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1990]

## Notes

### RELIGIOUS PROPERTY DISPUTES AND INTRINSICALLY RELIGIOUS EVIDENCE: TOWARDS A NARROW APPLICATION OF THE NEUTRAL PRINCIPLES APPROACH

#### I. INTRODUCTION

Since the early 1970's, doctrinal changes within the Episcopal Church have resulted in numerous instances of local congregations voting to withdraw their affiliation from the Episcopal Church.<sup>1</sup> These withdrawals, in many instances, have evolved into a dispute over the possession of church property between a secessionist majority of a local parish on the one hand and a minority loyal to the Episcopal Church on the other.<sup>2</sup> Not surprisingly, churches of many denominations have become involved in church property disputes.<sup>3</sup> Among these, cases involv-

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1. See, e.g., *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (doctrinal controversy involving ordination of women as priests and interpretation of Nicene Creed), *cert. denied*, 454 U.S. 864 (1981); *Bishop & Diocese v. Mote*, 716 P.2d 85 (Colo.) (doctrinal changes concerning ordination of women, divorce and changes in Book of Common Prayer), *cert. denied*, 479 U.S. 826 (1986); *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583 (Ky. 1988) (disagreement with national church policy); *Bennison v. Sharp*, 121 Mich. App. 705, 329 N.W.2d 466 (1982) (canon amendments instituting various doctrinal changes within church); *Tea v. Protestant Episcopal Church*, 96 Nev. 399, 610 P.2d 182 (1980) (majority of voting parishioners passed resolution to secede from national church); *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19 (1980) (doctrinal dispute concerning ordination of women and changes in Book of Common Prayer), *cert. denied*, 449 U.S. 1131 (1981). See generally Ross, *The Need for an Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U.L.J. 263, 292 (1987); Sirico, *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 342-43 (1986).

2. See, e.g., *Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541; *Mote*, 716 P.2d 85. For a discussion of other classes of religious disputes frequently presented to civil courts for resolution, see Young & Tigges, *Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes*, 47 OHIO ST. L.J. 475 (1986).

3. See, e.g., *African Methodist Episcopal Zion Church in America, Inc. v. Zion Hill Methodist Church, Inc.*, 534 So. 2d 224 (Ala. 1988); *Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541; *Samoan Congregational Christian Church in the United States v. Samoan Congregational Christian Church of Oceanside*, 66 Cal. App. 3d 69, 135 Cal. Rptr. 793 (1977); *United Pentecostal Church of Louisville v. Morrison*, 527 P.2d 1169 (Colo. Ct. App. 1974); *Mills v. Baldwin*, 362 So. 2d 2 (Fla. 1978) (Presbyterian Church in the United States), *vacated*, 443 U.S. 914 (1979), *on remand*, 377 So. 2d 971 (Fla. 1979), *cert. denied*, 446 U.S. 983 (1980); *Hinkle Creek Friends Church v. Western Yearly Meeting of Friends Church*, 469 N.E.2d 40 (Ind. Ct. App. 1984) (Quaker); *Russian Church of Our*

ing the Episcopal Church afford a telling example of the nuances and pitfalls inherent in the task of applying notions of civil law to religious property disputes.<sup>4</sup>

The Constitution requires that judicial resolution of church property disputes turn on secular considerations while still respecting religious autonomy.<sup>5</sup> Specifically, the first amendment<sup>6</sup> severely restricts the scope of the inquiry that civil courts may undertake in resolving disputes over religious property.<sup>7</sup> The Supreme Court has articulated two constitutionally permissible methods for analyzing church property disputes.<sup>8</sup> Each method, in its own way, seeks to free civil courts from any

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*Lady of Kazan v. Dunkel*, 33 N.Y.2d 456, 310 N.E.2d 307, 354 N.Y.S.2d 631 (1974) (Russian Orthodox Greek Catholic Church of America); *Park Slope Jewish Center v. Stern*, 128 Misc. 2d 909, 491 N.Y.S.2d 958 (Sup. Ct. 1985) (Orthodox Judaism), *rev'd on other grounds*, 128 A.D.2d 847, 513 N.Y.S.2d 767 (1987); *Southside Tabernacle v. Pentecostal Church of God*, 32 Wash. App. 814, 650 P.2d 231 (1982).

4. For a listing of cases involving the Episcopal Church, see *supra* note 1. This Note attempts to challenge some of the prevailing factual assumptions upon which civil courts have relied in applying constitutional principles to property disputes involving the Protestant Episcopal Church. In so doing, it is hoped that this Note can provide a legitimate and valid foundation for the sound application of constitutional doctrine to religious property disputes. This Note makes a more searching inquiry into the history and organization of the Protestant Episcopal Church than that traditionally undertaken in civil court opinions in an effort to provide both guidance in the context of the Episcopal Church as well as to suggest the level of inquiry necessary and appropriate to fairly decide disputes in this, as well as other, denominational contexts.

5. See Sirico, *The Constitutional Dimensions of Church Property Disputes*, 59 WASH. U.L.Q. 1, 48 (1981).

6. The first amendment states in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

7. First amendment protection applies to the states through the operation of the fourteenth amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (states may regulate time, place and manner of certain religious activities, but cannot do so on basis of what is taught, preached or distributed). The first amendment prohibits civil courts from inquiring into and deciding issues of religious doctrine and practice. See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *cf. Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (The "door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such."); *United States v. Ballard*, 322 U.S. 78 (1944) (evidence concerning truth or falsity of religious beliefs properly withheld from jury); *In re Estate of Supple*, 247 Cal. App. 2d 410, 55 Cal. Rptr. 542 (1966) (inquiry into truth or falsity of religious beliefs foreclosed by first amendment), *cert. denied*, 389 U.S. 820 (1967). *But cf. Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1878) (upholding enforcement of anti-polygamy law against Mormons); *Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I. 1978) (allowing tort action against defendant church for involuntary servitude and intentionally tortious conduct), *aff'd*, 602 F.2d 458 (1st Cir. 1979).

8. The two approaches are the "compulsory deference" approach and the "neutral principles of law" approach. The compulsory deference approach was

illicit inquiry into religious doctrine or practice while still permitting a full examination of the relevant evidence presented.<sup>9</sup> The first of these methods, the “compulsory deference” approach, focuses on the polity of a given church, that is, its organizational structure or system of governance.<sup>10</sup> This approach requires civil courts to enforce the decisions arrived at by a majority of the members in a local congregational church or, in the case of a hierarchical church, to defer to decisions of an appropriate church tribunal.<sup>11</sup> The second method, the “neutral principles of law” approach, requires civil courts to scrutinize religious and secular documents using purely legal principles, “and not to rely on religious precepts in determining whether the documents indicate that the parties have intended to create a trust” in favor of the diocesan church organi-

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first described in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). For a discussion of the *Watson* compulsory deference approach and its later development, see *infra* notes 36-42 and accompanying text.

The neutral principles of law approach was first endorsed by the Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979). For a discussion of *Jones* and the neutral principles of law approach, see *infra* notes 9, 49-67 and accompanying text.

9. The compulsory deference approach articulated in *Watson v. Jones*, seeks to avoid a forbidden inquiry into religious doctrine or practice by automatically deferring to decisions of appropriate church authorities on ecclesiastical issues. See 80 U.S. (13 Wall.) at 727.

Similarly, the neutral principles approach introduced in *Jones v. Wolf* seeks to avoid civil court entanglement in doctrinal matters by examining only those provisions contained within religious documents, constitutions and canons that are purely secular and devoid of any religious content. 443 U.S. at 603-04. The neutral principles approach also permits an examination of purely secular documents, such as articles of incorporation, trust instruments and deeds, which pose no threat of an unconstitutional inquiry into doctrine. *Id.* at 604.

10. Under the compulsory deference approach, the Supreme Court has characterized churches as either congregational or hierarchical. *Watson*, 80 U.S. (13 Wall.) at 722-23. Congregational churches are those that are “strictly independent of other ecclesiastical associations” in that they are governed solely from within local congregations. *Id.* at 724. The compulsory deference approach requires that property disputes within congregational churches be resolved according to majority vote of local parishioners or by decision of elected parish officers. *Id.* at 725.

Hierarchical churches, in contrast, are subordinate members of “some general church organization in which there are superior ecclesiastical tribunals” which exercise complete authority over affiliated congregations. *Id.* at 722-23. Under the compulsory deference approach, civil courts faced with disputes within hierarchical churches must defer to decisions rendered by an appropriate church decision-making body on questions of “discipline, or of faith, or ecclesiastical rule, custom, or law.” *Id.* at 727. The United States Supreme Court has not yet held that a church could be hierarchical as to dogma but congregational, or self-governing, as to property ownership. For a discussion of a Kentucky Supreme Court decision, *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583 (Ky. 1988), adopting this position, see *infra* notes 143-62 and accompanying text.

11. *Jones*, 443 U.S. at 602-03; *Serbian*, 426 U.S. at 724-25; *Watson*, 80 U.S. (13 Wall.) at 727. For a complete discussion of the *Watson* compulsory deference approach, see *infra* notes 36-42 and accompanying text.

zation, regardless of its organizational structure.<sup>12</sup> Both approaches have been used in recent cases to resolve church property disputes within the Episcopal Church.<sup>13</sup>

In *Bjorkman v. Protestant Episcopal Church*,<sup>14</sup> the Kentucky Supreme Court was faced with the question of whether to apply a compulsory deference or neutral principles approach in a case involving the secession of a local church majority from a national hierarchical church.<sup>15</sup> Kentucky precedent had applied the compulsory deference approach to

12. See *Jones*, 443 U.S. at 603-04. The Supreme Court's recognition of the neutral principles approach can be traced to the case of *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.* 396 U.S. 367 (1970) (per curiam). In *Sharpsburg*, the Maryland Court of Appeals had decided a church property dispute by examining state statutes governing church property ownership, language in deeds, charters of the church corporations and the diocesan constitution. *Id.* at 367. Affirming the decision per curiam, the Supreme Court found that the Maryland court's approach was constitutionally proper in that it involved "no inquiry into religious doctrine." *Id.* at 368. Justice Brennan, in his concurring opinion, asserted that "a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* at 368 (Brennan, J., concurring).

Eight years later in *Jones*, the Court adopted the rationale of Justice Brennan's concurrence in *Sharpsburg* and went on to outline in detail the application of neutral principles of law to church property disputes:

The neutral-principles method . . . requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

*Jones*, 443 U.S. at 604 (citation omitted). The Court envisioned a gradual elimination of civil court involvement in religious property disputes as religious organizations restructured their property relationships in purely legal terms. *Id.*

13. *Jones*, 443 U.S. at 604. The following recent state cases have utilized a compulsory deference or neutral principles approach to resolve church property disputes: *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (neutral principles), *cert. denied*, 454 U.S. 864 (1981); *Bishop & Diocese v. Mote*, 716 P.2d 85 (Colo.) (neutral principles), *cert. denied*, 479 U.S. 826 (1986); *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583 (Ky. 1988) (neutral principles); *Bennison v. Sharp*, 121 Mich. App. 705, 329 N.W.2d 466 (1982) (compulsory deference); *Tea v. Protestant Episcopal Church*, 96 Nev. 399, 610 P.2d 182 (1980) (compulsory deference); *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19 (1980) (compulsory deference), *cert. denied*, 449 U.S. 1131 (1981).

14. 759 S.W.2d 583 (Ky. 1988).

15. *Id.* For a discussion of the facts of *Bjorkman*, see *infra* notes 143-62 and accompanying text.

cases involving hierarchical churches so that the inevitable result was always "the triumph of the hierarchical organization."<sup>16</sup> The *Bjorkman* court held that while the Episcopal Church was hierarchical, the authority of the church hierarchy was exclusively ecclesiastical and did not extend to the "temporal affairs" of the local parish.<sup>17</sup> Thus, the *Bjorkman* court held that church decisions on property matters did not warrant compulsory deference and that the neutral principles of law approach was preferable for deciding disputes over property within the Episcopal Church.<sup>18</sup> The *Bjorkman* court went on to apply a narrow neutral principles approach which excluded intrinsically religious evidence<sup>19</sup> from review and instead looked solely to legal documents and the past conduct of the church and its members in matters concerning property.

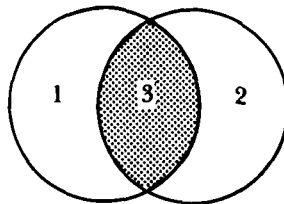
This Note examines the analysis employed in *Bjorkman* and in several other recent state court opinions involving the Episcopal Church in an attempt to demonstrate the impact the *Bjorkman* rationale will have in the law of church property dispute resolution.<sup>20</sup> Part II reviews the history of the Episcopal Church in the United States, the Supreme Court's development of the compulsory deference and neutral principles approaches, and the application of those approaches at the state court level. Part III highlights the *Bjorkman* court's conclusion that property

16. *Bjorkman*, 759 S.W.2d at 586.

17. *Id.* at 586-87.

18. *Id.* at 586.

19. The evidence that civil courts must review in deciding religious property disputes can be separated into three zones, represented by the following simple illustration:



Zone 1 contains purely secular evidence, such as deeds, corporate charters and trust instruments, which pose no threat of an impermissible inquiry into religious doctrine or faith.

Zone 2 encompasses purely religious evidence, such as scripture and canon law, which is outside a civil court's first amendment purview.

The evidence in Zone 3, occupying a position where Zone 1 and Zone 2 overlap, includes a mix of secular and religious components. Civil courts wishing to rely on evidence in this hybrid zone must excise secular provisions from language and concepts imbued with religious doctrine in such a way that the surviving secular language, dissected from its religious context, adequately reflects the legal expectations and intent of a church and its members. For a discussion of why evidence in Zone 3, as well as Zone 2, should be excluded from civil court review, see *infra* note 177 and accompanying text.

20. The scope of this Note will be limited to cases involving the Episcopal Church in the United States of America, otherwise known as the Episcopal Church. For a discussion of the historical development of the Episcopal Church in the United States, see *infra* notes 24-35 and accompanying text.

matters are beyond the hierarchical authority of Episcopal bishops and the national Episcopal Church, as well as the *Bjorkman* court's rejection of intrinsically religious evidence in applying the neutral principles of law doctrine.<sup>21</sup> Part III also questions the wisdom of relying on religious documents and canon law provisions in deciding purely legal issues.<sup>22</sup> Part IV concludes that a proper neutral principles inquiry should eschew intrinsically religious evidence, resulting in a more uniform, predictable and simple application of the law.<sup>23</sup>

## II. BACKGROUND

### A. Historical Considerations

An integral element of the American Revolution was an anti-colonial rejection of the ecclesiastical authority of the Church of England.<sup>24</sup> Until 1785, there were no Episcopal bishops in the colonies and the Bishop of London had jurisdiction over all colonial parishes.<sup>25</sup> Because there was no colonial bishop, churches were never formally consecrated.<sup>26</sup> Consequently, local congregations in the colonies emerged as the primary unit of the Episcopal Church in America.<sup>27</sup> Ownership of

21. For a discussion of the relative merits of a narrow application of the neutral principles approach, see *infra* notes 181-90 and accompanying text.

22. For a discussion of the dubious legal significance of church constitutions, canons and other religious documents in this context, see *infra* notes 171-77 and accompanying text.

23. For a complete discussion of why a proper neutral principles inquiry should avoid intrinsically religious evidence, see *infra* notes 171-91 and accompanying text.

24. See R. ALBRIGHT, *A HISTORY OF THE PROTESTANT EPISCOPAL CHURCH* 103 (1964).

25. J. ADDISON, *THE EPISCOPAL CHURCH IN THE UNITED STATES: 1789-1931* 59 (1969). Samuel Seabury, who eventually became the Episcopal Church's first American Bishop, sailed from America in July of 1783 seeking consecration by the Bishop of London. *Id.* Seabury was turned down because he refused to take an oath of allegiance to the crown which was required for consecration. *Id.* Seabury was finally consecrated as a Bishop in November, 1784, by the Nonjuror Bishops of Scotland and arrived back in America in the Spring of 1785 as the first American Bishop of the Episcopal Church. See *id.* at 58-59; R. ALBRIGHT, *supra* note 24, at 11, 130.

26. See N. BURR, *THE STORY OF THE DIOCESE OF CONNECTICUT: A NEW BRANCH OF THE VINE* 68-69 (1962).

27. D. STEVICK, *CANON LAW: A HANDBOOK* 87-88 (1965).

The parishes had some strength, and they were later reluctant to concede much of it to diocesan control. Dioceses were, in effect, federations of parishes. Very serious restrictions have been placed on the bishop's power to govern. In the calling and moving of clergy, in the closing or relocating of parishes, the bishop's will is dependent on the consent of the parties involved—and *there is a long tradition of disregarding the bishop!* A parish can become self-absorbed and withdrawn from responsible participation in the larger affairs of the diocese. *In many ways the structure of the Episcopal Church seems to imply that the parish is the primary reality, and the diocese is secondary and derived.*

*Id.* (emphasis added).

parish church property, typically, was in local hands.<sup>28</sup> Thus, in the absence of any truly local episcopacy to assert hierarchical control over the day-to-day affairs of colonial parishes, there evolved an essentially local style of church property ownership in the American colonies.<sup>29</sup>

Set against these historical underpinnings of local parish independence is the formal structure of governance of the Episcopal Church as set forth in its constitutions and canons.<sup>30</sup> The church government is essentially parliamentary and is governed by a bicameral General Convention consisting of the House of Bishops and the House of Deputies.<sup>31</sup> Either house may originate and propose legislation, which must be voted on and approved by both houses.<sup>32</sup>

From the late nineteenth century to the present, various efforts to shift control of parish property away from local congregations towards the diocesan and national hierarchies resulted in amendments to Episcopal canon law.<sup>33</sup> These amendments, passed by the General Convention and later added to many diocesan constitutions, restricted the alienation of church property without consent of the bishop and declared local church property to be held in trust for the general church.<sup>34</sup>

28. See, e.g., *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815) (parish minister seised of parish property and capable of transmitting same to his successor); *Calkins v. Cheney*, 92 Ill. 463, 476-77 (1879) (title held by trustees of incorporated religious society, consisting of local congregation); *Bjorkman*, 759 S.W.2d 583 (title held by local congregation); *Tea v. Protestant Episcopal Church*, 96 Nev. 399, 610 P.2d 182 (1980) (title held by local church corporation); *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19 (1980) (legal title held by rector, warden and vestrymen of local church).

29. For a discussion of the historically local style of church property ownership in the Episcopal Church in this country, see *supra* notes 24-28 and accompanying text.

30. CONSTITUTION & CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA preamble (1982) [hereinafter CONSTITUTION & CANONS].

31. See CONSTITUTION & CANONS, *supra* note 30, art. I, sec. 1. The House of Bishops consists of bishops of the church, bishop coadjutors, suffragan bishops, assistant bishops and retired bishops. *Id.* sec. 2. The House of Deputies consists of deacons and lay representatives elected from individual dioceses. *Id.* sec. 4. The Episcopal Church is affiliated with the Anglican Communion and the See of Canterbury. *Id.* preamble. The church's constitution, adopted by general convention in Philadelphia in October, 1789, and amended in later general conventions, governs the organization of the church and its missionary jurisdictions. *Id.* For a history of the church's development in England and the United States, see J. ADDISON, *supra* note 25; R. ALBRIGHT, *supra* note 24.

32. See CONSTITUTION & CANONS, *supra* note 30, art. I, sec. 1.

33. E. WHITE & J. DYKMAN, ANNOTATED CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA 480-81 (1981).

34. The first of these provisions appeared in an amendment passed by the General Convention of the Episcopal Church in 1868 which purported to prohibit a parish from encumbering or alienating its property without consent of the bishop. E. WHITE & J. DYKMAN, *supra* note 33, at 478 (citing to provision currently in CONSTITUTION & CANONS, *supra* note 30, tit. I, canon 6, sec. 3). The



Despite these canon law restrictions, the status of local church property ownership within the Episcopal Church remains far from settled; the result has been considerable litigation throughout the church's history.<sup>35</sup>

B. *The Polity Approach of Watson v. Jones and Compulsory Deference*

The first church property dispute heard by the United States Supreme Court was the 1871 case of *Watson v. Jones*.<sup>36</sup> In *Watson*, pro-slavery and abolitionist factions of a Kentucky Presbyterian congregation clashed in a dispute over the ownership of local parish property.<sup>37</sup> The *Watson* Court introduced a polity-based approach to the resolution of church property disputes, focusing upon the organizational structure of the religious institution involved.<sup>38</sup> If the church was hierarchical in nature, civil courts were required to defer to the decision of the appropriate church tribunal.<sup>39</sup> In the case of a church chiefly congregational

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amendment contained a proviso, however, that "this section shall not be operative in any state with the laws of which, relating to the title and holding of property by religious corporations, the same may conflict." E. WHITE & J. DYKMAN, *supra* note 33, at 478. This amendment and a second amendment passed in 1871 were enacted in response to the secession of Christ Church in Chicago, wherein the seceding congregation was eventually allowed to retain possession of local church property. *Calkins v. Cheney*, 92 Ill. 463 (1879). The 1871 amendment made consecration of a local church contingent upon full satisfaction of any mortgage and a sufficient showing that the deed to the church made further alienation possible only by consent of the bishop. *Id.* at 480-81; *see also* CONSTITUTION & CANONS, *supra* note 30, tit. II, canon 7, sec. 1. Even stronger language favoring the national church was added in 1904 and 1973. *See* E. WHITE & J. DYKMAN, *supra* note 33, at 481. It is extremely doubtful that these canon provisions are of any legal significance. "[T]he power of the General Convention over the disposition of real property is questionable, governed as it is by the law of the state in which it is situated." E. WHITE & J. DYKMAN, *supra* note 33, at 297; *see also* *Calkins v. Cheney*, 92 Ill. 463 (1879) (amendments to Illinois religious corporations law ineffective to create trust in favor of diocese).

35. For a listing of recent cases involving property disputes within the Episcopal Church, see the cases cited *supra* note 1.

36. 80 U.S. (13 Wall.) 679 (1871). In *Watson*, the General Assembly of the Presbyterian Church passed a resolution requiring all new applicants for pastoral positions to take an anti-slavery oath. *Id.* at 691. A majority of the Walnut Street Presbyterian Church in Louisville, Kentucky supported the oath requirement. *Id.* at 693. A dissenting minority, however, controlled the parish government. *Id.* This pro-slavery minority seized control of the church and purported to affiliate with the "Presbyterian Church of the Confederate States." *Id.* at 692. The General Assembly awarded possession of the church property to the loyal faction, *Id.* A state court ruled in favor of the pro-slavery minority. *Id.* at 690. The anti-slavery faction then commenced a concurrent federal diversity action. *Id.* at 694. The federal court granted possession of the church property to the anti-slavery faction. *Id.* at 699-700.

37. *Id.*

38. *See id.* Justice Miller, writing for the majority, began by classifying church property disputes into three categories: express trust cases, congregational church cases and cases involving hierarchical churches. *Id.* at 722-23.

39. *See id.* at 726-27. The *Watson* Court decided that a local congregation was hierarchically controlled if it was "a member of a much larger and more

in organization, the reviewing court was directed to enforce the decision of a majority of local church members.<sup>40</sup> Implicit in the Court's analysis was a threshold determination of whether the organizational structure of a given religious institution was congregational or hierarchical in polity.<sup>41</sup> After setting forth this polity approach, the *Watson* Court concluded that in a hierarchically structured church where there was a property dispute between a subordinate local parish and a diocesan or general church, civil courts must accept the authoritative ruling of the appropriate tribunal within the hierarchy.<sup>42</sup>

Almost sixty years after its decision in *Watson*, the Court in *Gonzalez v. Roman Catholic Archbishop*<sup>43</sup> suggested that it might review decisions of hierarchical church authorities for "fraud, collusion or arbitrariness" in determining whether compulsory deference was appropriate.<sup>44</sup> The

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important religious organization . . . under its government and control, and . . . bound by its orders and judgments." *Id.* at 726-27. In hierarchical churches, a civil court would be bound to enforce the decision of the highest-ranking church decision-making body to which a dispute had been taken. *See id.* at 727.

40. *Watson*, 80 U.S. (13 Wall.) at 725. The Court began by noting that in cases where property was donated with specific instructions that it be used for the propagation of certain religious tenets, courts should give effect to the terms of the donative instrument. *Id.* at 723-24. Absent specific trust provisions, two further methods applied. First, in locally autonomous congregational churches, or those "ow[ing] no fealty or obligation to any higher authority," the decision of the majority of parishioners would prevail in the property dispute. *Id.* at 722, 724-25. For a discussion of the second method, compulsory deference in hierarchical churches, see *supra* notes 38-39 and accompanying text.

41. The purpose of the inquiry was to decide whether a given religious organization was congregational, and thus governed by majority rule, or hierarchical, warranting compulsory deference to church authorities. *Watson*, 80 U.S. (13 Wall.) at 722-27.

42. The *Watson* Court determined that the local Presbyterian congregation was part of a hierarchical church polity. *Id.* at 726-27. The Court reasoned that unquestioning deference to church authority was justified in such cases because those who join a church impliedly consent to its governing power and are thus bound by it. *Id.* at 729. The Court also recognized the particular expertise of church tribunals in resolving ecclesiastical disputes and a correlative disability of civil courts in adjudicating religious controversies. *Id.* The Court stated:

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 heresy, and is committed to the support of no dogma, the establishment of no sect.* *Id.* at 728 (emphasis added); see also *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Heresy trials are foreign to our Constitution. Men may believe what they cannot prove.").

43. 280 U.S. 1 (1929).

44. *Id.* at 16. The Court modified its compulsory deference rule in *Gonzalez*. In *Gonzalez*, the Court affirmed the dismissal of a lower court order which had directed an archbishop to appoint a ten-year-old boy to an ecclesiastical chaplaincy created in 1820 pursuant to a will. *Id.* at 19. The archbishop applied then-current canon law provisions in refusing to make the appointment, rather than applying canon law in existence at the time the chaplaincy was created, which might have yielded a contrary result. *Id.* at 13-15.

Court later rejected this exception to the compulsory deference approach on the grounds that it might involve an impermissible inquiry into religious doctrine or practice.<sup>45</sup> The Court also hinted that a neutral principles of law approach, which would permit an inquiry into secu-

Justice Brandeis, writing for the Court, began by ruling that decisions on canon law were properly left to religious authorities. *Id.* at 16. The Court likened the situation to the judicial deference given to established judicatory bodies of clubs and civil associations. *Id.* at 16-17. The Court diluted some of the force of *Watson's* compulsory deference rule, however, by holding that civil courts could review church decisions for "fraud, collusion or arbitrariness." *Id.* at 16. The *Gonzalez* Court also hinted that only decisions by "proper church tribunals" would be accepted as conclusive, and then only if rendered on "matters purely ecclesiastical, although affecting civil rights." *Id.* The Court implicitly recognized that while parishioners may impliedly consent to the hierarchical authority of the churches they join, there are limits to their consent. *Id.* While the Supreme Court later rejected this fraud, collusion or arbitrariness exception to compulsory deference in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), the reasoning in *Gonzalez* demonstrates both the Court's uneasiness with religious evidence such as canon law provisions, and a desire to give effect to the legal expectations of the parties.

45. See *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). *Hull Church* involved a church property dispute which arose after two local churches withdrew from the Presbyterian Church over doctrinal changes. *Id.* at 441. The Georgia Supreme Court applied a departure-from-doctrine test mandated by state law which inquired whether the general church had abandoned the doctrinal tenets it had followed at the time the local church had affiliated with it. *Id.* The Georgia court found a "substantial abandonment" of the denomination's original tenets, working a forfeiture of the general church's implied trust in the disputed church property. *Id.* at 443-44.

In reversing the Georgia high court, the Supreme Court began by reaffirming its holding in *Watson* that "civil courts [have] no role in determining ecclesiastical questions in the process of resolving [church] property disputes." *Id.* at 447. The Court noted a similar infirmity in Georgia's two-step departure-from-doctrine test. *Id.* at 449-50. Under that test, a court must first decide whether the general church's actions depart substantially from prior doctrine, an inquiry necessitating an interpretation of church teachings. *Id.* at 450. Second, if a court decides there has been a substantial departure from doctrine, it must then decide if the departure is grave enough, in the theological context, to warrant forfeiture of the trust assets. *Id.* The Court held that such an inquiry "would require the civil courts to engage in the forbidden process of interpreting and weighing church doctrine." *Id.* at 451.

The *Hull Church* Court went on to express concern that its refinements on the *Watson* rule, especially the fraud, collusion or arbitrariness exception in *Gonzalez*, might involve courts in an impermissible inquiry into religious doctrine and practice unless narrowly applied to non-ecclesiastical matters. *Hull Church*, 393 U.S. at 450-51. The fraud, collusion or arbitrariness exception to the compulsory deference approach remained viable for a time. See *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 n.3 (1970) (Brennan, J., concurring). In *Serbian Eastern Orthodox Diocese v. Milivojevich*, however, the Court's misgivings about the "constitutional evils" of reviewing church decisions using secular notions of due process and fundamental fairness compelled it to reject the fraud, collusion or arbitrariness exception to compulsory deference. 426 U.S. 696, 713-20 (1976). For a discussion of the compulsory deference approach of *Watson* and *Gonzalez*, see *supra* notes 8-10, 44 and accompanying text.

lar provisions contained in religious constitutions, canons and documents, might be a permissible alternative to the compulsory deference approach.<sup>46</sup> It was not until 1979, over one hundred years after *Watson*, that the Court, in *Jones v. Wolf*,<sup>47</sup> endorsed the neutral principles approach as a constitutionally acceptable rationale for resolving religious property disputes.<sup>48</sup>

### C. *Jones v. Wolf and Neutral Principles*

*Jones* involved a schism within the Presbyterian Church.<sup>49</sup> In *Jones*, a majority of the parishioners in the Vineville Presbyterian Church of Macon, Georgia voted to disaffiliate from the Presbyterian Church in the United States<sup>50</sup> and join the Presbyterian Church in America.<sup>51</sup> A church property dispute between seceding and loyal factions ensued.<sup>52</sup> The Georgia Supreme Court applied neutral principles of law in examining deeds, state statutes dealing with implied trusts, the local church's charter and the constitution of the general church.<sup>53</sup> The Georgia court determined that the local congregation, represented by the majority of parishioners, was entitled to the property.<sup>54</sup>

On appeal, the United States Supreme Court confronted two issues:

46. In dicta, the Court suggested that a constitutionally perilous inquiry could be avoided through the application of "neutral principles of law, developed for use in all property disputes." *Hull Church*, 393 U.S. at 449. In this way, the *Hull Church* Court seemed to hint at a possible alternative approach to the church property problem, while reaffirming the validity of the polity-compulsory deference approach of *Watson* and *Gonzalez*. For a complete discussion of the Supreme Court's development of the neutral principles approach, see *supra* note 12 and accompanying text.

47. 443 U.S. 595 (1979). For a discussion of the facts of *Jones*, see *infra* notes 49-70 and accompanying text.

48. For a discussion of the Supreme Court's endorsement of the neutral principles of law approach in *Jones*, see *infra* notes 49-67 and accompanying text.

49. *Jones*, 443 U.S. at 597.

50. The Presbyterian Church in the United States is also known as the Presbyterian Church, or simply, PCUS. *Id.*

51. *Id.* at 598. At a meeting attended by a quorum of the congregation, 164 members, including the pastor, voted to secede from the Presbyterian Church, while 94 members opposed the resolution. *Id.*

52. *Id.* at 598-99. The Presbyterian Church is hierarchically organized as follows: local church, Session, Presbytery, Synod and General Assembly. *Id.* at 598. Actions or decisions by each branch are subject to review and control of the next higher branch, respectively. *Id.*

After part of the Vineville congregation voted to secede, the Augusta-Macon Presbytery appointed a commission to investigate. *Id.* The commission declared the loyal minority to be the "true congregation" and withdrew all official authorization from the secessionist majority which was in possession of the parish property. *Id.* The loyal minority faction then instituted a class action in state court, seeking declaratory and injunctive relief establishing the minority's right to exclusive possession and use of the church property. *Id.* at 598-99.

53. *Id.* at 601.

54. *See id.*

whether the first and fourteenth amendments permitted the Georgia Supreme Court to apply neutral principles of law to a religious property dispute and, if not, whether the state court should have deferred to the decision of the hierarchical church authority in deciding the property dispute.<sup>55</sup> The *Jones* majority approved of the Georgia court's decision to apply a neutral principles of law approach<sup>56</sup> and in so doing endorsed the neutral principles approach as constitutionally permissible.<sup>57</sup> Under this approach, civil courts were required to defer to doctrinal decisions rendered by hierarchical church authorities, but were free to undertake any inquiry not tainted by "the ritual and liturgy of worship or the tenets of faith."<sup>58</sup> The Court noted that the neutral principles approach relies on secular trust and property concepts, thus enabling courts to avoid examination of forbidden doctrinal matters while still permitting an examination of valuable secular evidence.<sup>59</sup> Furthermore, the Court noted

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55. The decision of the authoritative tribunal in *Jones* was rendered by a commission appointed by the Augusta-Macon Presbytery to investigate and resolve the dispute. *Id.* at 598. In a written ruling, the commission declared that "the minority faction constituted 'the true congregation of Vineville Presbyterian Church,' and withdr[ew] from the majority faction 'all authority to exercise office derived from [PCUS].'" *Id.* (citation omitted).

56. *Id.* at 604. The vote in *Jones* was 5-4. *Id.* at 596. Justice Blackmun delivered the opinion of the Court, joined by Justices Brennan, Marshall, Rehnquist and Stevens. Justice Powell dissented, joined by Chief Justice Burger and Justices Stewart and White. *Id.*

57. *Id.* at 604. The *Jones* Court specifically noted that [t]he primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties.

*Id.* at 603.

58. *Id.* at 602 (quoting *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. at 368 (1970) (Brennan, J., concurring)). The *Jones* Court did not discuss what other approaches might be permissible. See *id.* Various other approaches have been proposed. See, e.g., Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1402 (1981) (contract-based approach honoring "internal church agreements, just as a court would honor internal agreements of a secular organization"); Sirico, *supra* note 1, at 357 ("secular documents test" restricting admissible evidence to "secular provisions appearing in deeds, corporation papers, and other legal documents").

59. *Jones*, 443 U.S. at 603; see also *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 n.2, 370 (1970) (Brennan, J., concurring) ("[C]ivil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws."). For purposes of the neutral principles approach, the term "secular evidence" refers to purely secular provisions contained within church constitutions, canon law provisions and religious documents, as well as to articles of incorporation, deeds and state

that such an approach would encourage churches to order their affairs in advance of a schism to reflect the intentions of churches and their members by translating these intentions into purely secular terms accessible to any lawyer or judge.<sup>60</sup> The *Jones* Court stressed, however, that civil courts must strictly avoid interpreting documents tainted by religious concepts or doctrine.<sup>61</sup>

In a strong dissent, Justice Powell argued that the neutral principles approach condoned by the majority deprived courts of relevant information by excluding from review evidence germane to the dispute but tainted by doctrinal concepts and religious tenets.<sup>62</sup> The dissent also

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statutes governing church property ownership. *Jones*, 443 U.S. at 600-06; *Sharpsburg*, 396 U.S. at 370. In this regard, it is important to note that courts may not apply neutral principles of law to evidence of a religious nature if doing so would require resolution of doctrinal issues. See *Sharpsburg*, 396 U.S. at 370; see also Sirico, *supra* note 1, at 335, 353; Sirico, *supra* note 5, at 43-48, 51-68.

60. *Jones*, 443 U.S. at 603-04. The Court stated:

Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

*Id.* Encouraging Episcopal churches to translate their intentions into legally cognizable terms will allow church members themselves to control those aspects of church life that affect legal relationships and will free civil courts from an often perilous inquiry into the internal workings of religious institutions. See Sirico, *supra* note 1, at 359.

61. *Jones*, 443 U.S. at 604; see also *Sharpsburg*, 396 U.S. at 370 (“[G]eneral principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues.”).

62. *Jones*, 443 U.S. at 611-12 (Powell, J., dissenting). In arguing that the neutral principles approach was unduly restrictive in the scope of evidence it permits courts to review, Justice Powell wrote:

One effect of the Court’s evidentiary rule is to deny the courts relevant evidence as to the religious polity—that is, the form of governance—adopted by the church members. The constitutional documents of churches tend to be drawn in terms of religious precepts. Attempting to read them “in purely secular terms” is more likely to promote confusion than understanding. Moreover, whenever religious polity has not been expressed in specific statements referring to the property of a church, there will be no evidence of that polity cognizable under the neutral-principles rule. Lacking such evidence, presumably a court will impose some rule of church government derived from state law. In the present case, for example, the general and unqualified authority of the Presbytery over the actions of the Vineville church had not been expressed in secular terms of control of its property. As a consequence, the Georgia courts could find no acceptable evidence of this authoritative relationship, and they imposed instead a congregational form of government determined from state law.

This limiting of the evidence relative to religious government cannot be justified on the ground that it “free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice.”

argued that, by granting control to the seceding faction, the Georgia courts had effectively reversed the doctrinal decision of an authoritative church decision-making body.<sup>63</sup> Justice Powell contended that this was

*Id.* at 612-13 (Powell, J., dissenting). In a footnote, Justice Powell added:

The neutral-principles approach appears to assume that the requirements of the Constitution will be satisfied if civil courts are forbidden to consider certain types of evidence. The First Amendment's Religion Clauses, however, are meant to protect churches and their members from civil law interference, not to protect the courts from having to decide difficult evidentiary questions.

*Id.* at 613-14 n.2 (Powell, J., dissenting).

63. While noting that *Jones* dealt with the Presbyterian Church, it is fruitful to examine in the Episcopal Church context Justice Powell's imperative that civil courts not meddle in the established decisional process of a given church. Such an analysis raises the issue whether, indeed, there exists an authoritative tribunal within the Episcopal Church with legitimate authority in church property matters. *See id.* at 613 (Powell, J., dissenting).

The constitutions and canons of the Episcopal Church do not provide *per se* for a decision-making body to exercise authority over church property matters. *See CONSTITUTION & CANONS, supra* note 30. In the *Annotated Constitution and Canons of the Episcopal Church*, for example, the authors explain that the English sentence of deprivation, whereby a clergyman is deprived of his salary and the emoluments pertaining to his rectorship, is not found in the American ecclesiastical jurisprudence. E. WHITE & J. DYKMAN, *supra* note 33, at 1109. This absence is "due to the principle . . . that it was not competent for [Episcopal] church tribunals to pass on questions pertaining to the rights of real or personal property, as such questions are to be judged by the civil courts." *Id.* The constitution and canons do provide for a tribunal for disciplining pastoral office holders. *See, e.g., CONSTITUTION & CANONS, supra* note 30, art. IX (providing for trials of bishops, presbyters and deacons and providing for courts of review and of appeal), tit. IV, canon 12 (pertaining to sentences imposed on clergy).

The issue of whether or not there is a tribunal with authority over property matters in the Episcopal Church has never been addressed directly by the Supreme Court. The *Watson* Court, however, stated that courts must defer to hierarchical church authority where "there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization." *Watson*, 80 U.S. (13 Wall.) at 722-23. Later, in *Serbian Eastern Orthodox Diocese v. Milivojevic*, the Court reiterated the importance of an appropriate church tribunal with authority over property matters by stating that

the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

426 U.S. 696, 724-25 (1976). The Court, however, did find the "fraud, collusion or arbitrariness" standard articulated in *Gonzalez* to be a prohibited inquiry into religious rule, custom and law and thereby overruled *Gonzalez* on the point. *Id.* at 712-15. Then, in *Jones*, the Court noted that the Constitution "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones*, 443 U.S. at 602.

Dispensing with any requirement of some formal religious decision-making body as a basis for invoking compulsory deference would seem to foreordain a decision in favor of the hierarchical church in all cases where the hierarchical

tantamount to a direct decision on doctrine and practice.<sup>64</sup>

The majority in *Jones* agreed with the basic approach adopted by the Georgia Supreme Court to resolve the church property dispute.<sup>65</sup> The case was remanded, however, for a decision on whether Georgia religious incorporation law required that the identity of the true congregation of Vineville Church be determined by the "laws and regulations" of the general church.<sup>66</sup> If so, the Court noted, the first amendment would require that deference be given to the general church's determination.<sup>67</sup>

Following this endorsement by the Supreme Court in *Jones*, several state courts have attempted to apply the neutral principles of law approach.<sup>68</sup> An examination of these decisions, however, reveals that *Jones* has engendered considerable confusion concerning the permissible evi-

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church merely claims a right, in whatever capacity, to the local church property. For example, consider if a diocese were to set up a church property tribunal without real authority to do so. Would a decision by such a body in favor of the diocese warrant compulsory deference under the *Watson* polity approach? Arguably, deference to such a decision by a sham tribunal would sacrifice the individual rights of church members. "To afford to individual members of a church no protection whatever against usurpation on the part of those in power is not only a travesty on justice but a blow in the face of the doctrine of religious liberty." A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 533 (1964). *But see* *Kefroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 120-21 (1952) ("There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.").

64. *Jones*, 443 U.S. at 613 (Powell, J., dissenting). Justice Powell suggested that unless civil courts reach the same decision as the hierarchical church, they would effectively be reversing a doctrinal decision by the "church courts." *Id.* (Powell, J., dissenting). Recall that in *Jones*, a commission appointed by the Augusta-Macon Presbytery had ruled in favor of the diocesan church. *Jones*, 443 U.S. at 598. *Jones* involved the Presbyterian Church. For a discussion of the proposition that the constitutions and canons of the Episcopal Church do not provide for a decisional body having authority over property matters, see *supra* note 63 and accompanying text.

65. *Jones*, 443 U.S. at 604. The Court noted that the Georgia court was bound by a statute requiring that "'church property be held according to the terms of the church government,'" providing that a local church affiliated with a hierarchical religious organization "'is part of the whole body of the general church and is subject to the higher authority of the organization and its laws and regulations.'" *Id.* at 608 (citation omitted). The Court cautioned that the first amendment required deference to the "presbyterial commission's determination of that church's identity," under the terms of the Georgia law. *Id.* at 609.

66. *Jones*, 443 U.S. at 609-10. The Court decided that the Georgia Supreme Court's grounds for awarding the disputed church property to the local congregation "remain[ed] unarticulated." *Id.* at 610. The Court therefore vacated the judgment of the Georgia Supreme Court and remanded the case. *Id.*

67. *Id.* at 609.

68. See, e.g., *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541, *cert. denied*, 454 U.S. 864 (1981); *Bishop & Diocese v. Mote*, 716 P.2d 85 (Colo.), *cert. denied*, 479 U.S. 826 (1986); *Bjorkman*, 759 S.W.2d 583 (Ky.). For a discussion of these cases, see *infra* notes 112-62 and accompanying text.



dentiary scope of a neutral principles analysis.<sup>69</sup> *Jones* has also fostered an apparent misapprehension of the subtle realities involved in many church property cases within the Episcopal Church.<sup>70</sup>

D. *Application of Compulsory Deference and Neutral Principles  
at the State Level*

The Supreme Court's ruling in *Jones* introduced neutral principles as an alternative to the one-hundred-year-old *Watson* compulsory deference legacy.<sup>71</sup> Accordingly, some states have eagerly adopted the neutral principles approach,<sup>72</sup> while others have continued to practice compulsory deference.<sup>73</sup> Some states upholding the compulsory deference approach have borrowed from the neutral principles approach to either decide as a threshold matter whether a church is hierarchical or congregational,<sup>74</sup> or to provide an alternative rationale for their decisions based on compulsory deference.<sup>75</sup> Thus, by injecting neutral principles analysis into their opinions, these courts may be paving the way for their conversion to the neutral principles of law approach in the near future.

The courts that have openly embraced the neutral principles of law approach have exhibited a wide disparity in both their willingness to review evidence of a religious nature<sup>76</sup> and their reluctance to apply the neutral principles approach to hierarchical churches.<sup>77</sup> The net trend of these decisions, including those employing the compulsory deference approach, seems to favor a narrow neutral principles approach that bypasses intrinsically religious evidence altogether.<sup>78</sup> The implications of this trend are twofold. First, compulsory deference courts will be more

69. For support for the proposition that *Jones* has fostered confusion among courts regarding the permissible evidentiary scope of a neutral principles analysis, see the cases cited *supra* note 68.

70. See, e.g., *Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541; *Mote*, 716 P.2d 85 (Colo.); *Bennison v. Sharp*, 121 Mich. App. 705, 329 N.W.2d 466 (1982); *Tea v. Protestant Episcopal Church*, 96 Nev. 399, 610 P.2d 182 (1980); *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19 (1980), *cert. denied*, 449 U.S. 1131 (1981). For a discussion of these cases, see *infra* notes 72-142 and accompanying text.

71. See *Jones*, 443 U.S. at 604.

72. See, e.g., *Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541; *Mote*, 716 P.2d 85 (Colo.); *Bjorkman*, 759 S.W.2d 583 (Ky.).

73. See, e.g., *Bennison*, 121 Mich. App. 705, 329 N.W.2d 466; *Tea*, 96 Nev. 399, 610 P.2d 182; *Graves*, 83 N.J. 572, 417 A.2d 19.

74. See, e.g., *Bennison*, 121 Mich. App. 705, 329 N.W.2d 466; *Graves*, 83 N.J. 572, 417 A.2d 19.

75. See, e.g., *Bennison*, 121 Mich. App. 705, 329 N.W.2d 466; *Graves*, 83 N.J. 572, 417 A.2d 19.

76. See, e.g., *Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541; *Mote*, 716 P.2d 85 (Colo.); *Bjorkman*, 759 S.W.2d 583 (Ky.).

77. See, e.g., *Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541; *Mote*, 716 P.2d 85 (Colo.); *Bjorkman*, 759 S.W.2d 583 (Ky.).

78. For a complete discussion of the trend in favor of a narrow application

willing to convert to a narrow neutral principles approach which relies on purely secular evidence and avoids any inquiry whatsoever into religious doctrine or practice.<sup>79</sup> Second, a narrow construction by all courts of the neutral principles of law approach introduced by *Jones* would result in a more uniform, simple and predictable application of the law.<sup>80</sup>

### 1. *The Compulsory Deference Cases*

One of the first state cases involving Episcopal Church property following the *Jones* decision was *Tea v. Protestant Episcopal Church*.<sup>81</sup> In *Tea*, a majority of the local congregation of St. Christopher's Church in Boulder City, Nevada voted to leave the Episcopal Church.<sup>82</sup> The Bishop of the Episcopal diocese sought a declaratory judgment that the local parish property was held in trust for the benefit of the diocese.<sup>83</sup>

In resolving the church property dispute, the Nevada Supreme Court, formerly a proponent of a straight compulsory deference ap-

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of the neutral principles approach, see *infra* notes 171-90 and accompanying text.

79. For a complete discussion of the implications of a narrow application of the neutral principles approach, see *infra* notes 171-90 and accompanying text.

80. For a complete discussion of how a narrow neutral principles approach will result in a more uniform, simple and predictable application of the law, see *infra* notes 189-90 and accompanying text.

81. 96 Nev. 399, 610 P.2d 182 (1980).

82. *Id.* at 401, 610 P.2d at 183. *Tea* involved the church of St. Christopher in Boulder City, Nevada, which had incorporated in 1962 as a congregation "in communion with the Protestant Episcopal Church." *Id.* at 400-01, 610 P.2d at 183. St. Christopher's was incorporated in 1962, consisting of "[t]he Rector, Church Wardens, and Vestrymen of St. Christopher's Episcopal Church in Boulder City, Nevada," pursuant to a state statute providing for the incorporation of Episcopal Church parishes. *Id.* at 400, 610 P.2d at 183. Shortly after the parish was incorporated, the diocesan Bishop assigned his rights under a lease to certain church property to the local congregation at St. Christopher's. *Id.* In 1971, the Nevada Legislature enacted a statute which permitted the incorporation of the Episcopal Diocese of Nevada. *Id.* The diocese then incorporated to include all missions and parishes within the State of Nevada. *Id.* In 1977, the City of Boulder, which had formerly leased the property to St. Christopher's, transferred the church property to the local parish corporation. *Id.* The deed named the local church corporation as title holder to the property. *Id.* After a majority of the local congregation voted to disaffiliate from the diocese, the Bishop proceeded to discipline the local pastor and ultimately removed him pursuant to diocesan regulations. *Id.* at 401, 610 P.2d at 183.

Interestingly, the court noted that the deed to the disputed church property was not recorded until after the majority voted to secede. *Id.* The timing of the vote in relation to the recording of the deed would seem more relevant to a neutral principles analysis.

83. *Id.* at 401, 610 P.2d at 183. The seceding faction of the local church, including the rector and vestrymen, defended by claiming that the dispute was over religious doctrine, and thus, outside of civil court jurisdiction. *Id.* The seceding faction also attempted, unsuccessfully, to prevent the court from considering the constitution and canons of the Episcopal Church on the grounds that doing so involved an "inquiry by the court into questions of doctrine." *Id.*

proach, utilized the threshold inquiry set forth in the *Jones* neutral principles approach. Finding that the Episcopal Church structures of governance were hierarchical in nature, the court then slipped back into comfortable doctrine, ordering that deference be given to the decision of the appropriate ecclesiastical authorities.<sup>84</sup> The court reasoned that church authorities had deemed the "true" local congregation to be the loyal minority and that this determination required complete deference.<sup>85</sup> Moreover, the court concluded, there was nothing in the state statutes or relevant church documents granting a seceding church the right to retain control of church property held in the name of a local church corporation.<sup>86</sup> Accordingly, the court held that title to the disputed property properly belonged to the diocesan church.<sup>87</sup>

The approach used in *Tea* amounted to a preliminary neutral principles inquiry limited solely to an examination of church organizational structure followed by the application of compulsory deference principles in deciding the underlying property claims.<sup>88</sup> Other courts espousing

84. *Id.* at 402, 610 P.2d at 184. This statement by the court reflects the compulsory deference, or polity, approach enunciated in *Watson v. Jones*. For a complete discussion of the *Watson* compulsory deference rule, see *supra* notes 36-42 and accompanying text. The trial court had decided that the Episcopal Church was hierarchical and that the local church had acceded to the constitution and canons of the diocesan church. *Tea*, 96 Nev. at 401, 610 P.2d at 183. The trial court had examined "regulations of the Episcopal church polity," state statutes and "internal regulations of the church polity" which provided that local congregations held property "subject to a trust in favor of the general church." *Id.* at 402, 610 P.2d at 184. For a discussion submitting that the Episcopal Church is hierarchical as to dogma but congregational as to property ownership, see *infra* notes 161-67 and accompanying text. The court also found that the diocesan constitution and canons, as well as state statutes governing the incorporation of churches, empowered the Bishop to control the local church corporation and, therefore, the local church property as well. *Tea*, 96 Nev. at 401, 610 P.2d at 183.

85. *Tea*, 96 Nev. at 402-03, 610 P.2d at 184. The court reasoned that the hierarchical church authorities, by "severing communion" with the seceding faction, had placed them outside the statutory definition of the "Rector," the entity holding title to the disputed property under the 1977 deed from the City of Boulder. *Id.* at 402, 610 P.2d at 184. The court concluded, therefore, that as the legal representatives of the corporation known as the "Rector," the Bishop and diocese were entitled to possession of the church property. *Id.* at 402-03, 610 P.2d at 184. For a similar treatment of corporate status as determinative of property ownership, see *infra* notes 97, 108 and accompanying text.

86. *Tea*, 96 Nev. at 402, 610 P.2d at 184.

87. *Id.* at 403, 610 P.2d at 184. The court's mention of state statutes governing church incorporation suggests, though not strongly, an alternate neutral principles rationale for its holding in favor of the diocese. In this way, *Tea* implies that a neutral principles approach might yield a result consistent with a compulsory deference approach.

88. Specifically, the *Tea* court's analysis illustrates a strict application of the compulsory deference rule involving, first, an examination of church canons, constitutions and other documents in order to determine if the church in question was hierarchical or congregational and, second, in the case of a hierarchical church, a determination of whether there was a definitive decision by a higher

the compulsory deference approach address *Jones in dicta*. While not yet incorporating the neutral principles approach into their analyses as in *Tea*, these courts have noted that a neutral principles inquiry into underlying property claims would yield the same result as a compulsory deference approach under the same set of facts.<sup>89</sup>

One such case is *Bennison v. Sharp*.<sup>90</sup> In *Bennison*, the Michigan Court of Appeals confronted the issue of whether a majority faction of a congregation which had seceded from a hierarchical church had a right to retain church property.<sup>91</sup> The governing body of the main church had declared that the majority seceding faction was no longer the congregation, or its legitimate successor, for which the property was originally purchased.<sup>92</sup> The Bishop of the diocese and a minority of the congregation loyal to him sought control of the parish property.<sup>93</sup>

In affirming summary judgment in favor of the Bishop, the Michigan Court of Appeals adopted a compulsory deference approach.<sup>94</sup> The court began its analysis by finding that the Episcopal canons and diocesan constitution showed that the Episcopal Church was hierarchical with regard to property as well as spiritual matters.<sup>95</sup> Thus, the *Bennison*

authority warranting judicial deference. *Id.* For a complete discussion of the compulsory deference approach, see *supra* notes 36-42 and accompanying text.

89. For a discussion of cases in which courts have noted that a neutral principles inquiry into underlying property claims would yield the same result as a compulsory deference approach under the same set of facts, see *infra* notes 90-111 and accompanying text.

90. 121 Mich. App. 705, 329 N.W.2d 466 (1982).

91. *Id.* at 709-12, 329 N.W.2d at 468-69. St. Paul's Episcopal Church was an ecclesiastical corporation formed in 1871 and incorporated in 1901 under Michigan law providing for the incorporation of Episcopal churches. *Id.* at 709, 329 N.W.2d at 468. Legal title to the disputed church, parish house and rectory was in the name of the local church. *Id.* at 709-10, 329 N.W.2d at 468. After several doctrinal changes within the Episcopal Church, a majority of the congregation involved in *Bennison* voted to secede from their Episcopal diocese, formed a new ecclesiastical corporation affiliated with the Anglican Catholic Church and deeded the church property to the new corporation. *Id.* at 710-11, 329 N.W.2d at 468-69.

92. *Id.* at 711-12, 329 N.W.2d at 469.

93. *Id.* at 709, 329 N.W.2d at 468.

94. *Id.* at 718-21, 329 N.W.2d at 472-73.

95. *Id.* at 718, 329 N.W.2d at 472. Other jurisdictions, the court noted, had recognized the Episcopal Church as hierarchical as a matter of law. *Id.* at 720 n.1, 329 N.W.2d at 473 n.1. The court stressed the hierarchical organization of the Episcopal Church as an indication that the parties intended the decisional authority of the diocesan church to be controlling in property matters. *Id.* at 719-20, 329 N.W.2d at 472-73. Here, the court seemed to equate episcopal authority over religious dogma with episcopal control over property disposition. *See id.* Moreover, the court found a legal relationship based largely on evidence of an essentially religious relationship.

In effect, the court concluded that church members expected their Bishop to have the same authority over the ownership of local church property as he had over changes in the Book of Common Prayer. *See id.* Such a conclusion belies the historical realities of local church ownership in the Episcopal Church

court deferred to the governing body's decision granting control of the property to the loyal minority.<sup>96</sup> The court reasoned further that a neutral principles approach would yield the same result. Since the seceding faction of the congregation had dissolved its original corporate form, it relinquished any claim to the church property which therefore continued to be held by the original parish corporation consisting of the faction loyal to the diocese.<sup>97</sup>

In *Protestant Episcopal Church v. Graves*,<sup>98</sup> a panel of the New Jersey Supreme Court also used a compulsory deference approach to find for a diocesan church while stating that a neutral principles approach would yield a similar result.<sup>99</sup> In *Graves*, a majority of a local congregation voted to secede from the Episcopal Church in response to doctrinal changes concerning the ordination of women and changes in the Book of Common Prayer.<sup>100</sup> The Bishop sought to enjoin the seceding parishioners from occupying the local church property.<sup>101</sup>

The Supreme Court of New Jersey, employing a compulsory deference approach, ruled that because the Episcopal Church was a hierarchi-

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as well as the true expectations of church members regarding property matters. For a discussion of the historical realities of local church ownership within the Episcopal Church, see *supra* notes 24-29 and accompanying text.

96. See *Bennison*, 121 Mich. App. at 720, 329 N.W.2d at 473.

97. See *id.* at 725, 329 N.W.2d at 475. The *Bennison* court, in holding for the loyal minority, distinguished *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541, *cert. denied*, 454 U.S. 864 (1981), in which the seceding parishioners prevailed on appeal. The *Bennison* court noted that in *Barker*, the seceding faction had continued to function under the local parish's original articles of incorporation, thus retaining ownership of the church property, whereas the parish in *Bennison* had dissolved its charter and re-incorporated as an affiliate of a separate denominational church. *Bennison*, 121 Mich. App. at 725, 329 N.W.2d at 475 (citing *Barker*, 115 Cal. App. 3d at 625, 171 Cal. Rptr. at 551). Thus, the court reasoned, the dissolution of the original parish corporation had extinguished the local congregation's right to possess the property at issue. *Id.* For an example of similar reasoning by another court, see *infra* note 108 and accompanying text. For a complete discussion of *Barker*, see *infra* notes 130-42 and accompanying text.

98. 83 N.J. 572, 417 A.2d 19 (1980), *cert. denied*, 449 U.S. 1131 (1981).

99. *Id.* at 580, 417 A.2d at 24. *Graves* involved St. Stephen's Church which was incorporated in 1895 as an affiliated member of the Episcopal Church. *Id.* at 574, 417 A.2d at 20. Until 1935, St. Stephen's did not own any property. *Id.* The parish later purchased property and a chapel and affiliated buildings, using local funds and without diocesan financial assistance. *Id.* at 574, 417 A.2d at 20-21.

100. *Id.* at 575, 417 A.2d at 21. The parishioners of the local church deemed these changes heretical and voted to secede. *Id.* At a meeting attended by about 29% of St. Stephen's adult parishioners, a majority, including the Pastor, voted to sever relations with the diocese. *Id.* The diocesan Bishop reprimanded the Pastor and attempted, unsuccessfully, to replace him. *Id.*

101. *Id.* at 575, 417 A.2d at 21. The trial court granted summary judgment in favor of the Bishop and entered a declaratory judgment that the parish property not be used for any non-diocesan purposes. *Id.* The appeals court affirmed. *Id.* at 576, 417 A.2d at 21-22.

cal organization, the decision of the Bishop was binding.<sup>102</sup> Thus, the loyal minority retained control of the property.<sup>103</sup> The *Graves* court noted that only in the absence of hierarchical control should the neutral principles of law approach be applied.<sup>104</sup> As an affiliated member of the Episcopal Church, the local church was deemed subject to the hierarchical authority of its diocesan church.<sup>105</sup> The *Graves* court found that under a neutral principles approach the diocese would still prevail over the local congregation because the constitutions and canons of the diocese made any transfer of property subject to the Bishop's approval.<sup>106</sup> Moreover, the court stated that legal title to the property was held by the parish corporation as an affiliated member of the diocesan church.<sup>107</sup> By disaffiliating themselves from the diocesan organization, the court concluded that the local church officers had terminated their eligibility to hold office and, therefore, lacked standing to challenge the Bishop's actions.<sup>108</sup> The court, therefore, affirmed the judgment in favor of the diocesan church.<sup>109</sup>

Justice Schreiber, dissenting in *Graves*, strongly suggested that a church could be hierarchical as to ecclesiastical matters, but congregational as to property.<sup>110</sup> Thus in cases like *Graves*, Justice Schreiber con-

102. *Id.* at 580, 417 A.2d at 24.

103. *See id.*

104. *Id.* In so doing, the court affirmed the trial court's ruling. *Id.*

105. *Id.* The court stated that "it has been established that the Protestant Episcopal Church is a completely integrated hierarchical body, the ecclesiastical determination of which incidentally resolves the question of control over local church property. This is dispositive of the case." *Id.* For a complete discussion of why ecclesiastical determinations should not necessarily control the legal disposition of church property, see *infra* notes 159-70 and accompanying text.

106. *Graves*, 83 N.J. at 580-81, 417 A.2d at 24. The court relied on a state statute governing the incorporation of Episcopal Churches which required local parishes to obtain the consent of the bishops before alienating property. *Id.* The court also noted that title I, canon 6 (now 7), sec. 4, although adopted *after* the dispute in *Graves* arose, reflected the "established customs, practices and usages of The Protestant Episcopal Church." *Id.* at 581, 417 A.2d at 24.

107. *Id.* at 581, 417 A.2d at 24.

108. *Id.* at 581-82, 417 A.2d at 24-25. The court basically equated secession from the diocese with dissolution of the parish's original corporate form. *See id.* For a similar treatment of secession and corporate dissolution as dispositive of underlying claims in church property disputes, see *supra* note 97 and accompanying text.

109. *Graves*, 83 N.J. at 582, 417 A.2d at 25.

110. *Id.* at 588-89, 417 A.2d at 28-29 (Schreiber, J., dissenting). The dissent further criticized the notion that a local church necessarily abdicates control of its property by affiliating with a hierarchical church. *Id.* at 589, 417 A.2d at 28-29 (Schreiber, J., dissenting). Justice Schreiber would have examined relevant church documents to determine where the parties intended the "locus of control" to be in case of a schism. *Id.* at 589, 417 A.2d at 29 (Schreiber, J., dissenting). A neutral principles approach, Justice Schreiber contended, would reveal no trust provision favoring the general church and would result in the property being awarded to the seceding local church. *Id.* at 592-93, 417 A.2d at 30-31 (Schreiber, J., dissenting).

tended, the decision of a hierarchical authority, while controlling on doctrinal issues, would be irrelevant on property issues.<sup>111</sup>

## 2. *The Neutral Principles Cases*

In contrast to the "measured" approaches in *Tea, Graves* and *Ben-nison*, other courts have rejected the compulsory deference approach, favoring a more searching neutral principles inquiry into church constitutions, canons and other religious documents.<sup>112</sup> In *Bishop & Diocese v. Mote*,<sup>113</sup> a church property dispute arose after a local congregation seceded from its diocesan church.<sup>114</sup> The Bishop and a loyal faction then sued to recover possession of the parish property from the secessionist group.<sup>115</sup>

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111. *Id.* at 589, 417 A.2d at 28-29 (Schreiber, J., dissenting).

112. *See, e.g.*, *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541, *cert. denied*, 454 U.S. 864 (1981); *Bishop & Diocese v. Mote*, 716 P.2d 85 (Colo.) (en banc), *cert. denied*, 479 U.S. 826 (1986).

113. *Bishop & Diocese v. Mote*, 716 P.2d 85 (en banc), *cert. denied*, 479 U.S. 826 (1986).

114. *Id.* at 87. A majority of the local congregation voted to secede in response to doctrinal changes concerning the ordination of women, divorce and changes in the Book of Common Prayer. *Id.* at 89. Following the approval of the ordination of women by the General Convention of the Episcopal Church, the St. Mary's delegation introduced a resolution at the Annual Convention of the Diocese of Colorado calling upon the diocese to withdraw from the Episcopal Church. *Id.* The resolution was rejected and most of the St. Mary's delegation walked out. *Id.* At a meeting of the St. Mary's congregation, the members then voted 197 to 79 to secede from the national church and diocese and delete from its articles of incorporation all references to hierarchical authority. *Id.* Following the secession, the Bishop formally recognized as the rightful parish the minority which remained loyal to the diocese. *Id.* The loyal minority elected new parish officers to replace those in the seceding faction, as directed by the Bishop. *Id.*

115. *Id.* The appellants in *Mote* included members of the vestry representing the loyal minority of parishioners, the replacement pastor appointed by the Bishop and the Bishop and Diocese of Colorado. *Id.* at 89 n.3. The trial court reasoned that the Episcopal Church was hierarchical in polity, that the appropriate church authority had recognized the loyal faction and that this decision required complete deference. *Id.* at 90. The court, therefore, concluded that the original parish articles of incorporation remained in effect and that legal title to the disputed property was vested in the new pastor as officially recognized by the Bishop. *Id.* For a similar treatment of corporate dissolution as tantamount to a forfeiture of rights to possess local church property, see *supra* notes 97, 108 and accompanying text.

In reversing, the Colorado Court of Appeals in *Mote* applied the neutral principles approach and adopted a presumption that a majority of a local congregation would prevail, absent a showing that the identity of the true local church and control of the local church property "[was] to be determined by some other means." *Bishop & Diocese of Colo. v. Mote*, 668 P.2d 948, 952 (Ct. App. 1983), *rev'd*, 716 P.2d 85 (Colo.) (en banc), *cert. denied*, 479 U.S. 826 (1986). The appeals court found no evidence of an express trust in favor of the general church to rebut the presumption of majority rule and awarded control of the disputed property to the secessionist majority. *Id.* at 953. The Colorado Supreme Court reversed. *Mote*, 716 P.2d at 110.

The Colorado Supreme Court condoned the appeals court's adoption of a neutral principles approach.<sup>116</sup> The court noted, with approval, several decisions of the Colorado Court of Appeals which had applied the neutral principles doctrine.<sup>117</sup> The court disagreed, however, with the way the doctrine had been applied by the lower court.<sup>118</sup> First, the court reasoned that a proper neutral principles inquiry should ask initially whether the deeds, church documents and other relevant evidence establish a trust in favor of the general church.<sup>119</sup> If control is deemed to be vested in the diocesan church, no inquiry into local control would be necessary.<sup>120</sup> Only if ownership is found to be vested in the local church, the court asserted, would local control over the property become an issue.<sup>121</sup> Thus, the court refused to adopt a presumption that control of local parish affairs be determined by a majority of the parishioners.<sup>122</sup>

The *Mote* court also concluded that the lower court's neutral principles analysis had unduly restricted the scope of admissible evidence.<sup>123</sup> The court reasoned that under *Jones* a civil court's evidentiary inquiry could be as broad as possible so long as it involved no resolution of doctrinal matters.<sup>124</sup> The *Mote* court concluded that, as part of a neutral principles analysis, a court's inquiry might properly include "documents

116. *Mote*, 716 P.2d at 96. The court noted, however, that a compulsory deference approach might be preferable, even necessary, in the rare instance where a substantial portion of the available evidence was so tainted by religious dogma as to be outside a civil court's permissible constitutional purview, rendering a fair resolution on the merits impossible. *See id.* at 96 n.11.

117. *Id.* at 97-99. The court discussed several decisions by the appeals court which employed a neutral principles inquiry into local church articles of incorporation, by-laws, deeds, canons and constitutions, and state statutes. *Id.*

118. *Id.* at 99.

119. *Id.* This line of reasoning by the court suggests that, as a threshold matter, a neutral principles inquiry should decide whether ownership is vested in the diocesan church. *See id.* An affirmative answer to this threshold inquiry would end the analysis. *See id.* It should be noticed that the *Mote* court was more willing to engage in speculative interpretation of church documents and canons than the court in *Barker*. For a complete discussion of *Barker*, see *infra* notes 130-42 and accompanying text.

120. *Mote*, 716 P.2d at 99.

121. *Id.*

122. *Id.* at 100. In rejecting a presumption of majority representation, the court noted that state statutes governing non-profit organizations require a two-thirds vote to amend articles of incorporation. *Id.* Thus, allowing a mere majority of parishioners to effect a secession and dissolution of diocesan affiliation would be inconsistent with the state two-thirds rule. *See id.*

123. *Id.* The court cited Justice Powell's dissent in *Jones v. Wolf*. *Id.* (citing 443 U.S. 595, 610-21 (1979) (Powell, J., dissenting)). For a discussion of Justice Powell's dissent in *Jones*, see *supra* notes 62-64 and accompanying text.

124. *Mote*, 716 P.2d at 100. The court noted that clear language manifesting an intent to create a beneficial interest in another is traditionally necessary under trust law. *Id.* at 100-01; see 1 A. SCOTT, THE LAW OF TRUSTS §§ 24-25 (1967). Restricting the permissible scope of the evidentiary inquiry, the court reasoned, would frustrate this requirement. *Mote*, 716 P.2d at 101.



not traditionally associated with trust and property law, or provisions in documents not solely couched in the traditional terms of trust and property law."<sup>125</sup> The court held that relevant evidence included the constitutions and canons of the local and general church, even if intertwined with religious concepts.<sup>126</sup> The court cautioned, however, that civil courts must defer to a "definitive resolution" of any doctrinal issue involved in interpreting such religious documents.<sup>127</sup>

Applying its own version of the neutral principles approach, the Colorado Supreme Court found that the local church's articles of incorporation and bylaws, and the relevant canons of the general church demonstrated an intent by the local church to form a trust of the church property in favor of the diocesan church.<sup>128</sup> The court therefore awarded possession of the local church property to the diocese.<sup>129</sup>

While the *Mote* court was comfortable making a searching inquiry into intrinsically religious evidence, the California Supreme Court was less willing to examine evidence with religious content in a case involving four local parishes of the Episcopal Church.<sup>130</sup> In *Protestant Episcopal Church v. Barker*,<sup>131</sup> the four local congregations seceded from their diocese, but retained possession of the local church property.<sup>132</sup> The California Court of Appeal employed a neutral principles approach which examined the deeds to church property, the articles of incorporation of the local churches, state statutes and the rules of the diocese.<sup>133</sup> The *Barker* court held that the compulsory deference approach was properly limited to doctrinal and ecclesiastical disputes and was not applicable to property disputes.<sup>134</sup> Deeming the case before it a dispute over prop-

125. *Mote*, 716 P.2d at 101 (citations omitted).

126. *Id.* This statement by the court suggests a broad neutral principles inquiry, subject only to the court's discretion on a case-by-case basis of what is and what is not an impermissible foray into religious doctrine or practice.

127. *Id.* at 102.

128. *Id.* at 104-08. The court also based its holding on the conduct of the church and its members. *See id.* at 104. The court conceded that the evidence revealed no *explicit* trust provisions in favor of the diocese. *Id.* The court, however, found an extensive "policy direction and property control to be exercised by the general church." *Id.*

129. *Id.* at 108.

130. *See* *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541, *cert. denied*, 454 U.S. 864 (1981).

131. 115 Cal. App. 3d 599, 171 Cal. Rptr. 541, *cert. denied*, 454 U.S. 864 (1981).

132. *Id.* at 604, 171 Cal. Rptr. at 543. In a consolidated trial, the trial court sustained the claim of the diocese that title to the four local churches was held in trust for the diocesan hierarchy. *Id.* The trial court reasoned that in a hierarchically organized church, centralized control over church property superceded civil law disposition. *Id.* at 611, 171 Cal. Rptr. at 547. The trial court's analysis basically amounted to a compulsory deference approach. *See id.* The California Court of Appeal rejected this reasoning. *See id.* at 625, 171 Cal. Rptr. at 555.

133. *See id.* at 621, 171 Cal. Rptr. at 553.

134. *Id.* at 615, 171 Cal. Rptr. at 549. The court stated that "property dis-

erty, not dogma, the court decided that a neutral principles approach was appropriate.<sup>135</sup> The court found that three of the local churches had consistently exercised control over the local property and had incorporated before the diocese adopted a canon which declared that on dissolution of a church its property shall revert to the diocese.<sup>136</sup> As to these churches, the court awarded possession to the local congregations.<sup>137</sup> The fourth church, however, was incorporated after the adoption of the diocesan canon providing for reverter upon dissolution.<sup>138</sup> Moreover, that church's articles of incorporation contained a special provision declaring that on liquidation, dissolution or abandonment of the corporation its property would inure to the benefit of the diocesan body.<sup>139</sup> The court held that this church's property was subject to an express trust in favor of the diocese upon revocation of the parish charter.<sup>140</sup> By seceding from the general church, the court noted, the local congregation had effectively revoked its charter, thus triggering the reverter in favor of the diocesan church.<sup>141</sup> The neutral principles ration-

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putes between temporal claimants must be resolved by neutral principles of law." *Id.*

135. *Id.* A judicial determination that a given church dispute is over doctrine or over property is problematic. A comparison of the rationales in *Tea* and in *Barker* illustrates that two very similar factual scenarios can result in two drastically dissimilar characterizations of the underlying dispute. In *Tea*, the court stated that possession of church property was a matter properly determined by ecclesiastical authority and internal church regulation. *Tea*, 96 Nev. at 402-03, 610 P.2d at 184. In contrast, the *Barker* court deemed a dispute between a seceding faction of a local church and a diocese to be purely a matter of property law and within the proper jurisdiction of a civil court. *Barker*, 115 Cal. App. 3d at 615, 171 Cal. Rptr. at 549. Thus, given similar facts, courts can reach drastically different conclusions on whether a given dispute is ecclesiastical or purely legal, whether compulsory deference or neutral principles is preferable, and who should win under either approach. See, e.g., *Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (trial court applied compulsory deference in favor of diocese; appeals court reversed and applied neutral principles in favor of local church); *Mote*, 716 P.2d 85 (trial court applied compulsory deference approach in favor of diocese; appeals court reversed and applied neutral principles approach in favor of seceding parishioners; supreme court reversed and applied neutral principles approach in favor of diocese).

136. *Barker*, 115 Cal. App. 3d at 625, 171 Cal. Rptr. at 555. The court noted that title to the disputed property, as to the three churches, was vested in the local parishes, which had purchased the property without any diocesan financial assistance. *Id.* Moreover, the articles of incorporation of the three churches did not contain language of trust or subordination in favor of the diocese. See *id.*

137. *Id.*

138. *Id.*, 171 Cal. Rptr. at 555-56.

139. *Id.*, 171 Cal. Rptr. at 556.

140. *Id.* at 625-26, 171 Cal. Rptr. at 556. The court's reasoning here is similar to the *Bennison* court's finding that a seceding faction which dissolves its corporate form thereby terminates its right to possess and control property held by the church corporation. For a discussion of this reasoning in the *Bennison* decision, see *supra* note 97 and accompanying text.

141. *Barker*, 115 Cal. App. 3d at 625-26, 171 Cal. Rptr. at 556. The *Barker* court was careful to avoid relying on canon law provisions. Instead, it construed

ale in *Barker*, therefore, turned largely on interpretation of secular trust language found in diocesan canon provisions and did not, according to the court, require an inquiry into religious doctrine or practice.<sup>142</sup>

#### E. *Bjorkman v. Protestant Episcopal Church*

The most recent chapter in church property dispute litigation is *Bjorkman v. Protestant Episcopal Church*.<sup>143</sup> The *Bjorkman* case is significant in that the Supreme Court of Kentucky held that a neutral principles of law approach could be applied in cases of secession by a local church from its hierarchical organization and that the application of neutral principles to a church property dispute was preferable to compulsory deference to hierarchical church authority.<sup>144</sup>

In 1978, St. John's Protestant Episcopal Church of Bellevue and Dayton seceded from its hierarchical organization, the Protestant Episcopal Church in the United States of America.<sup>145</sup> In 1980, St. John's conveyed all of its property to a newly-formed corporation, the Anglican Catholic Parish of St. John the Evangelist, Inc.<sup>146</sup> The Episcopal Church then commenced suit seeking imposition of a constructive trust upon the church property for its use and benefit.<sup>147</sup>

The trial court applied the neutral principles of law approach endorsed in *Jones v. Wolf* and held that St. John's was the owner of the property.<sup>148</sup> The appellate court reversed, noting that the *Jones* Court did not require application of the neutral principles approach, but merely made it a permissible alternative to the compulsory deference approach.<sup>149</sup> The court reasoned that the compulsory deference rule for resolving disputes between local congregations and church governing bodies remained a constitutionally acceptable method for resolving such disputes and that a neutral principles analysis ran counter to established Kentucky precedent on the issue.<sup>150</sup> The Kentucky Supreme Court rejected this reasoning and reversed.<sup>151</sup>

The Kentucky Supreme Court, in *Bjorkman*, began its analysis by noting that St. John's had acquired its property exclusively through its

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documents relating to California's religious corporations law. *Id.* at 625-26, 171 Cal. Rptr. at 555-56.

142. *See id.*

143. 759 S.W.2d 583 (Ky. 1988).

144. *Id.* at 586.

145. *Id.* at 584. St. John's withdrawal was unequivocal and there was no dissenting faction. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 586-87. The Kentucky Supreme Court stressed that the diocese had avoided entanglement in the temporal affairs of the local church in order to avoid possible civil liability. *Id.*

own efforts, that title to the property was held by the local congregation and that St. John's had freely purchased, encumbered and sold its property without any involvement by the diocese.<sup>152</sup> The court then concluded that it was free to adopt a neutral principles analysis since past Kentucky cases applying a compulsory deference approach were factually distinguishable from the case at bar.<sup>153</sup> Further, the court noted that a compulsory deference approach invariably favored the diocesan church and, therefore, a neutral principles approach was preferable.<sup>154</sup>

The court then turned its attention to an "Instrument of Donation," executed in 1907 by local church officials, which requested the Bishop to "take" the disputed church building under his "spiritual jurisdiction."<sup>155</sup> The instrument stated, in somewhat stilted language, that the local congregation "relinquish[ed] all claim to any right and disposing of the said building, or allowing of the use of it in any way inconsistent with the terms and true meaning of this Instrument of Donation, and with the consecration hereby requested by the Right Reverend, the Bishop of this Diocese."<sup>156</sup> The court found that the church and its members never regarded the Instrument of Donation to be legally binding in a court of law.<sup>157</sup> The court rejected the dissent's contention that local church members intended to be bound by the instrument, citing the fact that the local church had freely purchased, encumbered and alienated the property without any diocesan involvement.<sup>158</sup> The court also held that a canon law provision adopted by the general church in 1907, purporting to prohibit transfer of church property without the Bishop's consent, was regarded by both parties as nonbinding in the absence of enforceable civil law restrictions.<sup>159</sup>

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152. *Id.* at 584.

153. *Id.* at 585. The court noted that application of the compulsory deference approach in cases involving the secession of a local church from its hierarchical organization, as in *Bjorkman*, would inevitably result in the triumph of the hierarchical organization. *Id.* at 586.

154. *Id.*

155. *Id.* The court noted that the Instrument of Donation applied only to the church building and not to any real estate, the parish hall, the rectory or any personal property. *Id.* The fact that the Instrument of Donation did not in any way effect ownership of the land on which the church was constructed seemingly casts doubt on its relevance to a church property dispute.

156. *Id.*

157. *Id.*

158. *Id.* The court also rejected the diocesan church's constructive trust argument. *Id.* at 587. The court reasoned that the local congregation was the true owner of the property and, therefore, it had not acted fraudulently in transferring title to the property. *Id.* Had the transfer been wrongful, the court added, "constructive trust would have been the proper remedy." *Id.*

159. *Id.* at 586 (citing CONSTITUTIONS AND CANONS, *supra* note 30, tit. II, canon 7, sec. 2). The court noted that the official commentary in the annotated constitution of the Episcopal Church described the provision forbidding alienation of local church property without the written consent of the bishop as of moral value only and without legal effect. The commentary states in part:

The *Bjorkman* court went on to characterize the diocesan church's relationship with St. John's as "exclusively ecclesiastical" and not encompassing the local parish's "temporal affairs."<sup>160</sup> Implicit in the court's reasoning was a recognition that while the hierarchical authority of the Episcopal Church undoubtedly encompassed matters of religious dogma and practice, local Episcopal congregations were self-governing as to property matters.<sup>161</sup> Accordingly, the Kentucky court ruled in favor of the local congregation, St. John's.<sup>162</sup>

### III. ANALYSIS

The polity of a church consists of its organizational structure or system of governance.<sup>163</sup> The polity of the Episcopal Church, while arguably hierarchical as to matters of dogma, is more properly characterized as congregational in regard to property ownership.<sup>164</sup> In other words,

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State laws control the conveying and encumbering of real estate, and each case which arises must be decided according to the law of the situs of the property. . . .

Dr. Dykman commented on [the canon restricting alienation of church property] in 1952 with particular reference to the State of New York. His comment was as follows:

The power of the General Convention over the disposition of real property is questionable, governed as it is by the law of the state in which it is situated. In a somewhat similar situation it has been held that the creation and dissolution of the pastoral relation are governed by the law of the Church in spite of the fact that a rector is an officer of a corporation created by the state.

E. WHITE & J. DYKMAN, *supra* note 33, at 297 (citation omitted).

160. *Bjorkman*, 759 S.W.2d at 587.

161. Although the court did not actually state this to be so, it certainly implied as much. By characterizing a hierarchical church's relationship to a local parish as ecclesiastical but not temporal, the inference is that decisions on property matters by church authorities are *ultra vires*. Several scholars have argued that the Episcopal Church is hierarchical as to dogma but congregational as to property. See Sirico, *supra* note 1, at 357-60. Support for this dichotomy derives principally from an historical understanding of property matters within the Episcopal Church and its predecessor, the Anglican Church. See generally, R. ALBRIGHT, *supra* note 24. It still remains, however, for the Supreme Court to articulate the criteria for making this distinction as well as to decide whether churches may be properly deemed to contain a mix of both congregational and hierarchical attributes.

162. *Bjorkman*, 759 S.W.2d at 587.

163. See D. STEVICK, *supra* note 27, at 74. "The polity of a church is that arrangement of authority whereby power is distributed and the work of the group is carried out." *Id.*

164. The notion of local parish independence regarding temporal affairs is not new. See, e.g., *Fiske v. Beatty*, 206 A.D. 349, 201 N.Y.S. 441 (1923). In *Fiske*, the New York Appellate Division stated:

The true doctrine of the Protestant Episcopal Church in America, in relation to the sources of power of a priest or rector, as we understand it, is correctly expressed as follows: "In the church, power does not ascend from the congregation or the vestry to the rector; it descends from

doctrinal matters are properly governed by hierarchical church authority, while matters of a more secular nature are properly decided within each congregation.<sup>165</sup>

This dogma/property distinction derives from the historical underpinnings of the Episcopal Church in this country.<sup>166</sup> Control of local parish property in the Episcopal Church has historically been in local hands, and legal title is most often vested in the local church corporation, warranting at least a presumption of ownership by the local majority following a schism.<sup>167</sup> In addition to these historical realities, first amendment concerns militate against stripping a seceding congregation of its property solely on the basis of canon law provisions, frequently enacted after incorporation of the local parish, purporting to vest equitable title in the diocese.<sup>168</sup> Typical canon law provisions attempt to create a trust in the local church property in favor of the diocesan church in the event of a schism.<sup>169</sup> Courts should not recognize such an arrangement as creating an enforceable trust. At the very least, it would be unfair to give retroactive effect to canon amendments absent some affirmative manifestation of assent to such amendments by a local

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above to the bishop and through the bishop to the subordinate ministry."

*Id.* at 356-57, 201 N.Y.S. at 446-47 (citing WHITE'S CHURCH LAW 185 (1898 ed.) (emphasis in original)).

165. The dogma/property distinction in the context of hierarchical churches has the salutary effect of freeing civil courts from a constitutionally perilous inquiry into church polity and discipline. Instead, courts can focus their attention on the conduct and expectations of the parties concerning *property* matters in an effort to characterize the *property* relationship as either self-governing or hierarchically-controlled. Deciding whether local church property is subject to hierarchical control would turn on such factors as the intentions of the parties as evidenced by past conduct and duly executed legal instruments, rather than on a broad characterization of the relationship as either congregational or hierarchical—a characterization which includes purely religious factors not necessarily relevant to the legal disposition of property. See Note, *Judicial Intervention in Disputes over Church Property*, 75 HARV. L. REV. 1142, 1158-60 (1962).

166. For a discussion of the historically local nature of church property ownership within the Episcopal Church in this country, see *supra* notes 24-28 and accompanying text.

167. For cases supporting this proposition, see *supra* note 28.

168. See *Graves*, 83 N.J. at 589, 417 A.2d at 28-29 (Schreiber, J., dissenting).

169. For example, the relevant Episcopal Church canon provides:

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 Constitutions and Canons.

CONSTITUTION & CANONS, *supra* note 30, tit. I, canon 6, sec. 4. Some diocese include similar provisions in their canons. See, e.g., *Barker*, 115 Cal. App. 3d at 608, 171 Cal. Rptr. at 545.

church congregation.<sup>170</sup>

In *Bjorkman*, the Kentucky Supreme Court considered section 2 of canon 45 of the Episcopal Church which prohibited the encumbrance or alienation of any church without consent of the diocese.<sup>171</sup> Avoiding any inquiry into the purpose and substance of canon law, the court instead stressed that the parties never intended canon law provisions to be legally binding.<sup>172</sup> In this way, the *Bjorkman* court was able to correctly recognize that section 2 of canon 45 was without legal effect.<sup>173</sup>

Further analysis supports the *Bjorkman* court's rejection of church constitutions, religious documents and canon law provisions in general. The purpose and substance underlying Episcopal canon law, for instance, demonstrates its dubious legal significance. Episcopal canon law is determined by religious dogma and theology;<sup>174</sup> its basis is said to be in the Bible.<sup>175</sup> Thus, Episcopal canon law provisions, church constitutions and similar ecclesiastical documents, such as the "Instrument of Donation" in *Bjorkman*, are poor indicia of legal intent. Any judicial decision which relies on church documents, constitutions and canon law provisions compromises its legitimacy by attaching *legal* significance to expressions of *religious* intent.<sup>176</sup> In view of the intrinsically religious nature of canon law provisions, religious documents and the like, courts should avoid altogether any inquiry into such evidence in seeking to ascertain the will of the parties regarding the legal disposition of property.<sup>177</sup>

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170. See, e.g., *Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (refusing to apply diocesan canons to parishes incorporated before enactment of canons).

171. *Bjorkman*, 759 S.W.2d at 586. Canon 45 is the present-day codification of tit. I, canon 6, sec. 3.

172. *Bjorkman*, 759 S.W.2d at 586. The *Bjorkman* court's refusal to examine the underlying historical significance of religious constitutions, documents and canons is striking, but not surprising. Civil courts are bound to avoid adjudicating doctrinal matters. See *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976). Courts are therefore anxious to avoid a searching examination of the doctrinal underpinnings of religious evidence in order to avoid even the slightest hint of an impermissible doctrinal inquiry and possible appellate reversal. By focusing instead on the expectations of the parties, the *Bjorkman* court ostensibly avoided addressing the intrinsically religious nature of the evidence it was reviewing by concluding that the parties never intended religious documents, constitutions and canons to be legally binding. The court's conclusion that canon 45 was not an expression of binding legal intent, therefore, casts doubt on the propriety of considering such evidence in the first place. See *Bjorkman*, 759 S.W.2d at 586.

173. *Bjorkman*, 759 S.W.2d at 586.

174. See D. STEVICK, *supra* note 27, at 17 ("[T]he distinctive role of canon law is as the servant of theology.").

175. See *id.* at 33.

176. A more difficult question might arise where one party regarded a religious document as legally binding while the other party did not. Such a case might require a more in-depth examination of the validity of religious evidence than that undertaken by the *Bjorkman* court.

177. Judicial review of intrinsically religious evidence is necessarily prob-

It has been suggested that as an approach to resolving church property disputes neutral principles must be abandoned.<sup>178</sup> This suggestion finds support in the tendency of courts applying the neutral principles approach to misinterpret the realities of church governance due to the restrictive scope of evidence the approach permits.<sup>179</sup> Moreover, there is a danger that courts will stray into forbidden zones of religious doctrine and practice in applying property and trust principles to essentially ecclesiastical evidence.<sup>180</sup> Thus, the neutral principles approach is not particularly effective in avoiding doctrinal incursions or in ascertaining the prior intent of the parties.

A better solution would be to apply the neutral principles approach narrowly, that is, allow civil courts to review only purely secular documents in applying the neutral principles approach.<sup>181</sup> A narrow neutral principles inquiry would accomplish two goals. First, courts would avoid any incursion into forbidden doctrinal matters by mechanically and consistently excluding any religious evidence from review.<sup>182</sup> Such an approach in *Bjorkman* would have precluded review of the "Instrument of Donation" and canonical provisions relied upon by the diocese.<sup>183</sup> Instead of reviewing essentially religious evidence, which was

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lematic. Neutral principles purports to review only secular provisions in religious documents. Singling out secular language in documents containing a hybrid of secular and religious language ignores the essentially religious context and thrust of the excised material. For instance, determining legally binding intent based on secular language contained in the Instrument of Donation in *Bjorkman* would provide only an incomplete picture of the document as a whole. Traditional rules of interpretation in trust and property law, as well as common sense, require that legal documents be read in their entirety, in light of surrounding factors, in order to discover the intent expressed therein. Thus, evidence containing a mixture of secular and religious provisions and concepts should be excluded from civil court review for several reasons: 1) isolated secular provisions, deprived of their context, do not adequately reflect the expectations of the parties, 2) it is not clear that the religious organization and its members agreed that these documents would be controlling in the event of a property dispute, and 3) civil courts are incompetent to decide which provisions are secular and which are imbued with religious meaning. Sirico, *supra* note 1, at 356.

178. See, Harris, *Neutral Principles of The Law and Church Property in the United States*, 30 J. CHURCH & ST. 515, 530 (1988).

179. See *Jones*, 443 U.S. 595, 610-11 (Powell, J., dissenting). For a discussion of Justice Powell's dissent in *Jones* and his assertion that the neutral principles approach acts as a restrictive rule of evidence, see *supra* notes 62-64 and accompanying text.

180. See Sirico, *supra* note 1, at 356-57.

181. See *id.* at 357-58.

182. See *id.*

183. The *Bjorkman* court refused to give legal effect to the Instrument of Donation on the grounds that both parties regarded it as nonbinding in the absence of enforceable civil law restrictions. *Bjorkman*, 759 S.W.2d at 586. The *Bjorkman* court's treatment of religious evidence implicitly supports a narrow neutral principles approach. For a discussion of this aspect of *Bjorkman*, see *supra* notes 171-77 and accompanying text.



ultimately cast aside as untrustworthy, the court in *Bjorkman* might have focused exclusively on secular documents, such as articles of incorporation, trust instruments and state statutes governing church property ownership, to ascertain the will of the parties.<sup>184</sup>

The *Bjorkman* court's rejection of religious evidence implicitly supports this narrow neutral principles approach. The court basically dismissed the canon law provisions and the "Instrument of Donation" on the grounds that neither party ever regarded them as legally binding.<sup>185</sup> A recognition that parties to a religious dispute do not regard religious documents as dispositive of property matters underscores the problem with relying on such evidence in the first place. Courts should not pretend to extract the intent of the parties from documents the parties themselves do not regard as legally binding.<sup>186</sup> Moreover, the expressions of *religious* intent codified in canon law provisions and religious instruments of donation do not necessarily coincide with the *legal* intent of a church and its members regarding the disposition of church property.<sup>187</sup> Therefore, courts should avoid religious evidence entirely and rely solely on formal expressions of legal intent in the form of duly executed deeds, articles of incorporation and trust instruments.<sup>188</sup>

More importantly, adoption of such an approach would encourage religious groups to order their affairs by executing legal documents expressing their intent as to the disposition of local church property in advance of a schism.<sup>189</sup> In this way, a narrow neutral principles approach would allow local churches and diocese to anticipate and plan for the future with greater certainty since judicial construction of legal documents would be more uniform and predictable than judicial construction of religious documents.<sup>190</sup>

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184. The *Bjorkman* court's *ratio decidendi* rested solely on its interpretation of secular evidence such as property deeds and articles of incorporation. *Bjorkman*, 759 S.W.2d at 587.

185. *Id.* at 586.

186. *Id.*

187. See E. WHITE & J. DYKMAN, *supra* note 33, at 297.

188. See Sirico, *supra* note 1, at 357-59.

189. See *Jones*, 443 U.S. at 603-04. Arguably, forcing church organizations to articulate their intentions in the event of a schism involving church property could in itself precipitate a dispute where none would have otherwise arisen.

190. That court decisions based on legal documents are more uniform and predictable than those based on religious documents is evidenced by the wide variety of results reached under the rubric of neutral principles. Moreover, the fact that the evidentiary scope of a neutral principles inquiry has been so loosely defined by the Supreme Court injects a significant element of uncertainty into the task of predicting an outcome based on any given set of facts. Excluding religious evidence would eliminate this element of unpredictability and allow religious groups to order their affairs based on the existing body of trust and property precedents.

## IV. CONCLUSION

State court decisions since *Jones v. Wolf* reflect a growing trend in favor of a narrow application of the neutral principles approach.<sup>191</sup> The *Bjorkman* decision is the latest step in this trend and signals a growing realization by state courts of the constitutional perils associated with an overly broad neutral principles analysis.<sup>192</sup> A narrow neutral principles approach properly places intrinsically religious evidence, such as church canons, constitutions and donation instruments, outside the purview of the court's inquiry.<sup>193</sup> The result is an overly formalistic approach, but one that is uniform, predictable and simple in application.<sup>194</sup> The *Bjorkman* majority correctly recognized the dubious wisdom of relying on canon law provisions and ecclesiastical documents in deciding church property disputes.<sup>195</sup> Moreover, the *Bjorkman* court properly characterized the Episcopal Church as hierarchical as to dogma but congregational, or self-governing, as to property ownership.<sup>196</sup> Such a dichotomy derives from the historically local nature of church property ownership within the Episcopal Church in this country.<sup>197</sup> By recognizing that the authority of the Episcopal Church hierarchy does not necessarily govern disputes over local parish property, the *Bjorkman* decision realistically considered the historical realities of local church ownership within the Episcopal Church. Moreover, the *Bjorkman* decision confirms that compulsory deference to hierarchical church authority should give way to a narrow neutral principles of law approach in disputes over property within the Episcopal Church.

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191. For a discussion of this trend, see *supra* notes 71-162 and accompanying text.

192. For a discussion of the problems with a broad application of the neutral principles approach, see *supra* notes 174-88 and accompanying text.

193. For a discussion of the relative merits of a narrow neutral principles approach, see *supra* notes 181-90 and accompanying text.

194. For a discussion of the ramifications of a narrow neutral principles approach, see Sirico, *supra* note 1, at 357-59.

195. For a discussion of the *Bjorkman* court's rejection of intrinsically religious evidence, see *supra* notes 143-62, 195-97 and accompanying text.

196. For a discussion of the *Bjorkman* court's characterization of the Episcopal Church as congregational, or locally self-governing, as to parish property matters, see *supra* notes 152-67 and accompanying text.

197. For a discussion of the history of local church ownership in the Episcopal Church, see *supra* notes 24-35, 166 and accompanying text.

