

WHOSE CHURCH IS THIS?

CHURCH PROPERTY DISPUTES AND THE CIVIL COURTS

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I. INTRODUCTION

Current well-publicized disputes over church property bring to the fore many questions about the legal relationship between Christian denominations, individual church congregations, and the state. Therefore, this question ought to be explored: should ecclesiastical disputes be resolved by civil law courts or at the very least, what part should civil courts play in their resolution?

Disputes over church property, beginning in the Civil War era and continuing to the present, often arise because a particular denomination and the individual churches affiliated with that denomination find themselves differing over particular doctrinal matters. Earlier in Christian history, these disputes arose over the issue of slavery. More recently differences over women's ordination, changes in liturgy, the teaching of neo-orthodoxy, various pronouncements made by denominations about social and economic issues, the blessing of same-sex unions, and the ordination of homosexuals have been the cause of strife. The more

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recent “social issue” disputes led Diane Knippers, President of the Institute on Religion and Democracy, to say that we would probably “see a spate of property disputes.”²

The lawsuits making their way through the courts of Virginia are typical of the pattern of modern schisms. Briefly put, certain Episcopal churches in several Virginia counties disagreed, among other things, with the ordination of Gene Robinson as Bishop of New Hampshire for the Episcopal Church, also known as the Protestant Episcopal Church of the USA (ECUSA). Robinson is a self-proclaimed homosexual living with a same-sex partner. The local churches, by a congregational vote, opted to break their ties with the Diocese of Virginia and the ECUSA and voted to come under the church governance of bishops ordained by various African Anglican Churches in Nigeria. Over 200 other Episcopal churches have “relocated their spiritual guidance offshore...[to] Uganda, Kenya, Rwanda, Bolivia and Argentina . . .” in addition to Nigeria.³ The local congregations and the denomination have filed many law suits as a result, both laying claim to the local church properties.

The Presbyterian and Methodist denominations have experienced the same division. Over the past thirty years, these denominational disputes produced a large number of state court decisions and several key U.S. Supreme Court decisions, together providing answers, though not entirely satisfying ones, to the question of church disputes and the role of civil courts in them.

This paper will set out the three key civil/legal approaches that have been used historically for settling such disputes, several illustrative cases, and a critique of how state courts have applied the three approaches to resolve disputes.

2 Kathleen R. Rutledge, *So, Who Owns the Sanctuary?*, CHRISTIANITY TODAY 73, 73-74 (2004)

3 Andrew Higgins, *Divided Flock, Episcopal Church Dissidents Seek Authority Overseas*, THE WALL STREET JOURNAL, Sept. 20, 2007, at A1.

II. THREE APPROACHES TO CHURCH PROPERTY DISPUTES

Though complicated by the variety of fact patterns in each case and despite the complaint by commentators that courts applying the same legal tests have produced varied outcomes, the American civil law courts have followed three distinct approaches to resolving church property disputes. Lloyd Lunceford labeled them as (1) the "implied trust/departure from doctrine approach", (2) the "hierarchical/deference approach" and (3) the "neutral principles of law approach."⁴

A. *The Implied Trust/Departure From Doctrine Approach*

One approach that American Courts followed until the 1970s, and English courts still use to resolve church property disputes is to award the church property to that entity, either the local church or denomination, that has adhered with the greatest fidelity to the original doctrine, polity and practice of the founders. The case which is usually cited as announcing this method of resolution is an English case, *Craigdallie v. Aikman*. In that 1813 decision, Lord Eldon, who wrote the opinion, made use of the trust concept and the principles surrounding trust law to reach his conclusion. Lord Eldon stated that the church founders and original contributors intended the church to espouse certain beliefs or doctrines and to follow certain practices of church government and that their intentions created an implied trust that the church property be used to further those ends.⁵ Therefore, under the *Craigdallie* doctrine, church property ought to be held in an implied trust "for the original principles of the church and should be awarded to those members who subscribed to those principles."⁶

This approach requires the civil courts to determine what the original

4 A GUIDE TO CHURCH PROPERTY LAW 28 (Lloyd J. Lunceford ed., Reformation Press) (2006).

5 *Craigdallie v. Ackman*, (1813) 3 Eng. Rep. 606 (H.L.)

6 M.H. Ogilvie, *Church Property Disputes: Some Organizing Principles*, 42 UNIV. TORONTO L.J. 377, 382 (1992).

principles of the church were and then to assess which group of members (in the case of internal disputes) or which entity (in the case of disputes between the denomination and the local church) has more closely adhered to those original principles. This approach was used by English law courts in the rest of the 19th and on into the 20th centuries and according to Professor M.H. Ogilvie “remains today the predominant theory” in common law countries such as the United Kingdom and Canada.⁷ Ogilvie points out that Parliamentary intervention and the language in the foundational documents allowing for changes in doctrine, practices, and polity of the church have sometimes modified the pure application of the *Craigdallie* doctrine.⁸

The most notable case in which *Craigdallie* was applied was *General Assembly of the Free Church of Scotland v. Overtoun*, decided in 1905. The case arose out of the merger of The Free Church of Scotland and the United Presbyterian Church in 1900 to form the United Free Church of Scotland. Approximately 30 small Highland congregations from The Free Church of Scotland, often referred to collectively as the “Wee Frees,” strongly opposed the union and brought legal action in the civil law courts urging the courts to apply the *Craigdallie* doctrine. According to the dissenting churches, the new denomination resulting from the merger was departing from certain doctrinal principles long held by The Free Church of Scotland.

There were two main points of contention. First, the Wee Frees wanted to continue to maintain a substantial role for the civil magistrate as a preserver of the Church as set out in Chapter 23 of the Westminster Confession. Kenneth Ross points out that “. . . [T]he men who formed the Free Church [of Scotland] in 1843 believed that it was the duty of the State to establish the church.”⁹ So there was

7 *Id.* at 381.

8 *Id.* at 384.

9 KENNETH R. ROSS, CHURCH AND CREED IN SCOTLAND, THE FREE CHURCH CASE 1900-1904 AND ITS ORIGINS 55 (Rutherford House Books) (1988).

an issue of establishment or disestablishment because the new merger contained churches what were "voluntarist"¹⁰ that is, churches which were opposed to state established religion.

Second, the Wee Frees wanted to continue adherence to the doctrine of absolute double predestination as set out in chapter 3 of the Westminster Confession. Double predestination is the view that God predestines some to everlasting life and others to everlasting death.¹¹ The United Presbyterian Churches were viewed as Arminian on this issue.¹² The newly formed merger-church viewed neither doctrine—establishment or double predestination—as fundamental or obligatory.¹³ Applying the *Craigdallie* doctrine, the Court in *Overtoun* found in favor of the Wee Frees because, in its judgment, those churches were continuing to hold to the original and essential principles of the denomination while the merger advocates were departing from it. All church properties, some 800 churches, plus three universities and considerable investments were *initially* awarded to the Wee Frees by the House of Lords.¹⁴ Parliament, in response, created a commission under the Churches (Scotland) Act of 1905 which allocated the property between the opposing groups in a fairer and more equitable way.¹⁵ Nevertheless, the *Craigdallie* doctrine, that is, the implied trust/departure from doctrine, was followed in the U.S. until 1871 when another approach was adopted by the Supreme Court in *Watson v. Jones*.

10 Ogilvie, *supra* note 6, at 383.

11 Ross, *supra* note 9, at 74.

12 Ogilvie, *supra* note 6, at 383.

13 *Id.* at 383-384.

14 *Id.* at 384.

15 *Id.*

B. *The Hierarchical Deference Approach*

The first of the two approaches constitutionally approved by the U.S. Supreme Court was discussed in *Watson v. Jones*, decided in 1871. The case arose as a result of a dispute between the Presbyterian Church in the United States (PCUS) and a local church. The issue was slavery and the support by Southern congregations of the Confederacy during the Civil War. A Louisville, Kentucky congregation, the Walnut Street Presbyterian Church, was affiliated with the Presbyterian Church in the United States, and under the Presbyterian form of government was a part of the presbytery of Louisville and, above that, to the Synod of Kentucky. During the Civil War and again at its conclusion, the General Assembly, the highest body of the PCUS, issued instructions to its presbyteries, missions boards and to the sessions (local boards of elders) of individual churches to require ministers, members, prospective members, and missionaries to repent and forsake as sin, any views they may have held in favor of the War of the Rebellion and in support of slavery. The Walnut Street Church split over whether to follow these instructions. Each of the two competing groups of members as well as the denomination disagreed over what should happen to the church property as a result of the breach. That led to several law suits, one of which found its way to the U.S. Supreme Court.

In its decision, the Court established as constitutionally acceptable a “deference approach” which was quite different from the “adherence to doctrine” approach of *Craigdallie*.

The Court first posited three possible sets of facts and what the judicial response should be to each one. The first two were viewed as *dicta* since the Court made pronouncements about facts not currently set before them. However, the *dicta* did help sort out certain likely fact patterns. The first hypothetical case was one in which there was an express dedication of church property in trust to be used to further a specified set of religious doctrines, e.g. Trinitarian worship and

teaching. According to Justice Miller, who wrote the opinion in *Watson*, the use of that entrusted property could not be diverted to a use contrary to the trustor's intentions such as the promulgation of a Unitarian view of God. The original trustor "has a right to expect that the law will prevent that property from being used. . ." in that way.¹⁶ Presumably, this sort of case would be rare.

The second hypothetical case referred to by the Court in *Watson* is one where the church is independent, that is, congregational in form of government. Congregational government places the rule of the church in the local congregation. The congregation does not share decision-making with any higher body. Therefore, all disputes are intra-congregational disputes and must be settled by ordinary organizational principles such as majority vote of the congregants.¹⁷

The third type of case referred to by Justice Miller is the one presented by the actual facts of the case in *Watson*. The local church, Walnut Street Church, was part of a larger ecclesiastical organization. The denomination, sometimes referred to "the general church" by commentators, exercised control over all local churches affiliated with the denomination through its church judicatories. In *Watson*, the authority of the PCUS denomination extended through various levels to the Walnut Street Church; in other words, the structure of the PCUS was hierarchical. The Court stated that in disputes involving schisms within hierarchical churches, the civil courts must defer to the findings and determinations of the highest church tribunal.¹⁸ The *Watson* court specifically rejected the *Craigdallie* doctrine indicating that in order for a civil court to determine competing groups' fidelity to religious

16 *Watson*, 80 U.S. at 723.

17 Note that besides congregational government there are usually two other kinds of church government: Episcopal and Presbyterian. Episcopal church government generally relies on the rule of bishops, the purest example being the Roman Catholic Church. Other examples of Episcopal government, but not as pure as the Roman Catholic model, are Anglican, Episcopal, and Methodist churches. Presbyterian government is connective. The local churches are joined together through higher bodies such as presbyteries, synods and general assemblies. These are sometimes called higher judicatories.

18 *Id.* at 727.

doctrines, the court would be in a position of working in areas and with religious doctrines that were largely outside of its realm of expertise.¹⁹ The *Watson* Court did not refer specifically to the limitations imposed by the First Amendment since the Fourteenth Amendment had not applied the First Amendment to the states at this point in time.²⁰

The *Watson* decision rested upon what might be called the Court's own prudence as to what it was equipped to decide. Nevertheless, it effectively redirected American courts toward deference when it came to ecclesiastical disputes and their implications for church property cases. It should be noted that in its opinion on another case, *Kedroff v. St. Nicholas Cathedral* in 1952, the U.S. Supreme Court held that the First Amendment required a *Watson*-like deference to the ecclesiastical authorities in church disputes. The dispute was one over the use of St. Nicholas Cathedral in New York City. The Court decided that a specially enacted New York religious corporation law could not constitutionally be allowed to determine the dispute between the American Russian Orthodox Church and the Moscow-based Supreme Church Authority of the Russian Orthodox Church. As the Court concluded, finding in favor of the Moscow administration, "Even in those cases when the property right follows as an incident from decisions of the church custom or law or ecclesiastical issues, *the church rule controls*. This under our Constitution necessarily follows in order that there may be free exercise of religion."²¹

Despite *Watson* and *Kedroff*, some U.S. state courts continued to use the departure from doctrine approach of *Craigdallie* well into the 1960s; this is clear given the next important Supreme Court decision on the subject of church/denominational disputes - *Presbyterian Church v. Hull Church*. This 1969 case came to the Supreme Court on appeal from the Supreme Court of Georgia and

19 *Id.*

20 *Id.* at 729.

21 *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 121 (1952) (emphasis added).

involved two Georgia Presbyterian churches whose members voted to leave the PCUS.

The issues were many and varied and included the denomination's ordaining of women as ministers and elders, giving support to the removal of Bible reading from the public schools, teaching of neo-orthodoxy, and insistence that member churches remain in the National Council of Churches.²² The Georgia trial court applied the "departure from doctrine" approach and found in favor of the local church; the Georgia Supreme Court affirmed. The U.S. Supreme Court reversed their decision, stating that "the First Amendment severely circumscribes the role that the civil courts may play in resolving church property disputes."²³ Moreover, the Court, Justice Brennan writing, proscribed the "departure from doctrine" portion of the implied trust approach to such disputes, saying that such a theory "can play no role in any future judicial proceedings."²⁴ By so doing, the Supreme Court marked the end of the *Craigdallie* doctrine, branding it as unconstitutional.

Brennan objected to the application of the *Craigdallie* doctrine because it would require the courts to determine whether a claimed departure from doctrine was substantial and, secondly, require the courts to assess its importance to the church's theology.²⁵ Such a determination by the courts, according to Brennan, injects the civil courts into matters of religion which they are not allowed to interpret and assess according to the establishment clause of the First Amendment.²⁶ Brennan wrote: "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are *neutral principles of law*, developed for use in all property disputes, which can be applied

22 *Presbyterian Church v. Hull Church*, 393 U.S. 440, 452 (1969)

23 *Id.* at 449.

24 *Id.* at 450.

25 *Id.*

26 *Presbyterian Church*, 393 U.S. at 450.

without 'establishing' churches to which property is awarded."²⁷ In so holding, Brennan gave life to what became the "neutral principles of law" approach that was subsequently applied by state courts when presented with such cases. In a subsequent case, *Jones v. Wolf*, the Court further elaborated the "neutral principles" theory.

C. *Neutral Principles of Law and Jones v. Wolf*

In 1973, a Georgia Presbyterian church, Vineville Presbyterian Church, decided to separate from the PCUS following a vote of its membership (164-94).²⁸ The majority of members then joined the Presbyterian Church in America (PCA).²⁹ The presbytery in which the Vineville Church had resided appointed a commission which found that the minority members were the true congregation of the Vineville Church.³⁰ The Court, Mr. Justice Blackman writing, referring to an earlier opinion from *Maryland and Virginia Churches* stated that individual states might use "one of various approaches for settling church property disputes so long as [the approach] involves no consideration of doctrinal matters...."³¹ The two approaches to which the Court was referring were the "deference to religious authority" approach of *Watson* and the "neutral principles of law" approach.

In *Jones v. Wolf*, the Court outlined the advantages of the latter approach as relying exclusively on "well-established concepts of trust and property law familiar to lawyers and judges" and "flexibility in ordering private rights and obligations to reflect the intentions of the parties."³² In using the "neutral principles" approach, the courts are to carefully scrutinize the "language of deeds, the terms of the

27 *Id.* at 449. (emphasis added)

28 *Jones v. Wolf*, 443 U.S. 595, 598 (1979).

29 *Id.*

30 *Id.*

31 *Id.* at 603. (citing *Maryland & Virginia Eldership v. Sharpsburg Church*, 396 U.S. 367, 368 (1970).).

32 *Jones*, 443 U.S. at 603.

local church charters, state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning ownership and control of property."³³ The Court went on to emphasize that the outcome of the case using the neutral principles of law approach "is not foreordained."³⁴ However, the Court maintained that ownership documents can be changed anytime before a dispute arises³⁵ and that states, churches and individuals should "structure their relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."³⁶ This does appear to require the agreement of "the parties"³⁷ and thus raises question about a trust proviso in favor of the denomination which is simply unilaterally adopted by the general church without the consent of the local congregation.

III. A BRIEF CRITICAL CONSIDERATION OF EACH APPROACH

A. Implied Trust/Departure From Doctrine Considered

The U.S. Supreme Court has regarded the "departure from doctrine" approach as an unconstitutional violation of the proscriptions in the First Amendment against the Establishment of Religion. The Court took the position that if it is asked to look at doctrinal deviance or fidelity of two religious entities (denomination vs. local church or one faction vs. another in a congregational church) it is, in effect, putting its imprimatur upon certain religious views and therefore, establishing one form of religion over another. Such a stance comes very close to hyper-separationism. Basically, a court would need to identify the traditional creedal principles of a denomination and of its constituent churches and determine which entity was closer to those creedal principles. This type of

33 *Id.*

34 *Id.* at 606.

35 *Id.*

36 *Id.* at 604. (citing *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969).)

37 *Jones*, 443 U.S. at 605.

determination is not foreign to courts. They often look at the traditional intent of framers of constitutional provisions or amendments, at legislative intent, at the main purposes and principles of drafters of contracts, wills and trusts.

Let us say, for example, that a hypothetical denomination "X" is founded and endorses three creedal distinctives—Scriptural inerrancy, the centrality of Christ's substitutionary death, and a Trinitarian view of the godhead. Could not a court easily identify those doctrinal commitments by looking at creeds, doctrinal statements and historical minutes of the denomination? Once it had made that finding, it would then have to decide whether a denomination had departed from its basic principles. A court that declares that denomination "X" first adhered to three distinctives then departed from them has not endorsed the doctrines of that church. It has embraced, perhaps implicitly, a view that "doctrinal continuity is the essential characteristic of a church" and that doctrinal innovation is not.³⁸

Imagine yet another set of facts in which denomination "Y" composed of "free thinkers" was founded on three core dogmas: the Scriptures are a wise guide, Christ is an exemplary teacher and speaker of prudent advice, and a Unitarian view of the godhead. Suppose now, that denomination "Y" through its governing bodies, seeks to move away from those initial distinctives toward a higher view of Scripture, Christ as a Savior and the godhead as three in one. Suppose a local church of the "Y" denomination, wanting to remain true to the founding ideals of the denomination, breaks off from it and wants to maintain its local church property. The court would be required, if it were to apply the departure from doctrine approach, to determine the founding principles of the denomination and whether the denomination or the local protesting churches had moved away from the foundations of the general church. In neither case would a court, by applying the "departure from doctrine" approach, be establishing one set of doctrines over

38 Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1147 (1962).

the other. It would be recognizing that doctrines which were held earlier.

Admittedly, there are problems to be faced with the "departure from doctrine" approach. What departures are "fundamental" and what changes are "immaterial"?³⁹ Here, once again, judging materiality, or what things really matter, is not foreign to judicial determinations. The question is not whether the court thinks an issue is important but whether or not *at the denomination's founding* it was deemed important. To the Covenanters, exclusive psalmody is a distinctive and therefore, material. To a Pentecostal Holiness church, a second baptism with the Holy Spirit is essential and central. The court need not become entangled in what one commentator has called the "unfathomable vagaries" or "theological abstruseness" of the issues⁴⁰ to be able to determine the essential principles of the denomination at founding and whether they still remain intact.

A variety of means are available to courts to help them determine this question. Does the church require certain core beliefs for membership? The answers to this question and other simple questions could provide clues as to what the church regards as important basic beliefs. Are there well-established features of the denomination recognized by church historians? For example, Baptists usually insist upon congregational government and believers' baptism. Presbyterians have presbyterian government and infant baptism. Departures from these commonly recognized characteristics could help the court decide the outcome of a dispute.

Nevertheless, the U.S. Supreme Court has effectively eliminated the application of the "departure from doctrine" approach by state or federal courts because of its strict construction of the First Amendment.

39 *Id.* at 1148.

40 *Id.*

B. The Hierarchical Deference Approach Considered

The hierarchical deference approach requires the civil courts to defer to the highest ecclesiastical authority in a church where there is hierarchical authority. In hierarchical forms of organization, such as the Episcopal and Presbyterian churches, a local congregation is not entirely free to act on its own and must subject itself to the scrutiny of higher entities—presbyteries, synods, general assemblies, diocese, bishops, conferences of bishops. If a local congregation or parish wishes to secede from its church and the higher authority opposes the secession, under the deference approach, the civil courts must honor the decision of the higher ecclesiastical bodies and therefore refuse to permit the secession.

The most obvious criticism of this approach is that it effectively takes away any meaningful challenge by local churches to the general church or denomination since it is unlikely that the general church would approve the withdrawal of their local churches.⁴¹ The deference approach, if universally adopted by the courts, would discourage church disputes from coming into the civil courts once the higher ecclesiastical body had ruled against the attempted secession of the local church. There would simply be nothing to be gained by a local church litigating its claim to church property if compulsory deference became the only approach allowed. Barring its ruling against its own interest, the denomination would always win were the matter to be submitted to a civil court. So the single gnawing question with this approach is: "...why is the ultimate decision [about the rightfulness of separation] ceded to the superior church body?"⁴² Isn't it true that "[t]his Procrustean attitude risks giving central bodies more power than the members of some churches have assigned to them?"⁴³ As Greenawalt puts it, "People join hierarchical churches with the understanding that the highest bodies

41 Ashley Alderman, Note, *Where's the Wall?: Church Property Disputes Within the Civil Courts and the Need For Consistent Application of the Law*, 39 GEO. L. REV. 1027, 1055 (2005).

42 Kent Greenawalt, *Hands Off? Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1851 (1998).

43 *Id.* at 1864.

will settle matters. But the idea that members give implied consent to whatever the hierarchy does is not tenable for many members of many churches."⁴⁴

There are further problems with the deference approach which belie the claims of some commentators that this approach would be the least likely to entangle the civil courts in matters of religion. A civil court, presented with a complaint from a local church wanting to separate, must make a determination about whether the relationship between the local church and the general church body is truly "hierarchical". Therefore, although it must refrain from examining church doctrines per se under the deference approach, it necessarily must scrutinize the church's internal governance. To do that it must review church constitutions, books of order, and other constituting documents. Therefore, it has ventured into making judgments about the ecclesiastical organization of the church.

There are other issues. When is a church "hierarchical"? More importantly what is the scope of the authority of higher church bodies over local churches? In answer to the first question, one can say with relative certainty that congregational churches are not hierarchical. Though they may join together to sponsor missionaries, hold conferences, or undertake other joint ventures, there is no functional hierarchy. To the extent that individual congregational churches follow any uniform patterns with respect to doctrine and practice, it is because of influence and persuasion but not compulsion.

A more difficult question occurs when churches are a mixture of church forms. For example, "the synods of the United Lutheran Church exhibit mixed presbyterial and congregational characteristics. . . ."⁴⁵ In fact, the argument of mixed church government is made by certain historians of the Episcopal Church in the United States even though Episcopal government is usually regarded as a prime example of hierarchical organization, that is, rule by bishops.

44 *Id.* at 1874.

45 *Where's the Wall?*, *supra* note 42, at 1159.

Lunceford said that the American version of the Anglican church, usually called Episcopalian, is really a combination of traditional Episcopal forms with what must be considered a congregational element.⁴⁶ The Anglicanism of early American life incorporated the more participatory, “democratic” forms found in American civil government into Anglican church polity.⁴⁷ The American Anglicans were a “lay-led group” with bishops playing a much less prominent role in the activities of the local parish churches.⁴⁸ Of course, this was due in part to the end of English Anglicanism in America following the Revolutionary War which left local congregations to continue operating “without a bishop or a centralized system of government to oversee local churches.”⁴⁹

Consequently, “the way colonial worshipers related to their churches encouraged a local sense of ownership. This was reflected in a view commonly held into the twentieth century that the parish owned the local church building.”⁵⁰ The centrality and importance of the local church in the development of American Episcopalianism is emphasized by others as well.⁵¹ With such a mixture of forms, is it correct to describe a church as “hierarchical” merely because there are certain kinds of connections between higher bodies and the local churches? Furthermore, is a hierarchical entity the authority for all matters or merely certain matters, and if so, which matters? If one determines that a local church is part of a larger hierarchy for *spiritual* and *ecclesiastical* purposes, is it necessarily hierarchical

46 LUNCEFORD, *supra* note 4, at 119-136.

47 *Id.* at 121.

48 *Id.* at 122.

49 Sarah M. Montgomery, Note, *Drawing the Line: The Civil Courts' Resolution of Church Property Disputes, The Established Church and All Saints' Episcopal Church, Waccamaw*, 54 S. CAR. L. REV. 203, 230 (2002).

50 LUNCEFORD, *supra* note 4, at 123.

51 Tim Smith and George Conger, *Parish Is the Basic Unit of the Church in American Anglicanism*, March 2, 2003, <http://geoconger.wordpress.com>.

concerning property rights?⁵² ⁵³ Put another way, does a local church necessarily regard its affiliation with a denomination as a relinquishing of that congregation's power to control its property?⁵⁴

C. *Neutral Principle of Law Approach Considered*

The neutral principles of law approach requires that a court not automatically defer to the ecclesiastical judgments of a higher denominational judicatory in deciding whether a local church has the right to separate itself from its denomination and keep its property rights. Instead, the court is to look at concepts of trust and property law to determine who is entitled to the local church property. This means examining deeds, state statutes concerning property rights, local church incorporation and charter documents and provisions of the denomination's constitution. Some commentators have complained that courts using this approach have produced widely divergent decisions.⁵⁵ This approach was deemed constitutionally allowable and perhaps even preferable in 1979 in the *Jones v. Wolf* opinion. Since state law cases on these matters are relatively infrequent, one should exercise patience so that state courts have time to gradually develop more clarity and uniformity in their decisions.

The Circuit Court for Fairfax County, Virginia Certain recently considered and decided cases involving a number of churches which voted by large super-majorities to disaffiliate from the ECUSA. In these cases, Judge Randy Bellows referred repeatedly to *Jones v. Wolf*, adopting the neutral principles of law approach and finding a long-existing state statute to be constitutional.⁵⁶

52 Louis J. Sirico, *Church Property Disputes: Churches As Secular and Alien Institutions*, 55 FORD. L. REV. 335, 349-350 (1986).

53 Nathan Clay Belzer, *Deference in the Judicial Resolution of "Intrachurch Disputes: The Lesser of Two Constitutional Evils"*, 11 ST. THO. L. REV. 109, 124 (1998).

54 *Id.* at 125.

55 *Id.* at 135.

56 *In re Multi-Circuit Episcopal Church Property Litigation*, "Letter Opinion of the Constitutionality of Virginia Code section 57-9(A)", Judge Randy I. Bellows, Fairfax County

The statute referred to as Virginia Code section 57-9 was passed by the Virginia legislature just after the conclusion of the Civil War to deal with “schisms generated by disputes over slavery and the Civil War.”⁵⁷ The statute says that when a division occurs within a church or religious society, members of local churches can vote to affiliate with either branch of the divided church. The local Episcopal churches in Virginia did just that and submitted the result to the county circuit court. The seceding churches then chose to affiliate with a different national church which was also a member of the Anglican Communion World-Wide, the Anglican Church of Nigeria.⁵⁸

Under the Virginia statute, the separating congregations would then have title the church property.⁵⁹ Despite the legal challenge by the Episcopal Church USA, Judge Bellows concluded: “Today, this Court finds that 57-9(A), as applied, is constitutional. Specifically, this Court finds that the statute, as applied in the instant case, does not violate the Free Exercise or Establishment Clause of the First Amendment nor does it violate the Equal Protection Clause of the Fourteenth Amendment, nor does it violate the Takings Clause of the Fifth Amendment.”⁶⁰ At the time of this writing, Judge Bellows’ decision is on appeal to the Virginia Supreme Court.⁶¹

What is clear from the *Jones v. Wolf* decision is the Court’s endorsement of the neutral principles approach with clear instructions for church bodies, local and denominational, to clarify the relationship they have with one another concerning

Circuit Court (VA.) 1, 17-21 (2008).

57 CANA (Convocation of Anglicans in North America) Congregations’ Memorandum of Law on the Scope of Hearing on Congregational Determination Pursuant to Va. Code section 57-9. Submitted to the Circuit Court for Fairfax County, Virginia In re: Multi-Circuit Episcopal Church Litigation, 3 (2007).

58 *Id.* at 19.

59 VA. CODE ANN. § 57-9(a).

60 *In re* Multi-Circuit Episcopal Church Property Litigation, *supra* note 57, at 48.

61 The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church et al., Record No. 090682, Appeal to the Supreme Court of Virginia.

local church property in question. In response to the 1979 admonition, various denominations realized that their hierarchical position over local congregations would *not* guarantee their ascendancy in church property disputes and sought to strengthen their positions regarding local church or parish property.

Probably one of the most widely known efforts in this regard was the adoption by the Episcopal Church of an addition to its church law called the "Dennis Canon". The Dennis Canon, found at Title I, Canon 7, section 4, Protestant Episcopal Church Canons, purports to create an express trust over local church property in favor of the Episcopal denomination and the diocese in which the local parish church is located. There is a question about the validity of the original adoption of the Dennis Canon.⁶² Leaving that aside, one can fairly ask whether a trust can be unilaterally created by an entity that has not been determined to be the owner of the property in the first place and which did not provide the funding for the purchase of that property.⁶³ Normally trust law would not allow such a unilateral creation and, if it did, such a trust would likely be revocable by the local parish.

In response to such denominational efforts, local churches in hierarchical organizations are now adopting provisions that seek to make clear that they do not accept implied or express trusts being asserted over their local property. Churches are adopting provisions in their Articles of Incorporation or amended articles which say that they view their property as being without a trust in favor of any other entity and if a trust is implied that it is regarded by the congregation as revoked.⁶⁴ How the courts, using the neutral principles approach, will handle the efforts by denominations to shore up their claims and the efforts by local churches to counter those efforts, remains to be seen.

62 LUNCEFORD, *supra* note 4, at 130-131.

63 *Id.* at 132.

64 *Id.* at 189.

IV. ARBITRATION AND NEGOTIATION: PERHAPS THE BEST SOLUTION

Churches that are separating from their denominations are now often negotiating a release of their church property which is a method that avoids litigation and the pitting of one set of Christians against another. In fact, mainline denominations are providing "Protocols for Departing Denominations."⁶⁵ Large church buildings are expensive to maintain, giving local congregations significant leverage. Repairs are costly; utility bills are high. Furthermore, mainline denominations seeking to maintain local properties are often declining in membership. Church buildings are special use structures not especially easy to convert to other purposes, therefore, making resale difficult. The settlements with which this writer is familiar usually require some payment, over a period of years, to the denomination or its subsidiary, the presbytery or diocese. For that payment, the local church's property is allowed to be titled unequivocally to the local congregation. Until the courts have made their approaches understandable, settlement may be the best solution for all concerned.

⁶⁵ Peter J. Lee, *Protocol for Departing Congregations*, September 28, 2006. Committee to Help Reconcile the Divisions within our Diocese of Virginia, The Episcopal Church.