

COMMENT

Intra-Church Property Disputes and the Failure of Neutral Principles: A Call for a Return to the Deference Standard

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Keywords: church property disputes, deference approach, neutral principles approach, jurisprudence, USA

INTRODUCTION

The issue of intra-church property disputes is one that is simultaneously quite old in American history and perhaps of greater relevance now than ever before. Given ever-increasing dissension within Christian church bodies over issues including homosexuality, women's ordination and racial justice, there are currently numerous church property disputes outstanding in the courts, and there are likely to be many more in the near future. From 1871 until 1979, the Supreme Court of the United States consistently took a deferential approach in property cases that involved church bodies with their own authorities and tribunals. When a dispute arose over church doctrine, polity or discipline and a hierarchical church reached its own decisions regarding proper ownership of the church's property, the Supreme Court determined that civil courts should defer to that church's internal decision-making process. The court first created this doctrine as a matter of 'federal common law' but in 1952 anchored it in the First Amendment's Free Exercise and Establishment clauses, applied to the states through the Fourteenth Amendment. During the mid-twentieth century, the Supreme Court consistently extended the deference standard against any state-level attempts to restrict or circumvent it. However, in the 1979 case of *Jones v Wolf*¹ the court changed its standard significantly and adopted a 'neutral principles' approach, which weighs a church's internal documents and deliberations against property deeds, state property and trust statutes, and other sources, in an attempt to allow secular courts to rule on such cases while avoiding potential First Amendment concerns.

¹ 443 U.S. 595 (1979).

Although the neutral principles approach is more recent, and *Jones v Wolf* remains the existing precedent on this issue, the Supreme Court has not revisited the subject since 1979 and the neutral principles standard remains underdeveloped, especially compared to the previous deference standard. Furthermore, a recent spate of property disputes involving schisms within the Episcopal Church, a major Protestant denomination, has exposed flaws in the current approach. Since ‘neutral principles’ were never fully established or defined, state courts in recent years have come to very different decisions in Episcopal Church property cases as to what exactly constitutes the said neutral principles. Some courts consider Church documents and proceedings to be important sources for their decisions, while others ignore them entirely.² This variety of approaches has produced contradictory outcomes, with diametrically opposed parties retaining ownership of Church property based purely on the state or federal circuit in which they are located. Such a system is unacceptably inconsistent, depriving churches and the lawyers who represent them of the predictability that is so prized by the legal community dedicated to religious freedom.

Because of the problems inherent in the neutral principles approach, this comment piece will argue that the Supreme Court should revisit *Jones v Wolf* and return to the old standard of deference to the internal decision making of religious bodies in intra-church dispute cases. Such an approach would avoid the existing problems, inconsistencies and ambiguities while simultaneously avoiding any possible First Amendment free exercise or establishment concerns. The Supreme Court has signalled a return to a more deferential approach in cases involving religious employment in recent years and it should do the same in property matters.

A HISTORICAL OVERVIEW OF THE SUPREME COURT’S APPROACH TO CHURCH PROPERTY DISPUTES

Establishing the deference approach in *Watson* and *Kedroff*

The first case to come before the Supreme Court concerning a major church property dispute was *Watson v Jones*.³ This case involved a contest over the rightful use and ownership of the Third (or Walnut Street) Presbyterian Church in Louisville, Kentucky. That church was a member of the Presbyterian Church in the United States of America (PCUSA), a voluntary organisation with governing authority exercised by ‘an ascending set of judicatories’.⁴ The highest

² See, eg, *All Saints Parish Waccamaw v Protestant Episcopal Church in the Diocese of S. Carolina*, 685 S. E.2d 163 (2009); *Rector, Wardens and Vestrymen of Christ Church in Savannah v Bishop of Episcopal Diocese of Georgia*, 718 S.E.2d 237 (2011).

³ *Watson v Jones*, 80 U.S. 679 (1871).

⁴ *Ibid* at 681.

judicatory of the national church body was the General Assembly, which had responsibilities typical of those given to the national governing assembly of a hierarchical church body such as shall be examined here.

At the outbreak of the American Civil War in 1861, a split occurred within the PCUSA over the issues of slavery and secession, as happened within most Protestant bodies in the United States around that time. In the case of the PCUSA (which became commonly known as the Northern Presbyterian Church), the General Assembly adopted a stance of support for the Union and President Lincoln at the beginning of the war. In 1865, the General Assembly declared that any Southern congregations who had supported the Confederacy or adhered to a doctrine supporting slavery on religious grounds must first 'repent and forsake these sins' before being accepted once again in the PCUSA.⁵ The Walnut Street Presbyterian Church in Louisville had divided during the war and ultimately the legal dispute turned on 'which of two bodies should be recognised as the Third or Walnut Street Presbyterian Church'.⁶ Through a complicated series of internal and external legal actions, the church ended up in the hands of a pro-slavery party, while the General Assembly of the Presbyterian Church recognised the claim of the anti-slavery party, and so that party appealed to the Supreme Court of the United States.⁷

The Supreme Court began by acknowledging that different legal circumstances exist for a congregational church body versus a hierarchical one, and it spent some time discussing what those differences are.⁸ However, the court firmly held that when a hierarchical body such as the PCUSA exists, with its ascending system of judicatories culminating in the General Assembly, civil courts must recognise the decisions of such authorities as binding.⁹ Therefore, since the General Assembly of the church recognised the anti-slavery body as the rightful trustees of the Walnut Street Presbyterian Church, civil courts were bound to do the same and not otherwise interfere with an internal church matter. In the most influential part of the opinion, Justice Miller wrote:

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no

5 Ibid at 690–691.

6 Ibid at 717.

7 Ibid at 683–700.

8 Ibid at 722–726. In brief, the Court declared that in property disputes within church bodies which are 'strictly independent' and owe 'no fealty or obligation to any higher authority ... the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations' (725).

9 Ibid at 726–729.

heresy, and is committed to the support of no dogma, the establishment of no sect.¹⁰

Future justices agreed with Justice Miller in explicit terms and frequently cited this language all the way until the *Jones v Wolf* decision in 1979.

Watson v Jones did not make any reference to the First Amendment in its majority opinion because the doctrine of incorporation through the Fourteenth Amendment had not yet been established.¹¹ For that reason, the *Watson* majority relied solely upon the common law, and church property disputes were decided upon such lines for the next eight decades. However, in 1952 the Supreme Court firmly grounded its jurisprudence in religious property disputes within the First Amendment's Free Exercise and Establishment clauses in *Kedroff v St. Nicholas Cathedral*.¹² The case concerned St Nicholas' Russian Orthodox Cathedral in Manhattan, which was (and is) under the direct jurisdiction of the Patriarch of Moscow, who appointed the cathedral's bishop.¹³ After the Russian Revolution, a number of émigré jurisdictions split off from the Russian Orthodox Church due to that body's coming under the control of the Soviet authorities.¹⁴ During the early years of the Cold War, the idea of an officially atheist communist government being allowed to appoint clergy at an American church parish concerned many American civil authorities, including those in the state of New York.¹⁵ In response the New York State Legislature passed a law transferring control of the cathedral property to the breakaway Russian Church in America, under the theory that that body 'would most faithfully carry out the purposes of the religious trust'.¹⁶ The two church bodies both claimed to have possession of the cathedral through their own duly elected hierarchs, but the Moscow Patriarchate had never recognised the independence of the American churches. As the case proceeded, the New York Court of Appeals determined, based on the relevant statute, that the archbishop elected by the American group was the rightful trustee.¹⁷

10 Ibid at 728.

11 *Kedroff v St. Nicholas Cathedral*, 344 U.S. 94, 105 (1952) at 115.

12 Ibid.

13 Ibid at 105.

14 Ibid at 102–103. The Supreme Court's opinion goes into great detail about the complex history behind these events. For the purposes of this comment, it suffices to say that the Soviet government attempted to reform the Russian Orthodox Church to make it more compliant to the communist authorities, imprisoning the Patriarch of Moscow, along with many other priests and bishops, and installing their own preferred clergy instead. These moves naturally incensed many émigré members of the Orthodox Church, and many chose not to place themselves under the authority of an atheist government that was actively oppressing their co-religionists. Various attempts at reconciliation over the years had remained unsuccessful as of 1952. The full history can be found in *ibid* at 100–106.

15 Ibid at 108–109.

16 Ibid at 109.

17 Ibid at 106–110.

The US Supreme Court reversed this decision, however, and awarded control of the cathedral property to the clergy appointed by the Patriarchate of Moscow.¹⁸ In doing so, the court both relied on *Watson* and expanded that case's holding. Writing for the majority, Justice Reed approvingly cited the quotation from *Watson* that 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'¹⁹ He furthermore held that the New York statute prohibited the free exercise of religion, violated the separation of church and state, and threatened a government establishment of religion.²⁰ As it had been well established by 1952 that the Fourteenth Amendment applies the First Amendment to the states, the New York statute was invalidated by the *Kedroff* opinion.

Building on the deference approach in *Hull Memorial Presbyterian Church*

In 1969 the Supreme Court further clarified its stance on church property disputes in *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church*, involving a dispute between the Presbyterian Church in the United States (PCUS) and two local congregations in Georgia.²¹ The dispute arose when two congregations objected to the PCUS General Assembly's changes in doctrine, which moved the Church in a more liberal direction.²² These two congregations wished to leave the PCUS and reconstitute themselves as an independent Presbyterian body while maintaining control of their property.²³ In reviewing the case on appeal, the Supreme Court of Georgia took an innovative approach in analysing the state's 'departure from doctrine' test, determining that the question at issue was whether the general church body had departed from 'its tenets of faith and practice'. The Georgia court determined that the PCUS had indeed departed from orthodox doctrine, but the Supreme Court of the United States held that the lower court had violated the First Amendment in doing so.²⁴ Writing for a unanimous court, Justice William J Brennan emphasised that secular courts do sometimes have jurisdiction over cases involving ecclesiastical property:

It is obvious . . . that not every civil court decision as to property claimed by a religious organization jeopardises values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property.²⁵

18 Ibid at 121.

19 Ibid at 114.

20 Ibid at 110.

21 *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

22 Ibid at 442.

23 Ibid.

24 Ibid at 443.

25 Ibid.

It is when questions of church property are made to turn on questions of ‘religious doctrine and practice’ that First Amendment issues are clearly implicated and secular courts must leave well alone, Brennan continued. To that end, the court invalidated Georgia’s ‘departure from doctrine’ standard.²⁶

As Justice Brennan explained, there were multiple problems with this standard. First, it required secular courts to interpret church doctrine, a dubious proposition to begin with.²⁷ Second,

If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated.²⁸

Asking civil courts to ‘interpret and weigh church doctrine’ raises clear free exercise and establishment concerns, so the Supreme Court did not hesitate to strike down the relevant Georgia law.²⁹ Justice Brennan pointed these issues out and the Supreme Court again cited *Watson v Jones* in emphasising the importance of avoiding government interference with religious exercise in America, stating in no uncertain terms that ‘it [is] wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions’.³⁰

Justice Brennan’s opinion is also noteworthy, however, for its dictum about ‘neutral principles’, which would later become the crux of the majority’s decision in the 1979 case *Jones v Wolf*. Brennan declared 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’.³¹ He specified that such neutral principles should, of course, only be applied when property disputes *do not* turn on questions of church doctrine, but the Supreme Court ten years later took his words and used them to help create an entirely new standard in ecclesiastical property cases.

In the meantime, however, the Supreme Court decided *Serbian Eastern Orthodox Diocese for U.S.A. and Canada v Milivojevich*.³² That case will not be discussed here except to state that in its decision the Supreme Court extended deference to its furthest point by declaring that civil courts may never ‘disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical

²⁶ Ibid at 443, 452.

²⁷ Ibid at 452.

²⁸ Ibid at 450.

²⁹ Ibid at 451.

³⁰ Ibid at 445–446.

³¹ Ibid at 449.

³² *Serbian Eastern Orthodox Diocese for U.S.A. and Canada v Milivojevich*, 426 U.S. 696 (1976).

polity' when a dispute can only be resolved by extensive inquiry into religious law and polity.³³ Since civil courts are not equipped to do so and cannot do so without raising serious First Amendment issues, such disputes must be left in the hands of the hierarchical church's own authorities.

A sudden turn: *Jones v Wolf* and the creation of the neutral principles standard

In 1979 the Supreme Court abandoned its century-long precedent of a deference standard in ecclesiastical property disputes in the case of *Jones v Wolf*.³⁴ The case originated in the aftermath of *Hull Memorial Church*, as in the ensuing decade Georgia had been forced to modify its own laws on the subject.³⁵ In a series of cases, the Georgia courts had developed what became known as the neutral principles approach, whereby they examined a variety of documents including property deeds, state property law and a hierarchical church's own internal laws and regulations to determine if any of them established a trust. If any of the documents were found to establish an express trust in favour of the general church body, then that body received the property; otherwise, the property remained in the hands of the local church.³⁶ After further refinement by the state courts, the doctrine was tested by the US Supreme Court in *Jones v Wolf*, which concerned another dispute between Presbyterian congregations and the hierarchical body to which they belonged.³⁷ The Supreme Court decided that the neutral principles approach was the best possible approach in such disputes; though the decision was by a mere 5–4 majority, the new standard has not been revisited since 1979.

Writing for the majority, Justice Blackmun argued that the neutral principles standard should be the court's new preferred method because it was 'completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity'. Blackmun postulated that this approach relied on concepts of property and trust law that all judges and lawyers were familiar with, allowing courts to adjudicate conflicts over church property without ever having to consider questions of 'religious doctrine, polity, and practice'.³⁸ He further argued against Justice Powell's dissent that the neutral principles approach freed courts from making impermissible inquiries that might raise First Amendment issues, while doing nothing to inhibit the free exercise of religion. Blackmun relied on neutral principles' inherent theoretical neutrality as proof that such a standard could not possibly raise free exercise or establishment concerns.³⁹ He explained his theory succinctly:

33 Ibid at 709.

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

35 Ibid at 599–600.

36 Ibid at 600–601.

37 Ibid at 602–603.

38 Ibid at 603.

39 Ibid at 605–606.

Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property . . . The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.⁴⁰

As will be seen, things have not quite worked out in practice as Justice Blackmun envisioned, as courts have frequently ignored the very methods that he recommended to ‘ensure . . . that the faction loyal to the hierarchical church will retain the church property’. However, to date the Supreme Court has declined to revisit *Jones v Wolf*, which remains good law, while the neutral principles standard remains the method that lower courts use to resolve intra-church property disputes.

ORIGINS OF THE CURRENT PROPERTY DISPUTES WITHIN THE EPISCOPAL CHURCH

Background: The Episcopal Church’s history before 2003

The Episcopal Church (TEC) is one of the oldest hierarchical churches in the United States. Its origins lie in the founding of the Thirteen Colonies by English settlers during the seventeenth century, who set up Anglican churches in every colony to represent the Church of England, the established state church in their home country. Like other hierarchical religious bodies, TEC has ascending levels of authority, beginning at the local parish level, continuing up to the diocesan level and culminating with the General Convention, which meets every three years. The General Convention makes the most important decisions regarding church polity, discipline and doctrine, including liturgical revisions, official doctrinal declarations and election of a presiding bishop to a nine-year term.⁴¹ As a result, since the 1970s it has typically been decisions of the General Convention that have stoked the most controversy within TEC and have led to ever-widening church splits.

Beginning in the 1960s, TEC became increasingly associated with liberal social and political causes, first as an active participant in the civil rights movement. During the 1960s and 1970s, the Church broadened its official involvement in various causes to include opposition to apartheid in South Africa, support for the ordination of women and acceptance of gay people within the

⁴⁰ Ibid at 606.

⁴¹ ‘The General Convention of the Episcopal Church’, <<https://www.generalconvention.org/>>, accessed 16 September 2021.

Church. The first major breaking point came in 1976, when that year's General Convention approved the ordination of both women and openly gay clergy and declared that gays are 'children of God' who deserve acceptance and pastoral care from the Church.⁴² These decisions were too much for some conservatives, who led a schism of breakaway groups all claiming to be the representatives of 'true' Anglicanism.

The consecration of Gene Robinson and the formation of the Anglican Church in North America

In the years after 1976, the general trend in TEC continued to be a broadly liberal one, and that trend culminated in 2003 with the election and consecration of Gene Robinson as Bishop of New Hampshire. Robinson was an openly gay and partnered man at the time, and his episcopal consecration was seen as a bridge too far by many of TEC's conservatives.⁴³ As a result, talks began among those conservatives, at both diocesan and parish levels, about next steps and whether they could remain members of TEC in good conscience. Between 2003 and 2009 a number of dioceses and parishes separated themselves from TEC and formed various other jurisdictions. During this period, many church leaders came to agree on the importance of forming a unified body for conservative Anglicans in the United States and Canada. To that end, in 2009 most of the breakaway groups from TEC formally established and joined the Anglican Church in North America (ACNA).⁴⁴

As soon as the current schism within North American Anglicanism began in 2003, property disputes arose. The parishes and dioceses that left TEC naturally wished to take possession of the church property they had always held, while TEC's hierarchy wanted to maintain its own control over the property, partly in hope of retaining or re-establishing its presence in those places where schism had occurred. Many of these legal disputes are still ongoing and new ones regularly arise as new parishes and dioceses choose to join the ACNA.

Owing in part to the Supreme Court's adoption of the inconclusive neutral principles standard in *Jones v Wolf*, different state courts have ruled on these disputes in ways that all claim to apply 'neutral principles' but have led to dramatically different outcomes. This disparity in outcomes is the result of a disagreement among different courts as to whether they should recognise TEC's constitution and canons as valid reference points.

TEC's internal documents are quite clear on the issue of how to dispose of disputed property. As a response to the Supreme Court's ruling in *Jones v*

42 'Marking the 40th anniversary of General Convention's approval of women's ordination', <<https://www.episcopalnewsservice.org/2016/09/16/marking-40th-anniversary-of-general-conventions-approval-of-womens-ordination/>>, accessed 16 September 2021.

43 See, eg, P J Boyer, 'A church asunder', *New Yorker*, 17 April 2006.

44 'About the ACNA', <<https://anglicanchurch.net/about/>>, accessed 16 September 2021.

Wolf, the next General Convention in 1979 adopted what has become widely known as the ‘Dennis Canon’. So called because it was drafted by the attorney Walter Dennis, the Canon survives today as TEC’s official stance on the matter. It reads in full:

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. The 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 of, and subject to, this Church and its Constitution and Canons.⁴⁵

This Canon aimed to clarify and confirm the TEC’s ownership of Church property that came through a myriad of donations, purchases and gifts over many centuries and that is subject to a variety of state property and trust laws. The Dennis Canon sought both to establish a uniform policy that would both place all ecclesiastical property under the ultimate purview of TEC’s national hierarchy and to tie the possession of that property to a parish or diocese remaining a member in good standing of TEC.

The Dennis Canon has only been partly successful in accomplishing its mission since 2003, however, because civil courts have been far from uniform in their application of it to cases involving Church property disputes. Some courts have given the Dennis Canon and other Church documents considerable weight, while others have ignored them entirely and still others have tried to adopt a middle approach, with mixed success. This divergence in results is explored in detail below.

DIFFERING RESULTS IN EPISCOPAL CHURCH PROPERTY CASES SINCE 2003

This comment piece illustrates and analyses the diversity of outcomes using three case studies, drawn from former TEC parishes in Virginia, South Carolina and Texas. By showing both the divergence between the different state courts’ holdings and their varying rationales for doing so, I hope to make clear the incoherence of the Supreme Court’s neutral principles approach when that approach is put into practice and to show the importance of the Supreme Court finding a new standard that can be applied universally across the United States.

45 Episcopal Church Canon I.7.4 (2018).

South Carolina: applying property law in *All Saints Parish Waccamaw v Diocese of South Carolina*

One of the earliest cases to come out of the post-2003 TEC schism, and one of the first to be conclusively resolved by the relevant state supreme court, is *All Saints Parish Waccamaw v Protestant Episcopal Church in the Diocese of South Carolina*.⁴⁶ The relevant pre-dispute history stretches from 1745 until 2000. All Saints Waccamaw was a colonial-era parish created in 1745 through a granting of trust by local landowners.⁴⁷ By 1902 the congregation had become concerned about the status of their title because of statutes passed by the South Carolina General Assembly in the intervening years. As a result, the congregation reincorporated under the name All Saints Parish, Waccamaw, Inc, and the diocese's trustees signed a quitclaim deed renouncing any interest they might have in the parish's property. Finally, in 2000 the diocese filed a notice with the county stating that the property was held in trust for the diocese and the national Church, pursuant to the Dennis Canon.⁴⁸

In 2003, the parish met to decide whether to disassociate from TEC and the Diocese of South Carolina, due to the aforementioned consecration of Gene Robinson. The congregation overwhelmingly voted to do so, and the parish's articles of incorporation were amended accordingly in 2004.⁴⁹ The following year, a minority group loyal to TEC filed suit claiming that they were the true representatives of the parish, that the church property was rightfully theirs and that some of their number should be recognised as the parish's officers. The trial court held that the original 1745 trust was still valid but that the rightful owners of the property could not be determined until it was known who were the current parties to the trust. However, the trial court did determine that the minority group were the rightful officers of the parish and ejected the majority officers from the property. The majority group appealed and the South Carolina Supreme Court granted certiorari.⁵⁰

In its decision the South Carolina Supreme Court reversed both of the trial court's holdings.⁵¹ The court began its analysis by defending and justifying its use of neutral principles. In a theme that is common to the case studies presented here, the court averred that it was possible to resolve the dispute before it without having to decide controversies over religious doctrine.⁵² The court claimed this to be true because the case could be resolved solely by application of property, trust and corporate law. It first held that the original

46 *All Saints Parish Waccamaw v Protestant Episcopal Church in the Diocese of South Carolina*, 685 S.E.2d 163 (2009).

47 *Ibid* at 167.

48 *Ibid* at 167–168.

49 *Ibid* at 169.

50 *Ibid* at 169–170.

51 *Ibid* at 175.

52 *Ibid* at 170–171.

1745 trust had been fully executed, as the original trustees had no relevant duties and there was a beneficiary who could take full control of the property, namely the congregation. The court went on to hold that the 1903 quitclaim deed had removed the parish's property from any association with the diocese and had placed it completely under the control of the corporate entity All Saints Parish, Waccamaw, Inc. As a result, the court found the diocese's 2000 claim of trust to be invalid, since the diocese had not had any interest in the property whatsoever since 1903.⁵³

Because it found the 2000 declaration to be invalid, the South Carolina Supreme Court next examined whether the congregation of All Saints had validly amended its articles of incorporation as a non-profit entity.⁵⁴ Finding that the congregation had done so, the court held that the majority group constituted the parish's rightful representatives and officers and awarded them full control of the parish property. The court made sure to note that it felt that the lower court had erred in adopting a deference approach and finding in favour of the hierarchical church authority, claiming that the only question at issue was whether a non-profit corporate entity had appropriately severed its legal ties to another body.

While the South Carolina Supreme Court's analysis is not incorrect on its own terms, it is flawed in the assumptions that it makes and problematic in terms of setting a precedent for other cases, even in the same state. This case appears to have presented a unique set of circumstances in the form of the parish's reincorporation and the diocese filing a quitclaim deed. It seems unlikely, therefore, that other parishes would be able to use the same rationale to claim ownership of church property, whether in South Carolina or elsewhere. Furthermore, the court strongly asserted that it was possible to determine who the rightful representatives of the parish were without having to decide controversies of religious doctrine, even though controversies over religious doctrine were what caused the dispute in the first place. The court's assumption is a dubious one and it appears to have used the existence of the quitclaim deed as a way out of the First Amendment-related dilemmas that might otherwise have faced it. The court would have been better off following the trial court's deferential approach, thereby avoiding such issues and allowing for greater consistency both within the state and around the country.

Deference by another name: neutral principles in *The Falls Church v Protestant Episcopal Church*

The next case presents a fitting contrast with *All Saints Parish Waccamaw*, as a similar set of facts (with one key difference) produced the complete opposite

53 Ibid at 173–174.

54 Ibid at 174–175.

outcome, with TEC ultimately retaining ownership of the property in dispute in *The Falls Church v The Protestant Episcopal Church in the United States*.⁵⁵ Although the parish predated the formation of TEC in 1789, it officially petitioned to be a part of that Church and of the Diocese of Virginia in 1836, a petition accepted by the national Church. Like All Saints Waccamaw, the congregation of the Falls Church objected to the consecration of Gene Robinson and overwhelmingly voted to disaffiliate from the Diocese of Virginia in 2006. The diocese responded in the same manner as the Diocese of South Carolina had, claiming that the parish's property was held in trust for the diocese and TEC by the congregation. In this case, the trial court initially found for the congregation but the Supreme Court of Virginia reversed and remanded the decision, with instructions to resolve the dispute 'under principles of real property and contract law'.⁵⁶ The trial court in doing so considered all 11 deeds that had been granted to the parish over the years and determined that the relevant real property and tangible personal property should be awarded to the Diocese of Virginia, while intangible personal property acquired after the split could be retained by the congregation. The Falls Church appealed and the Supreme Court of Virginia granted certiorari.⁵⁷

Like the South Carolina Supreme Court, the Supreme Court of Virginia was quick to assert that it did not believe a question of religious doctrine was at issue.⁵⁸ Rather, it felt that the dispute could be resolved under 'neutral principles of law' relating to property and trust law. However, here the court diverged from the South Carolina Supreme Court's rationale in determining that the Dennis Canon was very much applicable to the dispute. It found that a constructive trust could be created when there was a fiduciary relationship between two parties, and that the Dennis Canon was the only evidence needed to show the existence of such a fiduciary relationship. The court held that the Dennis Canon was a mere codification of an implied relationship that had existed between TEC, its dioceses and their parishes since the Church was formed in 1789. The Falls Church had countered by arguing that there was no fiduciary relationship between it and the Diocese of Virginia, since there had been no mutual consent to such a relationship.⁵⁹ However, the court overruled this objection, holding that, by petitioning to join TEC in 1836 and agreeing to be bound by its rules and canons, the Falls Church had demonstrated implied consent to a fiduciary relationship ever since.⁶⁰ The court found that the Falls Church had broken that fiduciary relationship by disassociating from the

55 *The Falls Church v Protestant Episcopal Church*, 740 S.E.2d 530 (2013).

56 *Ibid* at 530.

57 *Ibid* at 535–536.

58 *Ibid* at 536.

59 *Ibid* at 540.

60 *Ibid* at 540–541.

Diocese of Virginia and TEC and that a constructive trust had thereby been created.⁶¹ As a result, the parish property belonged to the diocese, and the court ordered the conveyance of that property accordingly.⁶²

Although the Supreme Court of Virginia claimed to be applying neutral principles in line with the precedent set by *Jones v Wolf*, its rationale in resolving this dispute in favour of TEC shows that it was really adopting a deference approach and dressing it up in the language of neutral principles. The court held that the Dennis Canon was highly relevant to the dispute and emphasised repeatedly the fact that TEC is a hierarchical church. The court went to great pains to show that it was not addressing issues of religious doctrine but it approvingly quoted *Kedroff* when the Supreme Court stated in that case that ‘religious freedom encompasses the “power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”’.⁶³ Such a statement shows that the Supreme Court of Virginia favoured a deference approach and did what it could to produce such a result under the post-*Jones* standard of neutral principles.

The key difference in facts between *All Saints Parish Waccamaw* and *The Falls Church* is the former parish’s reincorporation and its diocese’s filing of a quit-claim deed, something that never happened with the Falls Church. The South Carolina Supreme Court was thereby able to find a way of ignoring the Dennis Canon and strictly applying property, trust and corporation law. As stated previously, it is unlikely that such a rationale could be applied to many other TEC property disputes, if any. Even so, it is apparent from reading the contrasting rationales in each opinion that the South Carolina court did not want to apply the Dennis Canon in the first place, or recognise the relevance of TEC being a hierarchical body.⁶⁴ By contrast, the Supreme Court of Virginia clearly wanted to emphasise the differences between hierarchical and congregational church bodies and grant deference to a hierarchical authority in such cases. It did not hesitate to use the Dennis Canon to show the existence of a constructive trust, even as it admitted that no express denominational trust had been created at any point, allowing for a deferential outcome even under a neutral principles framework.⁶⁵

The upshot of contrasting these two cases is to show just how much ‘neutral principles’ are in the eye of the beholder rather than being clearly defined principles that can be applied in the same manner to any relevant dispute. Both

61 Ibid at 541–542.

62 Ibid at 545.

63 Ibid at 541.

64 At one point, the South Carolina Supreme Court asserted the superiority of the neutral principles approach versus deference because ‘Church disputes that are resolved under the neutral principles of law approach do not turn on the single question of whether a church is congregational or hierarchical.’ *All Saints Parish Waccamaw* at 172.

65 *Falls Church* at 541–542.

courts used so-called neutral principles to arrive at two completely different outcomes, each of which was that court's preferred outcome. A deferential approach, however, would have forced both courts to have awarded the property in dispute to TEC and its local diocese, without having to consider issues surrounding trust or property law in the court's home state (or any other such complicating factors).

A complicated hybrid approach in *Episcopal Diocese of Fort Worth v Episcopal Church*

One of the most recent cases to address these issues in a state supreme court is *Episcopal Diocese of Fort Worth v Episcopal Church*, which was decided by the Supreme Court of Texas in May 2021.⁶⁶ This case differs from the cases previously examined in this comment piece in that it involves the withdrawal of an entire diocese from TEC, rather than just an individual parish church. The Episcopal Diocese of Fort Worth was formed in 1982 and had long had a reputation for being one of the most conservative dioceses in TEC.⁶⁷ Nevertheless, the diocese had consistently adhered to the national Church's constitution and canons since its creation. It is worth noting, however, that in 1989 the diocese amended its own canons to explicitly deny the existence of any trust under the Dennis Canon.⁶⁸ This amendment was made by majority vote, the method specified in the original diocesan constitution.⁶⁹

Eventually, in 2006 the diocese voted to withdraw from TEC, for the same reasons given by the parishes discussed above. A majority of the parishes in the diocese also chose to withdraw, while a minority wished to remain within TEC. Soon afterwards the national church body determined that the majority had no right to withdraw the diocese from a hierarchical church body and that those voting to do so automatically lost their rights as members in good standing of TEC. As a result, in 2009 TEC convened a special diocesan convention, which 'voted to reverse the constitutional amendments adopted at the 2007 and 2008 Diocesan Conventions; declared all offices of the diocese and the corporation's Board of Trustees vacant; and elected new "qualified" leaders for both the diocese and the corporation'. This new diocesan leadership quickly sued the majority faction that had left TEC in an attempt to recover its property, thus beginning litigation that lasted over a decade.⁷⁰

After a number of court decisions, the Supreme Court of Texas finally determined in 2013 that neutral principles would be the standard used to resolve the

66 *Episcopal Diocese of Fort Worth v Episcopal Church (Episcopal Church II)*, 602 S.W.3d 417 (2020).

67 S C Gwynne, 'Bishop takes castle', *Texas Monthly*, February 2010.

68 *Episcopal Church II* at 422.

69 *Ibid* at 421.

70 *Ibid* at 422–423.

dispute.⁷¹ The court justified this decision using language quoting *Jones v Wolf*, claiming that the neutral principles approach was superior to deference, in that it used documents and legal principles familiar to judges while avoiding religious questions and associated First Amendment concerns.⁷² After a further series of decisions by lower courts, the Texas Supreme Court finally reheard the case in December 2019 and issued its decision in May 2020. At that point, the entire case turned on the true identity of the Episcopal Diocese of Fort Worth, a point of dispute agreed upon by both parties.⁷³ In the end, the court awarded the property to the majority (ACNA) faction but did so through a highly convoluted rationale. The final opinion is complex, attempting to cover every possible issue raised by the two parties in lower court litigation and in their arguments before the Supreme Court. The court was clearly aware of the First Amendment concerns inherent in their opinion, and they took pains to stress that they were not making a determination on church leadership, which remained an ecclesiastical question.⁷⁴ However, the court used various arguments to reach its final conclusion that the property dispute could be separated from any such ecclesiastical issues and could be decided based entirely on secular neutral principles of law.⁷⁵

The Texas Supreme Court stated that, while the national Church had complete freedom to determine church leadership, that determination was not relevant to the case at hand. Rather, in a bit of sophistry, the court asserted that the majority faction represented the true Episcopal Diocese of Fort Worth because the diocesan canons allowed for all changes to be made by a majority vote, and the vote to disassociate from TEC was made in 2006, before TEC took any action to dispute that decision.⁷⁶ The court stated that, since the Episcopal Diocese of Fort Worth was formed as an unincorporated non-profit association operating in Texas, the governing statute was the Texas law regarding unincorporated non-profit associations, with church documents playing no significant role.⁷⁷ As a result, since the diocesan canons allowed changes to be made by a majority vote, that majority vote had to be abided by in this instance, with no thought

71 *Masterson v Diocese of Nw. Tex.*, 422 S.W.3d 594 (2013); *Episcopal Diocese of Fort Worth v Episcopal Church (Episcopal Church I)*, 422 S.W.3d 646 (2013). Both of these opinions were handed down on the same day. *Masterson* concerned a property dispute between a parish and a diocese, while *Episcopal Church I* was the first appellant decision in the litigation discussed here. In both opinions, the Texas Supreme Court declared that it was important to adopt a uniform approach in church property cases for the sake of consistency and predictability (*Masterson* at 596). The majority then went on to argue that the neutral principles approach was the best one to apply, 'because it better conforms to Texas courts' constitutional duty to decide disputes within their jurisdiction while still respecting limitations the First Amendment places on that jurisdiction' (*ibid*).

72 *Episcopal Church II* at 428.

73 *Ibid* at 423.

74 *Ibid* at 426.

75 *Ibid* at 432.

76 *Ibid*.

77 *Ibid* at 430.

given to ecclesiastical questions. Indeed, the court specifically stated that none of the circumstances in question relied on an ecclesiastical determination by the national Church and that the national Church's own documents did not explicitly preclude a diocese withdrawing of its own volition. It further discounted the validity of the Dennis Canon through the simple proposition that Texas trust law does not allow the creation of an implicit trust purely through the action of the entity that declares the trust's existence. The court placed great weight on the authority of Texas trust law over TEC's constitution and canons, claiming that, because Texas law requires a trust to be declared irrevocable in express terms, the implied trust created by the Dennis Canon was presumptively revocable, regardless of what the hierarchical church's documents might say.⁷⁸

The court therefore held that the trust created by the Dennis Canon in the case of the Diocese of Fort Worth was invalid, since an express trust was never created; even if the trust had been valid, it was revoked by the diocese's 1989 decision.⁷⁹ The court summed up its opinion in *Episcopal Church II* very simply by declaring, 'The Fort Worth Diocese's identity depends on what *its* documents say.'⁸⁰

As with *All Saints Parish Waccamaw*, the Texas Supreme Court's reasoning raises a number of issues. While the court took great pains to stress the importance of maintaining deference when ecclesiastical questions were at stake, it then jumped through multiple logical hoops in order to achieve its preferred outcome by stating that the case at issue simply did not involve an ecclesiastical question. The court freely admitted that deference was still a constitutionally valid approach to the case, but it attempted to distinguish clearly separate categories for using the deference approach versus neutral principles:

generally courts applying the deference approach to church property disputes utilize neutral principles of law to determine where the religious organization has placed authority to make decisions about church property . . . Once a court has made this determination, it defers to and enforces the decision of the religious authority if the dispute has been decided within that authority structure. But courts applying the neutral principles methodology defer to religious entities' decisions on ecclesiastical and church polity issues such as who may be members of the entities and whether to remove a bishop or pastor, while they decide nonecclesiastical issues such as property ownership and whether trusts exist based on the same neutral principles of secular law that apply to other entities.⁸¹

78 Ibid at 433.

79 *Episcopal Church I* at 633–634.

80 *Episcopal Church II* at 433 (emphasis added).

81 *Episcopal Church I* at 650.

This proposition is a highly dubious one, as once again the entire dispute arose specifically because of a dispute over religious doctrine and theological disagreements. However, the court doubled down on this idea by stating that

what happens to the relationship between a hierarchical religious organization and a subordinate unit after a vote to disassociate is an ecclesiastical matter over which civil courts generally do not have jurisdiction . . . But what happens to the property is not, unless the [local entity's] affairs have been ordered so that ecclesiastical decisions effectively determine the property issue.⁸²

While the court's logic is internally consistent, it does not find agreement in other relevant jurisprudence, and the idea that ecclesiastical membership or pastoral employment can be separated from property ownership goes directly against a century of US Supreme Court decisions, not even being firmly based on anything in *Jones v Wolf*.

The one major factor that supports the Texas Supreme Court's opinion is the fact that, as the court pointed out, TEC made no objection to the Diocese of Fort Worth's overt disavowal of the Dennis Canon between 1989 and 2007.⁸³ However, even that fact provides more justification to the argument that neutral principles should be abandoned in favour of a return to the deference standard. While the Texas Supreme Court had a valid point in this matter, the specific circumstances in question appear to only be relevant to the Diocese of Fort Worth. Other dioceses involved in litigation did not adopt similar canons, further increasing the confusion and inconsistency of results between various cases based purely on geography. Further, while TEC made no objection to the diocese's 1989 decision, it also did not recognise or acknowledge that decision in any way. It is therefore possible to argue that, under a deference approach, the decisions of TEC's hierarchical bodies should apply regardless of the nature of any unrecognised, unacknowledged decisions made by an individual diocese.

In summation, the Texas Supreme Court's argument ultimately took convoluted means to reach a conclusion that is easily knocked down, and their decision to award the property to the ACNA diocese is as weak in its particulars as *All Saints Parish Waccamaw* and other opinions awarding property to dissident church groups based on 'neutral principles'.

⁸² *Episcopal Church II* at 430.

⁸³ *Ibid* at 434.

PROPOSED SOLUTION: A RETURN TO DEFERENCE

Summary of problems with the neutral principles approach

As seen in all the examples examined above, the current jurisprudence regarding ecclesiastical property disputes is a convoluted mess with no real consistency or predictability of outcomes. It is manifestly unfair that religious freedom principles should depend entirely on geography and the state in which a dispute arises, when all such cases involve national church bodies that cross state lines. Such a system as currently exists makes litigation impossible to predict for both litigants and the attorneys representing them, and inconsistency and unpredictability are things that the American legal system has long abhorred. Whether neutral principles is really a constitutionally valid approach under the First Amendment is doubtful in itself, but even if it is assumed to be a valid standard it was never defined well enough by the Supreme Court to be applicable in a clear and consistent way by lower courts around the country.

For all these reasons, the Supreme Court of the United States should hear a property dispute involving TEC on appeal in the near future. To date, a number of the cases reviewed in this comment piece have appealed to the Supreme Court but have consistently been denied certiorari. However, there is ultimately no good reason that the Supreme Court should not hear a case on this issue in the near future, as *Jones v Wolf* is a 40-year-old standard decided by a 5–4 majority. The existing jurisdictional splits have left lawyers and church bodies in an untenable position, as there is no predictability of outcome between different property disputes within the civil courts at present.

Ideally, the Supreme Court should return to its previous stance of strict deference to hierarchical church bodies. Such an approach would remove the very reasonable First Amendment questions that were never really resolved by *Jones v Wolf* and establish that civil courts cannot rule on intra-church property disputes without considering ecclesiastical questions. The Supreme Court correctly noted as far back as 1871 the distinction between congregational and hierarchical churches. Congregational churches are voluntary associations who are autonomous and self-directed; as the court put it in *Watson v Jones*, they ‘owe no fealty or obligation to any higher authority’.⁸⁴ By contrast, membership in a hierarchical church necessarily involves a congregation or parish placing itself under the jurisdiction of a higher authority in exchange for assets such as money and property, with obedience to that authority’s rules and judgments implicit in the process. Hierarchical churches usually go to great lengths to define those rules and establish bodies for the purpose of judging and arbitrating disputes and transgressions. Secular courts would do well to respect the time, effort and

84 *Watson* at 725.

thought that go into such rules and judicatories, which are much better suited for settling religious disputes and indeed are created for that very purpose.

That church property disputes are inextricably tied to ecclesiastical questions has been amply established by the cases examined here, as well as by many other cases that have passed through state courts since 2003. Determining who constitutes the ‘true’ church body is ultimately an ecclesiastical question, regardless of what property law, trust law or corporations law may say. Ultimately, under America’s historic First Amendment jurisprudence, churches are simply not the same as other non-profit associations and they should not be treated as such by the law. Determining the ‘true’ body is an ecclesiastical question and all of the property disputes discussed here have ultimately arisen because of a disagreement over who constitutes the ‘true’ body, a question ultimately driven by disputes over theology and church doctrine. It is too difficult to disentangle ecclesiastical questions from secular property and trust law questions when church property is concerned, and courts would do best to defer as much as possible.

Final thoughts

Decades ago, Justice William J Brennan wrote two statements summarising his beliefs on this issue (and those of the Supreme Court of his day). In *Mary Elizabeth Blue Hull Memorial Church*, he wrote that it is ‘wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions’.⁸⁵ Seven years later, in *Milivojevich*, Brennan wrote that civil courts may never ‘disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity’ when a dispute can only be resolved by extensive inquiry into religious law and polity.⁸⁶ Those statements are no less relevant today than when they were first written in the 1960s and 1970s, and the Supreme Court should consider them when approaching religious property cases in the 2020s.

The Supreme Court has consistently shown in the past decade that it is moving back towards a stance of deference when religious free exercise issues are at stake. While this trend has primarily been seen in cases involving employment, the same principles and reasoning apply to disputes over church property, particularly when those disputes arise out of fundamental questions about religious doctrine and practice. It is ultimately impossible to make such property cases entirely secular in nature when they are inextricably tied to ecclesiastical issues, and therefore the property matters are themselves ecclesiastical by definition. Cases of this sort are likely to continue appearing before secular courts in the coming years, with more and more Protestant denominations dividing over political and cultural issues. Most recently the United Methodist Church agreed

85 *Mary Elizabeth Blue Hull Memorial Church* at 445–446.

86 *Milivojevich* at 709.

to split into at least two separate bodies; at least some court cases involving church property are likely to come out of that split.

The neutral principles standard has not been consistent or effective in its application over the past 40-plus years, and the deferential standard exemplified by the US Supreme Court's decisions from *Watson* to *Milivojevich* is the best approach to these cases. Such an approach raises the fewest First Amendment concerns, in relation to both the Free Exercise Clause and the Establishment Clause. Given that the Supreme Court is moving in that direction in other areas, it should hear a case on appeal involving TEC sometime in the near future. Hearing such a case (or combining a group of cases on appeal) would settle the issue for the foreseeable future, providing consistency, predictability and clarity on a question that remains important and relevant to twenty-first-century American society and culture.

doi:10.1017/S0956618X2100065X

'And Who Is My Parishioner?' Residency, Human Rights and the Right to Burial in the Parish Churchyard

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Keywords: Church of England, right to burial, parish, residency, human rights, St Giles Exhall

When asked by an expert in the law, 'And who is my neighbour?', Jesus answered with the parable of the good Samaritan (Luke 10:25–37). This was a radically inclusive answer: your neighbour could be anyone. By contrast, a priest who asks an ecclesiastical lawyer 'and who is my parishioner?' may be given a far less clear or satisfying answer.

1 This comment is based on the moot problem set for the inaugural Inner Temple Ecclesiastical Law Moot in which the author participated in spring 2021. The author would like to thank the Inner Temple Mooting Society for organising the competition, all the participants and Morag Ellis QC, Araba Taylor and Caroline Harris, who presided over the final. Special thanks are given to Mark Hill QC for advising on an early draft of this article. More information about the moot can be found in *Newsletter of the Ecclesiastical Law Society*, no 3 (2021), pp 3–4, <<https://ecclawsoc.org.uk/wp-content/uploads/2021/06/ELS-newsletter-May-2021-v-FINAL.pdf>>, accessed 18 August 2021.