must accept the ecclesiastical decisions of a church's highest tribunal, this "requires that proof be made as to what these decisions are, and if proofs on that issue conflict, the civil court will inevitably have to choose one over the other."[56] The dissent asked: if a court may do this much, why can't it, on the basis of expert canon testimony, determine if the church followed its own rules?[57] The dissent advocated treating religious organizations like any other voluntary association.[58]

Justice Rehnquist's dissent is interesting given the potential im-

53. *See* Michael Galligan, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007, 2024 (1983).

54. Greenawalt, *supra* note 16, at 1879 (referencing his footnote 167).

55. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 726 (1976) (Rehnquist, J., dissenting).

56. *Id.*

57. *Id.* at 727.

58. *Id.* at 728.

plications of a later decision in *Employment Division v. Smith*,[59] which held that neutral, generally applicable laws that incidentally burden the religious conduct of individuals do not violate the Free Exercise Clause.[60] If the principle of *Smith* is taken to its logical end, defenders of blind deference must answer how religious groups can claim that they are exempt from generally applicable laws, including laws relating to voluntary organizations, when individuals lack the same immunity.[61] Thus,

> [d]espite the ease with which courts set forth [deference]/church autonomy principles, the doctrine creates a myriad of practical and doctrinal problems. In the practical context, the Supreme Court has ruled that courts can constitutionally burden church autonomy . . . but it never defined the degree of permissible interference. Consequently, courts have proven institutionally incapable of drawing a line separating permissible and impermissible infringement on the internal affairs of a religious organization.[62]

III. THE NEUTRAL PRINCIPLES OF LAW APPROACH

Justice Brennan first announced the Neutral Principles of Law Approach by stating "there are neutral principles of law, developed for use in all property disputes, which can be applied without establishing churches to which property is awarded."[63]

A. The History and Development of the Neutral Principles of Law Approach

Subsequent to *Watson*, federal courts resolved church property disputes using the Deference/Church Autonomy Approach, though a few decisions suggested that other approaches were permissible.[64] First, in *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the Court noted that there were neutral principles of law that could be

59. 494 U.S. 872 (1990).

60. *Id.* at 882–90.

61. *See* Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656–57 (10th Cir. 2002) (noting that *Smith* does not change the deference approach because that doctrine addresses the rights of a church not individual members).

62. Soukup, *supra* note 5, at 1681.

63. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

64. *Id.* (noting that "there are neutral principles of law, developed for use in all property disputes, which can be applied without establishing churches to which property is awarded").

applied.[65] Then, in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, Justice Brennan, in his concurrence, noted that "neutral principles of law, developed for use in all property disputes, provide another means for resolving litigation over religious property."[66] The Court's per curium opinion in *Maryland and Virginia Eldership* affirmed the Maryland Supreme Court's use of statutory law to resolve the case because it did not involve inquiry into religious doctrine.[67] Using state law, church deeds and the national church's constitution, the Maryland Supreme Court concluded there was no evidence giving the national church control over the local church property.[68]

The Supreme Court finally gave full credence to the Neutral Principles of Law Approach in *Jones v. Wolf*.[69] Like most church property dispute cases, *Jones* involved a question of which faction should retain the church property: the smaller faction loyal to the general church or the disloyal majority who were not. The local congregation voted to withdraw from the Presbyterian Church and join another denomination.[70] The minority, remaining loyal to the denomination, was declared the "true church" and sued to retrieve the church property.[71] The deeds conveyed the property to the local church,[72] and neither the local corporate charter nor state statutes gave a property interest to the national church.[73] The Georgia Supreme Court held that the property belonged to the local congregation.[74] The Supreme Court, in affirming Georgia's approach,[75] stated that the First Amendment does not require any particular approach for resolv-

65. *Id.*

66. Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring). It is likely that Justice Brennan was referring to the "formal title" approach whereby property disputes are resolved by civil law documents such as deeds.

67. *Id.* at 368.

68. Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 254 A.2d 162, 166–71 (Md. 1969).

69. 443 U.S. 595 (1979).

70. *Id.* at 598.

71. *Id.*

72. *Id.* at 597.

73. *Id.* at 601.

74. Jones v. Wolf, 243 S.E.2d 860, 862–63 (Ga. 1978).

75. Georgia's approach included a presumptive rule of majority representation, defensible upon a showing that the identity of the local church is to be determined by some other means such as providing for an identity in the constitution or corporate charter. *See Jones*, 443 U.S. at 610 (Powell, J., dissenting).

ing church property disputes.[76] Instead, "a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters . . . ."[77] The Court further held this included application of the Neutral Principles of Law Approach.[78]

The Supreme Court found neutral principles of law a promising approach because it would "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[79] This approach involves a court looking into deeds, statutes, corporate charter, constitution, religious documents, etc. When reviewing religious documents, "[c]ivil courts must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts especially when [the document] incorporates religious concepts in the provisions relating to the ownership of property."[80] If the interpretation of that document, for purposes of ownership, requires a court to resolve a religious controversy, then the court must defer to the church's highest tribunal.[81] Interestingly, the Court suggested that churches could include express trust language in their deeds, charters, and constitutions to ensure there was no doubt about ownership.[82] "Many religious organizations, not surprisingly, have tried to put their property affairs in order, but the ordinary limitations of foresight about events and ambiguities of language, as well as how courts will make decisions, render this opportunity less than a perfect guarantee that relevant aspirations will be fulfilled."[83]

"Though *Watson* and *Jones* employ different approaches, both seek the same result: to enforce the will of the parties as expressed in the contract."[84] It is also important to note that, as an approach, neutral principles of law do not distinguish between hierarchical and congregational structures. Such structures are treated essentially the same. Andrew Soukup notes that neutral principles language has been

76. *Id.* at 602 (majority opinion).

77. *Id.* (quoting Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

78. *Id.*

79. *Id.* at 603.

80. *Id.* at 604 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976)).

81. *Id.* at 609 n.8 (citing *Serbian E. Orthodox Diocese*, 426 U.S. at 709).

82. *Id.* at 606.

83. Greenawalt, *supra* note 16, at 1861.

84. Adam E. Lyons, *Here Is the Church, Now Who Owns the Steeple? A Revised Approach to Church Property Disputes*, 15 WM. & MARY BILL RTS. J. 963, 968 (2007).

used to resolve a variety of cases to hold churches liable for defamation, sexual abuse, breach of contract, etc.[85] "In short, since *Jones* was decided, virtually every court to consider the church autonomy defenses outside of the context of church property disputes has relied on *Jones*'s neutral principles approach, rather than on *Watson*'s deferential approach to decide a case."[86]

B. The Neutral Principles of Law Approach critiqued

Justice Powell criticized the Neutral Principles of Law Approach in his dissenting opinion in *Jones*. Notably, even Justice Blackmun stated for the majority: "[t]his is not to say that the application of the neutral-principles approach is wholly free of difficulty."[87] This statement was prophetic in its criticism of the Neutral Principles of Law Approach. The very nature of this approach requires a far greater involvement of civil courts in church property disputes, and likely the controversies underlying them, than the Deference/Church Autonomy Approach.

According to Justice Powell, the "First Amendment's Religion Clauses . . . are meant to protect churches and their members from civil law interference, not to protect the courts from having to decide difficult evidentiary questions."[88] Additionally, reading what is often inherently religious language in secular terms will likely distort what the actual meaning is both to the local and national church.[89] The dissent also noted that this approach invites judicial overreaching. "Whenever religious polity has not been expressed in specific statements referring to the property of a church there will be no evidence of that polity cognizable under the neutral principles rule. Lacking such evidence, presumably a court will impose some rule of church government imposed from state law."[90]

Greenawalt notes that only three Justices actually favored giving states a choice between neutral principles and deference approaches.[91] Two Justices in the majority, Stevens and Rehnquist, had in the earlier case of *Serbian Eastern Orthodox Diocese* favored treating reli-

85. Soukup, *supra* note 5, at 1691.
86. *Id.*
87. *Jones*, 443 U.S. at 604.
88. *Id.* at 613 n.2 (Powell, J., dissenting).
89. *Id.* at 612.
90. *Id.* at 612–613.
91. Greenawalt, *supra* note 16, at 1862.

gious organizations the same as voluntary organizations with regard to property dispute cases.[92] The expressed views of these Justices may suggest a more hands-on approach than *Jones* appears to suggest. Thus, the more restrictive nature of the Neutral Principles of Law Approach may not be on solid ground.[93]

Even if courts were to attempt to treat religious organizations as voluntary organizations, *Jones* prohibits the ability of courts to delve into polity, doctrine, and custom, thus precluding them from examining documents that are often significant indications of purpose and attachment.[94] "With ordinary secular associations, courts may examine relevant documents and extrinsic evidence to discern how activities fit underlying purposes, and to gauge whether primary attachment is to a local or general organization."[95] Greenawalt cautions:

> This creates a dilemma. Insofar as courts rely on decisional principles that avoid disputes about doctrines and church polity, the principles may be neutral in not requiring religious understanding, but, by effectively excluding forms of investigation analogous to those for secular associations, these same principles result in unequal treatment of religious and secular associations.[96]

There are nagging questions that courts must grapple with in using a neutral principles approach. For example: what documents may a court examine? How does a court determine if a document is too religious to be of probative value in a secular property dispute case? One of the weaknesses of the neutral principles is that in reviewing documents a court may realize they are religious and thus the court must defer to the highest tribunal. Thus, neutral principles may lead right back to deference.

Despite the nearly uniform popularity of this approach, courts have struggled to properly apply the Neutral Principles of Law Approach. The *Jones* dissenters "correctly pointed out that determining whether a court can apply the neutral principles approach on a case-by-case basis necessarily entails an entangling inquiry in to the religious group's organization or doctrinal practices."[97] Just as in the Deference/Church Autonomy Approach, the Neutral Principles of

92. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (Rehnquist, J., dissenting).

93. Greenawalt, *supra* note 16, at 1863.

94. *Id.* at 1882.

95. *Id.*

96. *Id.*

97. Soukup, *supra* note 5, at 1694.

Law Approach can lead to unjust results by refusing to review matters that parties often care a great deal about: doctrine and practices.

IV. THE EPISCOPAL CHURCH CASES: THE EPISCOPAL CHURCH WELCOMES YOU—NOW GET OUT!

Presiding Bishop Jefferts Schori reports that there are perhaps 45 parishes of the overall total of 7600 parishes in The Episcopal Church, in which majorities have voted to depart from The Episcopal Church, often leaving behind members who form the core of a continuing Episcopal congregation. It has to be acknowledged, however, that some of those parishes seeking alternative arrangements are amongst the larger congregations within the Episcopal Church.[98]

A. A Survey of Episcopal Church Property Dispute Cases

Before a different framework for resolving church property disputes can be advanced, at least as it relates to the Episcopal Church, a basic knowledge of how courts have hereto treated such disputes is important. The cases discussed in this section represent a sampling of cases from various jurisdictions.[99] Though not entirely unanimous, the courts have held that parish property belongs to the national church in the overwhelming majority of cases.[100]

In response to the Supreme Court's decision in *Jones*, the Episcopal Church adopted the Dennis Canon[101] in 1979. The Dennis

98. THE REPORT, *supra* note 11, at 10.

99. The represented jurisdictions include: California, Colorado, Massachusetts, New Jersey, New York, and Pennsylvania.

100. *See, e.g.*, *In re* Church of St. James the Less, 888 A.2d 795, 810 (Pa. 2005); Episcopal Church in the Diocese of Connecticut v. Trinity—St. Michael's Parish, 620 A.2d 1280, 1293 (Conn. 1993); Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 110 (Colo. 1986); Protestant Episcopal Church of the Diocese of N.J. v. Graves, 417 A.2d 19, 25 (N.J. 1980); Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville, 684 N.Y.S.2d 76, 82 (N.Y. App. Div. 1999); Bennison v. Sharp, 329 N.W.2d 466, 475 (Mich. Ct. App. 1982); Protestant Episcopal Church v. Barker, 171 Cal. Rptr. 541, 555–56 (Cal. Ct. App. 1981).

101. THE EPISCOPAL CHURCH, CONSTITUTION & CANONS 40 (2006) ("Sec. 4. All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission, or Congregation is located. Existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission, or Congregation otherwise existing over such property so long as the particular Parish, Mission, or Congregation remains a part and subject to, this Church and its Constitution and Canons. Sec. 5. The several Dioceses may, at their election, further confirm the declared under the foregoing Section 4 by appropriate action, but no action shall be necessary for the existence and validity of the trust."), *available at* http://www.churchpublishing.org/general_convention/pdf_const_2006/Title_I_OrgAdmin.pdf.

Canon provides that "all real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission, or Congregation is located."[102] This canon was intended to create an express trust for the national church. It has been cited extensively by courts to resolve such conflicts.[103]

Courts may generally review spiritual documents if they are probative and can be read in purely secular terms. In *In re Church of St. James the Less*,[104] the Pennsylvania Supreme Court dealt with a parish that disaffiliated from the national church but attempted to retain its property.[105] Though the title to the property was in the parish's name,[106] the parish had remained within the denomination after the adoption of the Dennis Canon.[107] Despite those factors, the most important consideration for the court was that the charter noted its purpose was "the support of the public worship . . . according to the faith and discipline of the Protestant Episcopal Church," excluding from membership any person who "shall disclaim or refuse conformity with and obedience to the constitution, canons, doctrines, discipline, or worship of the Protestant Episcopal Church," and further prohibiting the parish from amending its charter without diocesan approval.[108] The court reasoned those spiritual documents were probative of the intent of the parish to create a trust in favor of the national church.[109]

The Massachusetts Appellate Court in *Episcopal Diocese of Massachusetts v. Devine* held that the Dennis Canon provides principally that a parish holds its property in trust for the national church.[110] *Devine* involved a parish seeking to disaffiliate itself from the national church. Because the bylaws of that parish included that it would "accede to the Constitution, canons, doctrine, discipline, and worship of . . . [the] Episcopal Church" it was bound to accept the authority of

102. *Id.*

103. *See In re Church of St. James the Less*, 888 A.2d 795, 803; Episcopal Diocese of Mass. v. Devine, 797 N.E.2d 916, 923 (Mass. App. Ct. 2003); *Trustees of Diocese of Albany*, 250 A.D.2d 282, 284-85.

104. 888 A.2d 795.

105. *Id.* at 800.

106. *In re* Church of St. James the Less, 833 A.2d 319, 322 (Pa. Commw. Ct. 2003).

107. *In re Church of St. James the Less*, 888 A.2d at 810.

108. *See In re Church of St. James the Less*, 833 A.2d at 323; *see also In re Church of St. James the Less*, 888 A.2d at 808–09.

109. *In re Church of St. James the Less*, 888 A.2d at 805.

110. 797 N.E.2d 916, 923 (Mass. App. Ct. 2003).

the Dennis Canon.[111] The Dennis Canon was also determinative for a New York Court in *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*.[112] While noting that the deeds "do not indicate that Trinity Episcopal Church or its predecessors acquired the property with the intention to hold it in trust for [the national church],"[113] the court held that the Dennis Canon applied because it represented the existing church policy at the time the parish affiliated with the Episcopal Church.[114] Interestingly, the court noted that

> the mere fact of association with [the Episcopal Church and its dioceses] does not by itself support a finding that an implied trust was created . . . the record shows that throughout Trinity Episcopal's existence the parish conducted its affairs in accordance with the Constitution and canons of [the Episcopal Church].[115]

The Colorado Supreme Court gave great weight to the ways in which a parish participates in national and diocesan level activities in determining church property disputes. In *Bishop and Diocese of Colorado v. Mote*,[116] the court held that no specific language was needed to create an express trust.[117] Despite the fact that the parish held legal title "to the real and personal property at issue,"[118] the original "incorporators specified . . . that they 'unanimously decided to organize as a Protestant Episcopal Church.'"[119] For the court, this was significant proof that the parish property was held in trust for the national church.

California rejected doctrines of implied trusts because they required "impermissible inquiry into religious doctrines, or they concerned a kind of diversion from basic charitable purposes that was not involved."[120] In *Protestant Episcopal Church v. Barker*,[121] the California Supreme Court was not particularly receptive to finding a trust for the national church. The case involved four parishes in Los Angeles who disaffiliated from the national church. For the court, the in-

111. *Id.*
112. 250 A.D.2d 282, 288–89 (N.Y. App. Div. 1999).
113. *Id.* at 286–87.
114. *See id.* at 288.
115. *Id.* at 289.
116. 716 P.2d 85 (Colo. 1986).
117. *Id.* at 101.
118. *Id.* at 88.
119. *Id.*
120. Greenawalt, *supra* note 16, at 1896, 1896 n.235.
121. 171 Cal. Rptr. 541, 553 (1981).

quiry was whether an express trust existed. "Simply put, the issue [is] . . . whether the local churches expressly hold their property in trust for members of the Diocese and [the Episcopal Church]."[122] In relying on earlier California case law favoring a neutral principles approach, the court looked at the deeds of property, articles of incorporation, constitution, canons, and rules of the national church and state statutes.[123] The court found that only one parish had created an express trust because that parish was created after the Diocese approved a canon providing for an express trust.[124] The three others were incorporated prior to that.[125]

Despite the fact that the three other parishes had agreed to the constitution, canons, doctrine, and worship of the national church, the court held that this was "nothing more than expressions of present intention" analogizing this to a marriage vow which can be broken in divorce.[126] "As in matrimony, always and forever do not preclude a change in heart and do not create an express trust in another's property."[127]

In *Protestant Episcopal Church in the Diocese of New Jersey v. Graves*,[128] the court dealt with a parish whose property was "made with local funds without Diocesan financial assistance."[129] The deeds ran to the parish corporation and did not contain any words of trust or reverter in favor of the diocese.[130] However, the parish had adhered to customs and usages of the national church and diocese, including use of the prayer book, making annual assessments and sending delegates to the church conventions,[131] and thus, the parish "was an integral part of the hierarchical structure of the church and submitted to the Church's authority . . . ."[132] The court held that "in the absence of express trust provisions, we conclude that the hierarchical [*Watson*] approach should be utilized in church property disputes" and thus "only where no hierarchical control is involved, should the neutral princi-

122. *Id.* at 553.
123. *Id.*
124. *Id.*
125. *Id.* at 555.
126. *Id.* at 554.
127. *Id.*
128. 417 A.2d 19 (N.J. 1980).
129. *Id.* at 21.
130. *Id.*
131. *Id.*
132. *Id.*

ples of law principle come into play."[133] Because the parishioners disaffiliated themselves from the Episcopal Church, they lacked standing to dispute the "hierarchical control over St. Stephen's church property."[134]

B. A Critique of the Courts' Handling of Episcopal Church Property Dispute Cases

As the trial court in *Devine* noted, "courts in other jurisdictions . . . have concluded [the Episcopal Church], its regional Dioceses, and local parishes constitute a hierarchical church . . . ."[135] In applying the neutral principles analysis, Reeder notes that "courts almost unilaterally rule in favor of the diocese and against the local church with what appears to be little regard for highly salient, case-specific facts."[136] It is understandable that courts will seek to examine similar documents such as constitutions, corporate charters, the Dennis Canon and so on because it has the attractive advantage of producing consistent results. However, as Reeder further notes, "these uniform outcomes fail to account for differing expectations and investments of parish members and church leadership."[137]

In examining documents such as corporate charters or other church documents giving "lip service" to the constitution and canons of the national church through the lenses of property law, corporate law, and trust law, courts assume "a near-slavish devotion of local churches to their dioceses and denominations."[138] While the *Barker* court may be an outlier in its conclusion, it rightly realized that "a blanket assumption that member organizations accept all decisions of their superiors is untenable."[139]

This should not come as a great surprise to the courts, given the fact that the Episcopal Church is witnessing schism. In recognizing

133. *Id.* at 24.

134. *Id.* at 25.

135. Episcopal Diocese of Mass. v. Devine, No. 990268A, 2000 WL 33941911, at *4 (Mass. Supp. May, 26, 2000); *see also* Rector, Wardens, & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn., 620 A.2d 1280, 1285 (Conn. 1993); Tea v. Protestant Episcopal Church in the Diocese of Nev., 610 P.2d 182, 184 (Nev. 1980); Olston v. Hallock, 201 N.W.2d 35, 39 (Wis. 1972); Bennison v. Sharp, 329 N.W.2d 466, 471 (Mich. Ct. App.1983).

136. Reeder, *supra* note 8, at 147.

137. *Id.*

138. *Id.* at 149.

139. *Id.* at 150.

that many of their own parishes do not accept the decisions of the national church, the Episcopal Church adopted a plan called Caring for All the Churches,[140] which essentially gave dissenting parishes the ability to have "Delegated Episcopal Pastoral Oversight."[141] In layman's terms, this allows parishes "who in all conscience feel bound to dissent from the teaching and practice of their province"[142] to request a more conservative or liberal Bishop from another diocese to exercise pastoral episcopal oversight over their parish.

The hierarchical assumption is, with rare exception, completely misunderstood by courts when applied to the Episcopal Church. The Episcopal Church is a member of the Anglican Communion, and thus, court decisions that defer to the hierarchy but go no further than the national church miss a very important component of Episcopalian polity. Even within the framework of schism, the Anglican Communion now has a Panel of Reference,[143] whereby parishes and dioceses in "serious dispute concerning the adequacy of schemes of delegated or extended episcopal oversight"[144] may appeal to the Archbishop of Canterbury to recommend to the authorities concerned ways in which the impasse can be resolved.[145] By ignoring the judicatory procedures outside of the national polity of the Episcopal Church, courts are not following the principles they set out for a hierarchical church in either a deference approach or a neutral principles approach.

The court in *Gloversville* noted that "it is settled law that 'even though members of a local [church] belong to a hierarchical church, they may withdraw from the church and claim title to real and personal property, [held in the same of the local church] provided that they have not previously ceded property to the denominational church."[146] The courts have clung to the Dennis Canon in resolving

140. *See* The Episcopal Office of Pastoral Development, Caring for All the Churches, http://www.ecusa.anglican.org/pastoral_11107_ENG_HTM.htm?menu=menu22077 (last visited Feb. 20, 2008).

141. THE REPORT, *supra* note 11, at 9.

142. Primates Communiqué, Lambeth, October 2003, *available at* http://www.anglicancommunion.org/acns/news.cfm/2003/10/16/ACNS3633.

143. The Panel of Reference was established by the Archbishop of Canterbury in response to the request of the Primates and Moderators of the Provinces of the Anglican Communion in their Communiqué issued from Dromantine, Northern Ireland, in February 2005.

144. The Panel of Reference, Mandate, May 6, 2005, *available at* http://www.anglicancommunion.org/commission/reference/mandate.cfm.

145. *Id.*

146. Trustees of Diocese of Albany v. Trinity Episcopal Church of Gloversville, 250 A.D.2d 282, 286 (N.Y. App. Div. 1999) (citing First Presbyterian Church of Schenectady v.

church property disputes in favor of the national church. While this appears reasonable at first glance, it ignores the reality of congregational life. Many Episcopal Parishes were founded long before the Dennis Canon was approved in 1979. Further, while the national church, after the Supreme Court decision in *Jones*, sought to "maintain a stronghold over church property . . . member parishes likely remained relatively uninformed about impending legal difficulties if they attempted to secede."[147] It is inherently more unjust when, as Judge Colins noted in his dissent in *In re Church of St. James the Less*, "parishioners had donated and funded the purchase of real and personal property associated with [the parish] and that the deeds indicated that [the parish] had always owned the property in fee simple."[148] Judge Colins explained that *Jones* did not sanction a denomination unilaterally imposing a trust on property by amending its governing documents and claiming that the individual church would be deemed to hold property in trust for the diocese.[149]

As Reeder notes, national and diocesan conventions are "often political and theological powder kegs. A conservative church in a relatively liberal diocese has little hope of rallying enough votes to send a conservative representative to [the national convention]."[150] It is precisely because of this phenomenon that Bishops from other provinces of the Anglican Communion have now intervened into the national jurisdiction of the Episcopal Church.[151]

> In ruling in favor of the diocese, courts rely heavily on the Dennis Canon and the implied trust doctrine. . . . [B]ut a closer examination of The Episcopal Church's operations and other factors suggest no relationship of implied trust between the parish and the diocese. For example, parishes bear the brunt of the financial burden of caring for the greater national church,

United Presbyterian Church in the U.S., 464 N.E.2d 454, 459 (N.Y. 1984); *see also* Bd. of Mgrs. of Diocesan Missionary & Church Extension Society of the Protestant Episcopal Church in the Diocese of N.Y. v. Church of the Holy Comforter, 628 N.Y.S.2d 471, 474 (1993)).

147. Reeder, *supra* note 8, at 153.

148. *Id.* at 153–54.

149. *Id.* at 154 (citing *In re* Church of St. James the Less, 833 A.2d 319, 328–29 (Pa. Commw. Ct. 2003) (Colins, J., dissenting)).

150. *Id.* at 154.

151. THE LAMBETH COMMISSION ON COMMUNION, THE WINDSOR REPORT 2004 §§ 147, 149 (2004) [hereinafter THE WINDSOR REPORT], *available at* http://www.anglicancommunion.org/windsor2004/downloads/windsor2004full.pdf.

> but under the application of neutral principles and deference, they lose the very properties they have purchased, improved, and maintained.[152]

V. THE STRUCTURE OF THE ANGLICAN COMMUNION AND THE QUESTIONS A COURT SHOULD ASK

"The National Church is a member of the Anglican Communion, a group of churches that all have their roots in the doctrine, discipline, and worship of the Church of England's Book of Common Prayer."[153]

A terrific example of where the court got it wrong is *Episcopal Diocese of Rochester v. Harnish*.[154] In that case, a parish in New York disaffiliated from the Diocese of Rochester and the national church[155] and realigned itself with the Anglican Church of Uganda.[156] Originally, the parish was a mission, but when it applied to be recognized as a parish in 1947, it agreed to abide by the Constitution and Canons of the diocese and national church.[157] Serious theological disputes culminated in a Diocesan Convention declaring the parish extinct.[158] Thereafter, the parish sought "alternative ecclesiastical oversight by other bodies within the Anglican Communion," which was given by the Archbishop of the Anglican Church of Uganda.[159] Interestingly, the Diocese and the national church denied any relationship between the Anglican Church of Uganda and the Episcopal Church.[160] The parish agreed, but from a church governmental point of view.[161] The property in question was granted for the sole purpose of building the parish and included a clause insisting that if the property was ever abandoned, the title would revert back.[162] Thus the deed conveyed the land to the parish with no express trust for the diocese or national church.[163] Further, "all the funds for building the church, the small

152. Reeder, *supra* note 8, at 157–58.

153. Episcopal Diocese of Rochester v. Harnish, No. 2006/02696, 2006 WL 4809425, at *2 (N.Y. Supp. Ct. Sept, 13, 2006).

154. *Id.*

155. *Id.* at *2.

156. *Id.* at *3.

157. *Id.* at *2.

158. *Id.* at *3.

159. *Id.*

160. *Id.*; *see also id.* at *5 (discussing the Episcopal Church's allegations that the Anglican Church of Uganda "severed all ties to the Protestant Episcopal Church").

161. *Id.* at *3.

162. *Id.* at *4.

163. *Id.* at *10.

endowment funds, and land for the church were either donated or paid for by the parishioners of [the parish] without any grants from the Episcopal Diocese."[164]

In resolving this dispute, the court relied on a neutral principles of law approach.[165] The court examined the deeds first, the local church charter second, the statutes governing holding church property third, and the national church's constitution regarding church property last.[166] Relying largely on the Dennis Canon and on the Article of Incorporation's reference to a law relating to Episcopal Churches, the court held that the property belonged to the national church.[167] The parish argued that the enactment of the Dennis Canon violated the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution and the equivalent provisions in the New York Constitution.[168] The court rejected this argument as flawed because "[d]ue process does not apply to private actors, unless 'there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.'"[169] Apparently the court did not consider that, in holding for the diocese and national church, it was ratifying the Dennis Canon with the power of the state, thereby creating a rather "close nexus between the state and the challenged action."[170]

Harnish illustrates the injustice that occurs in these decisions. What makes this injustice worse is that often courts either do not understand or simply ignore the role the wider Anglican Communion plays in Episcopal polity. Justice is also frustrated by the fact that courts frequently ask the wrong questions and place far too much emphasis on legal documents that denote a spiritual relationship far more than a legal one. Because courts focus on documents such as deeds, charters and relationships with the hierarchy at a diocesan and national level, I will first suggest alternative ways in which a court may view those documents. I will then explain the role the Anglican Communion plays in the polity of the Episcopal Church.

It is reasonable for a court to assume an implied trust between a

164. *Id.* at *7.

165. *Id.* at *8.

166. *Id.*

167. *Id.* at *18.

168. *Id.* at *17.

169. *Id.* at *18 (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001)).

170. *Id.*

parish and the diocese or national church when the parish participates in conventions, submits to authority and contains references to the national church in its articles of incorporation. However, are those really expressions of loyalty? Since the consecration of a bishop living in a same-sex relationship, some parishes and even entire dioceses have withheld their assessments to both the national church and the diocese (that is in the case of a diocese that voted to affirm the consecration of a gay bishop).[171] If a parish participates in a diocesan convention only to attest that they will withhold their annual assessments, does that rise to the level of an expression of loyalty? If an entire diocese withholds assessments to the national church, does that mean more or less than adherence to a common liturgy? Participation in church conventions can be an important indication of a parish submitting to the authority of the hierarchy, likewise withholding assessments may be powerful evidence of a parish's intent to not bind its property in a trust for the diocese and national church.

When courts examine charters with clauses alluding to "the support of the public worship . . . according to the faith and discipline of the Protestant Episcopal Church,"[172] they are right in holding that this language suggests a trust. However, courts may be engaging in a departure from doctrine analysis. By reviewing church documents to determine what the doctrine of a church requires in church property disputes, courts must determine what the doctrine is. Could it not be argued that, by examining documents in such a fashion, courts are essentially telling a parish that they departed from the doctrine of the national church? Thus, while such charters should be given weight, a court should not resolve a case based only on that issue.

The intent of the original donors may provide valuable evidence of whether a trust was created. However, when a donor deeds property for the construction of an Episcopal parish, should their opinions be binding? For example, it is likely that a donor who lived one hundred or even fifty years ago would be nonplussed by the idea that the parish may be under the jurisdiction of a female bishop or a bishop who wishes to approve liturgies for gay marriages. If it is possible to determine the intent of an original donor, it may be important evidence, but it would require unconstitutional departure from doctrine

171. *Some Episcopal Districts, Foes of Gay Bishop, Halt Donations*, N.Y. TIMES, Aug. 23, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?res=9501E3D71739F930A1575BC0A9659C8B63.

172. *In re* Church of St. James the Less, 888 A.2d 795, 808–09 (Pa. 2005).

analysis or, at the very least, a difficult speculation of the original intent of the donor. Further, such an analysis could cripple churches from developing new doctrines.[173]

Who pays for the parish involves very little doctrine and the answer to that question should make for a more fair result. When a diocese purchased property or was deeded that property, the diocese should justly keep that property in the case of schism. The same is true if members of a parish purchased the property or were deeded the property. This allows the parties in a case to take out of the dispute what they put in. Though courts uniformly rule to the contrary, this may be said to stem from a court's failure to understand the lack of bargaining power of parishes. In many instances, dioceses and the national church enact policies without a full knowledge of parishes in any number of areas, including church property. Understanding that a parish, especially one founded hundreds of years ago, likely had no idea the diocese had a policy that gave it an implied or express trust in church property may allow a court to give greater weight to a parish's position in a church property dispute.

The greatest shortcoming of the court cases dealing with Episcopal parishes is the lack of deference courts give to the Anglican Communion. To understand the role that the Anglican Communion should play in such decisions it is necessary to understand where the Anglican Communion fits into Episcopal polity.

> The Anglican Communion [is] a fellowship of churches in communion with the See of Canterbury. Individual provinces express their own communion relationships in a variety of judicial forms, as: bipartite (in communion with Canterbury); multipartite (in communion with all Anglican Churches); or simply through the idea of belonging to the Anglican Communion.[174]

Like the language that courts find so important in parish charters, the Episcopal Church's own Constitution sates that "[t]he Protestant Episcopal Church in the United States of America . . . is a constituent member of the Anglican Communion . . . in communion with the See of Canterbury."[175] If courts wish to adhere to a deference approach in a hierarchical church, shouldn't the courts defer to the decisions of the Anglican Communion? What if a diocese is in violation of Anglican

173. For cases dealing with similar issues in the context of Orthodox Jewish Synagogues see Katz v. Singerman, 127 So.2d 515 (La. 1961); Davis v. Scher, 97 N.W.2d 137 (Mich. 1959); Park Slope Jewish Ctr. v. Stern, 491 N.Y.S.2d 958 (N.Y. Sup. Ct. 1985).

174. THE WINDSOR REPORT, *supra* note 151, at § 48.

175. THE EPISCOPAL CHURCH CONST. pmbl.

standards but a parish wishing to disaffiliate from the diocese is not? Who should get the property? Further, what if that parish realigns itself with an Anglican province that is not in violation of Anglican standards and thus wishes to disaffiliate with one that is? The court in *Harnish* apparently ignored the connection to the Anglican Communion by accepting the diocese's contention that the Anglican Church of Uganda was not in communion with it. However, under Anglican polity, it is not which member church is in communion with the other, but who is in communion with the See of Canterbury.

One reason courts may ignore the role of the Anglican Communion is that many refer to the autonomy of the member churches. This is fundamental to Anglican polity. However,

> the concept of 'provincial autonomy' in Anglican thinking was developed in its early twentieth century context to signify 'independence from the control of the British Crown'. . . .
>
> . . .
>
> A further development in meaning then occurred: as provinces received or devised their own constitutions, autonomy . . . came to be interpreted more in terms of 'the right of each church to self-determination', expressed in the possession of extensive powers over the determination of local issues.[176]

Thus, the word "autonomy" represents within Anglican polity "not an isolated individualism, but the idea of being free to determine one's own life within a wider obligation to others."[177] One of the controversies that have arisen in this context is the authority of The Lambeth Conference.[178] The Lambeth Conference is a body consisting of all Bishops of the Anglican Communion recognized by the Archbishop of Canterbury. The seemingly settled view is "[w]hile the decisions of Lambeth Conferences do not have canonical force, they do have the moral authority across the Communion. Consequently, provinces of the Communion should not proceed with controversial developments in the face of teaching to the contrary from all the bishops gathered in Lambeth Conferences."[179]

Recent controversies have shown how the structure of the Angli-

176. THE WINDSOR REPORT, *supra* note 151, at §§ 73–74.

177. *Id.* § 76.

178. The Lambeth Conference "takes place every ten years at the invitation of the Archbishop of Canterbury**.** It is the only occasion when bishops can meet for worship, study and conversation. Archbishops, diocesan, assistant and suffragan bishops are invited." The Lambeth Conference, http://www.lambethconference.org (last visited Feb. 20 2008).

179. THE WINDSOR REPORT, *supra* note 151, app. 1 at 61.

can Church operates hierarchically with authority despite "autonomous" churches. In response to the Episcopal Church's decision to consecrate a priest living in a same-sex relationship, the Archbishop of Canterbury commissioned The Lambeth Commission on Communion to report on the implications of those actions.[180] The Commission then published The Windsor Report,[181] which contained specific recommendations and questions addressed to the Episcopal Church. The Primates then asked the Episcopal Church to "respond through [its] relevant constitutional bodies to the questions specifically addressed to them in the Windsor Report as they consider their place within the Anglican Communion."[182] Those questions were then addressed by the Episcopal Church at their General Convention. The responses were then presented to the Primates at their meeting in Dar es Salaam.[183] There, the Primates expressed regret was about the lack of clarity in the Episcopal Church's responses. The Primates requested that the Episcopal Church make unequivocal covenants abiding by the recommendations in the Windsor Report and the teachings expressed in The Lambeth Conference relating to human sexuality.

The Episcopal House of Bishops has stated that they "pledge as a body not to authorize public rites for the blessing of same-sex unions."[184] Further, the General Convention resolved that "bishops with jurisdiction . . . exercise restraint by not consenting to the consecration of any candidate to the episcopate whose manner of life presents a challenge to the wider church."[185] The Primates then went on to request that the Episcopal House of Bishops "confirm that the passing of Resolution B033 . . . means that a candidate for episcopal orders living in a same-sex union shall not receive the necessary consent . . . unless some new consensus on these matters emerges across the Communion."[186] The House of Bishops then responded affirmatively that B033 pertains to gay and lesbian persons who are non-celibate.[187]

180. THE REPORT, *supra* note 11, at 2 (noting the Mandate of The Windsor Report).

181. *See generally* THE WINDSOR REPORT, *supra* note 151.

182. Dromantine Communiqué § 14 (February 2005), *available at http://www.stalban.ca/documents/Dromantine.pdf*.

183. THE REPORT, *supra* note 11, at 2.

184. The Episcopal House of Bishops, A Response to Questions and Concerns Raised by Our Anglican Communion Partners, Summary (Sept. 25, 2007), *available at* http://www.episcopalchurch.org/79901_90457_ENG_HTM.htm.

185. THE REPORT, *supra* note 11, at 7 (noting General Convention Resolution B033).

186. THE COMMUNIQUÉ, *supra* note 14, at 10.

187. THE REPORT, *supra* note 11, at 8.

This example shows how, while autonomous, the Anglican Communion operates on a hierarchical basis with authority. The importance of this authority in cases of church property disputes is clear when it is noted that the

> Primates urge the representatives of The Episcopal Church and of those congregations in property disputes with it to suspend all actions in law arising in this situation. We also urge both parties to give assurances that no steps will be taken to alienate property from The Episcopal Church without its consent *or* to deny the use of that property to those congregations.[188]

A last note on the use of the word "autonomy" as it relates to Anglicanism is warranted. Anglicans trace their views of episcopal autonomy from ancient doctrinal documents,[189] and as such, under current constitutional laws, judges would be precluded from examining them. Thus, under a "safe" approach, even if a court did not accept the above example as evidence of hierarchy, a court would be safer to choose a hierarchical approach than chart the waters of ancient church councils for proof of autonomy.

VII. A NEW FRAMEWORK FOR DECIDING CHURCH PROPERTY DISPUTES IN THE EPISCOPAL CHURCH

Given the shortcomings of the Court's current approaches in deciding church property disputes, a different approach is necessary not only to produce more logical decisions, but also more just decisions. Courts should revisit the logic of Justice Rehnquist's dissent in *Serbian Eastern Orthodox Diocese*, where he advocated treating religious organizations like any other voluntary organization. Allowing courts to penetrate the stained glass wall of absolute deference that they currently give to church hierarchy will allow courts to truly determine what the hierarchy is canonically allowed to do and what is truly the highest tribunal of the church. Also, courts should treat religion as distinct from voluntary organizations. If they do so, courts should use administrative law principles to decide church property disputes. The following test should be used to bring about more logical and just results.

188. *Id.* at 11 (emphasis added).

189. *See* The Lambeth Conference 1878 Encyclical Letter (1878); The Decrees of the Council of Chalcedon (451); The Decrees of the Council of Constantinople (381); Canon 3 of the Western Council of Sardica (343); The Decrees of the Council of Nicaea (325).

First, just as in administrative law where exhaustion of administrative remedies is a prerequisite to civil action,[190] a civil court should ensure that a parish that wishes to disaffiliate from a national church has exhausted all remedies available to it within the structure of the national and international church. This relieves courts, already overbooked, from deciding cases which can be better decided through ecclesiastical channels.[191] While the majority in *Serbian Eastern Orthodox Diocese* forbade civil courts to "probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law,"[192] this approach is arguably different. Here the court is not being asked to interpret religious law. The court simply asks the parties a factual question: has the parish exhausted all remedies available to it within the structures of the denomination to which it belongs? The burden should be on the parish to prove that it has. A parish should also be able to prove that exhausting remedies currently available will be untenable due to bad faith on the part of the national or international church. If the parish has not exhausted all remedies, the case should be dismissed.[193] Within the context of the Episcopal Church, this would involve a court at the very least determining that a parish had requested Delegated Episcopal Oversight[194] and then appealed to the Archbishop of Canterbury's Panel of Reference.[195]

If a parish has exhausted all remedies, or if to exhaust all remedies would only further the bad faith efforts of the national or international church, the court should move to the next step of the proposed approach. At this stage, the court should defer to the highest tribunal unless the decision appears to be arbitrary or capricious. In essence, the court should follow the deference courts traditionally give to ad-

190. *See* Woodford v. Ngo, 126 U.S. 2378 (2006); Reiter v. Cooper, 507 U.S. 258 (1993); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41 (1938); Hedden-Empire Ltd. P'ship v. Dep't of Revenue, State of Mont., 793 P.2d 828 (Mont. 1990) (noting that litigants must exhaust any prescribed administrative remedies prior to seeking judicial review, and that if the administrative remedies are not exhausted, then a court should dismiss the case).

191. *See* Jimmy Swaggart Ministries v. Bd of Equalization of Cal., 493 U.S. 378 (1990); Rojo v. Kliger, 276 Cal. Rptr. 130 (1990); Power v. City of Providence, 582 A.2d 895 (R.I. 1990) (noting that forcing litigants to exhaust administrative remedies prevents overbooked courts from deciding issues that can still be dealt with through administrative channels).

192. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) (citing Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

193. *See* THE WINDSOR REPORT, *supra* note 151.

194. *See supra* text accompanying note 141.

195. *See supra* text accompanying note 143.

ministrative agency decisions.[196] The Supreme Court has developed a deferential standard by which courts review agency decisions in *Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc*. Using a variant of this approach, if a court determines that the church's highest tribunal relied on a canon that speaks directly and unambiguously to the issue of church property, then the court should defer to the church's tribunal. If the court determines that the canon is not clear or its application to the parish is questionable, then the court must determine if the highest tribunal acted in an arbitrary or capricious manner. Thus, in the context of Episcopal parishes, if a parish was founded after the Dennis Canon, or prior but knowingly incorporated it, they should be bound by it. However, if a parish was incorporated prior to the Dennis Canon or was incorporated after but had no knowledge of it, the court should consider if the church tribunal made an arbitrary decision. Four principles should guide this process.

First, in his dissent in *Serbian Eastern Orthodox Diocese*, Justice Rehnquist noted that, if a court must defer to the ecclesiastical decisions of a church's highest tribunal, this "requires that proof be made as to what these decisions are, and if proofs on that issue conflict the civil court will inevitably have to choose one over the other."[197] If a court may do this much, why can't it, on the basis of expert canon testimony, determine if the church followed its own rules?[198] The Supreme Court should now adopt this reasoning and allow lower courts the room to inquire whether a church followed its own rules. While a court is not a competent judge of doctrine, a court is a wholly competent judge for whether an organization followed its own policies. To suggest otherwise would raise questions of the courts' competency to determine any case dealing with an organization or agency following policies. Within the context of Anglican polity, this principle would involve a court looking at the judicial procedures to ensure they were followed based on the principles the church has set out, not necessarily what secular due process would require.

Second, courts should adopt the Living Relationship Test of the Ohio Appellate Court.[199] "The living relationship test looks beyond the ordinary indicia of property ownership expressed in deeds, articles

196. Chevron, U.S.A. Inc. v. Nat'l Res. Defense Council, Inc., 467 U.S. 837 (1984).

197. *Serbian E. Orthodox Diocese*, 426 U.S. 696, 726 (Rehnquist, J., dissenting).

198. *Id.* at 727.

199. *See* S. Ohio State Executive Offices of Church of God v. Fairborn Church of God, 573 N.E.2d 172 (Ohio Ct. App. 1989).

of incorporation and like documents, and examines the rituals and practices of the churches in dispute to determine the governmental relationship or polity prevailing."[200] The test looks at how the organization actually works. Thus, in deferring to a church's highest tribunal, a court should review how the daily life of the church organically operates. This would allow a court to give credence to the fact that an Episcopal parish may have refused to support the diocese or national church through annual assessments, refused to accept their Bishop's authority and other expressions that give weight to a parish's desire to not remain loyal to the diocese. This test will also allow a court to give weight to the fact that a parish that disaffiliates from the Episcopal Church, but remains aligned with another Anglican Church, remains within the Anglican Communion, and thus, its property is not being withdrawn from the international church.

The third principle a court should consider in determining whether a church's highest tribunal should be relied on is whether there was meaningful notice to a parish during the adoption of the canon.[201] This will alleviate the injustice that can occur when a national or international church changes its policies without adequately informing a parish as well as alleviate problems of a parish claiming falsely that they had no notice of any change in policy. This would also allow a conservative parish in a largely liberal diocese, or vice versa, to ensure that its voice can still be given weight in a church property dispute. Likewise, a requirement of notice would prevent churches and parishes from changing their policies in the cloak of night in an attempt to usurp powers traditionally granted to the other, and it would ensure that open communication remains active prior to a lawsuit.

The fourth principle is a robust examination of fraud by the national or international church. Originally, the blind deference afforded to the determinations of hierarchical church tribunals in *Watson* was tempered by *Gonzalez v. Roman Catholic Archbishop of Manila*,[202] where the Court said that such decisions will be enforced "[i]n the absence of fraud, collusion, or arbitrariness."[203]

200. *Id.* at 182–183.

201. *See* Natural Resources Defense Council, Inc. v. E.P.A., 22 F.3d 1125 (D.C. Cir. 1994) (noting that an administrative agency must provide notice sufficient to fairly apprise interested persons of the subjects and issues before the agency).

202. 280 U.S. 1 (1928).

203. *Id.* at 16.

However, the Court later narrowed this exception in *Serbian Eastern Orthodox Diocese* by holding that

> whether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes, no "arbitrariness" exception in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, international organization or ecclesiastical rule, custom or law.[204]

It is time for the court to resurrect this "marginal civil court review" to determine if there has been fraud or collusion. Anything less would be injustice and an acknowledgement that a court is not competent to determine fraud or collusion in a religious organization. It is noted that judges are not competent judges of theology, but they should be competent to determine fraud or collusion. In many events such disputes hinge on fraud or collusion.

VIII. CONCLUSION

This new framework should guide courts in reviewing a church's highest tribunal in a way that allows courts to continue to defer to the hierarchy, but in a way that pays tribute to the differing circumstances a parish finds itself in. Within the Anglican Communion context, this allows courts the flexibility to determine the living structure between the parish and the Episcopal Church within the Anglican Communion.

204. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976).