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The Sword and the Steeple: A History of Church Property Disputes and an Analysis of Falls Church v. Protestant Episcopal Church in the United States

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NOTE

THE SWORD AND THE STEEPLE: A HISTORY OF CHURCH PROPERTY DISPUTES AND AN ANALYSIS OF *FALLS CHURCH V. PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES*

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I. INTRODUCTION

The United States of America has developed into a large, pluralistic society. One feature of many pluralistic societies is the reality of multiple religions. With each religion comes, to some extent, a polity.[1] From time to time, the civil law of state and federal governments have had to interact with these religious polities. How the civil law corresponds with the canonical laws of these religious polities has tremendous import for many different areas of the law.

One particular area where this correspondence is important is the field of ecclesiastical property law. Recently, numerous hierarchical churches[2] have been undergoing divisions over issues of doctrine and practice. Legal questions have arisen regarding who owns property claimed both by the dissenters and the general church after a formal division has taken place. This has led to numerous civil cases in many states. This Note will explore one such case from the Commonwealth of Virginia, *Falls Church v. Protestant Episcopal Church in the U.S.* This Note will consist of three parts. First, it will explain the factual and procedural background to the *Falls Church* case. Second, it will discuss the history of the legal status of ecclesiastical property and how courts, both in Europe and the United

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1. When the term "polity" is used in this Note, it will be in reference to a politically organized unit having a distinct legal identity.

2. When this Note refers to hierarchical churches it refers to churches that have governing structures built on an episcopal model or a similarly structured system. These churches typically have more centralized contral with bishops and a ranking of church officials.

States, have applied trust law to ecclesiastical property. Finally, this Note will discuss what the policy of the courts should be in the future and how these suggestions, if applied, would have affected the *Falls Church* holding.

II. FACTUAL AND PROCEDURAL BACKGROUND

The conflict that gave rise to *Falls Church* came from a dispute within the Episcopal Church. The church has, in recent years, been torn asunder as conflict has arisen between the hierarchy of the Episcopal Church and the orthodox Anglican congregations that seek independence.[3] The division revolves around doctrinal issues, particularly in matters of the church's public witness.[4] All congregations and ecclesiastical bodies involved in the dispute were originally part of the larger Anglican Communion.[5] However, the new organization formed by the breakaway congregations are not recognized as being a part of the Anglican Communion by the Archbishop of Canterbury.[6] This communion is organized hierarchically. However, unlike the Catholic Church, the Anglican Communion is decentralized and power within the American Anglican community largely rests with the Protestant Episcopal Church in the United States.[7]

In response to what they considered to be an embrace of heretical actions by the Protestant Episcopal Church ("the general church"), numerous congregations around the United States broke away from that polity and sought to re-associate with a different ecclesiastical body.[8] Many of these churches, including the Falls Church, associated with an Anglican Communion in Nigeria and formed the Convocation of Anglicans in North America ("CANA") congregations.[9] This created a more orthodox polity that served as a counterbalance to the general church.

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3. Michael Conlon, *Episcopal Church dissidents move towards division*, THOMSON REUTERS (Dec. 3, 2008, 10:48 PM), http://www.reuters.com/article/2008/12/04/us-religion-episcopal-idUSTRE4B30Q320081204.

4. *Id.*

5. *See Resolution 14: Episcopal Authority and Oversight*, ANGLICAN COMMUNION (2015), http://www.anglicancommunion.org/communion/acc/meetings/acc9/resolutions.cfm.

6. *See* Jennifer Berry Hawes, *Archbishop says ACNA not part of the Anglican Communion*, THE POST AND COURIER (Oct. 9, 2014, 2:52 PM), http://www.postandcourier.com/article/20141009/PC16/141009387.

7. *The Anglican Communion*, THE EPISCOPAL CHURCH, http://www.episcopalchurch.org/page/anglican-communion (last visited Nov. 3, 2015).

8. *See* Alicia Constant, *The Costly Faithfulness of the Falls Church,* THE GOSPEL COALITION (May 24, 2012), http://www.thegospelcoalition.org/article/the-costly-faithfulness-of-the-falls-church.

9. *Id.*

This division did not come without legal consequences. The separated churches had to settle the question of who owned the property that the break-away congregations used.[10] The Falls Church property is located in Fairfax County, Virginia, which is one of the highest valued real estate markets in the country. The general church claimed that the Falls Church and other CANA churches were merely holding the properties in trust for the general church; and that now, because a separation had occurred, the property should revert back to the general church.[11]

Falls Church was one of a string of cases that dealt with issues ranging from who the parties were to whether religious documents should be considered in ecclesiastical property cases.[12] The *Falls Church* court specifically faced the issue of how to apply "neutral principles of the law" to a church property dispute.[13] The neutral principles of the law doctrine has been interpreted by the Supreme Court to mean that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."[14] This issue has generated a great amount of deliberation from courts around the country that have had to wrestle with this question.

Different states have taken different approaches to how they deal with the issues associated with *Falls Church*. Many states have statutory schemes that are more conducive to hierarchical churches than others.[15] The court of

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10. *See generally Property Recovery Litigation*, EPISCOPAL DIOCESE OF VA., http://www.thediocese.net/News/Property_Recovery/ (last visited Oct. 4, 2015).

11. *See generally Church Property Dispute*, EPISCOPAL CHURCH, http://www.episcopalchurch.org/library/topics/church-property-dispute (last visited Oct. 4, 2015); Mary Schjonberg, *State high court won't reconsider decision against Falls Church Anglican,* EPISCOPAL CHURCH (June 14, 2013), http://www.episcopalchurch.org/library/ article/state-high-court-won%E2%80%99t-reconsider-decision-against-falls-church-anglican.

12. *See Property Recovery Litigation*, EPISCOPAL DIOCESE OF VA., http://www.thediocese.net/News/Property_Recovery/ (last visited Jan. 16, 2016).

13. Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530, 537 (Va. 2013).

14. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969). The Court was operating out of a desire to avoid entanglements that would implicate a First Amendment Establishment Clause issue. The neutral principles approach has the effect of treating the ecclesiastical body as any other corporation, using "neutral" principles of property law. Throughout this Note, the author will attempt to convey that this approach, when applied in such a way that it ignores the ecclesiastical polity of the church, is antithetical to the freedom and independence of the church.

15. *Compare Falls Church*, 740 S.E.2d 530 (discussing Virginia Code § 57-1.1), *with* Masterson v. Diocese of Nw. Texas, 422 S.W.3d 594 (Tex. 2013) (discussing Texas corporation law).

any state must consider the common and statutory law of that state, the United States Constitution, and general principles of law when determining the status of these congregations and, ergo, who is the owner of the property.

In deciding this case, the Virginia Supreme Court considered Virginia statutes regarding the corporate status of churches and the common law that developed around the application of those statutes.[16] Virginia's anti-establishmentarian legacy has provided a strong bias in favor of congregational churches. However, recent revisions to the Virginia Code have opened up space for hierarchical churches to exercise more authority in the Commonwealth.[17]

The manner in which ecclesiastical property cases are decided will have a significant impact in determining questions of sovereignty, jurisdiction, and property. It is imperative that the judicial branch provide the necessary guidance in accordance with the rule of law.

A. Impact of Jones v. Wolf on Jurisprudence

In *Jones v. Wolf,* the Supreme Court explicitly and thoroughly applied neutral principles of the law for the first time.[18] That case involved a dispute between a portion of a Georgia congregation and the general church to which that congregation belonged.[19] The Court vacated the decision of the Georgia Supreme Court, which had been in favor of the majority of the break-away congregation against the general church.[20]

The Court's decision in *Jones* opened the door for state courts to minimize the independence of ecclesiastical polities. Even though the Establishment Clause functions to protect the independence of the Church, the majority opinion in *Jones* ironically undermined the freedom of the Church in the name of preserving establishment clause jurisprudence.

1. Justice Blackmun's Majority Opinion

Justice Blackmun issued the majority opinion, holding that the states may exercise the option of using neutral principles of contract and property law to determine church property disputes. The Court claimed the rule allowed for courts to give deference to the highest decision making body

16. *Falls Church*, 740 S.E.2d at 537-39.

17. *Id.*

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

19. *Id.* at 597-98.

20. *Id.* at 610.

within a religious polity, provided that courts did not address issues of religious doctrine in doing so.

Blackmun's opinion reflected the overarching concern that caused the court to take up the case in the first place, namely, that the courts would employ judgment in regards to doctrine when deciding which faction would control the property. The idea was that using secular contract and property law would relieve the court of the necessity of considering matters of doctrine. The Virginia Supreme Court decision in Falls Church applied the neutral principles doctrine in a way that took into account the religious documents defining the polity of the church. However, other courts have used the opportunity provided for them in the *Jones* decision to disregard the religious documents of the church and apply the default provisions provided in state statutes regarding corporations instead.

By utilizing the neutral principles approach, Justice Blackmun claimed the new approach would be "completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity."[21] He pointed to the fact that the approach would allow lawyers and judges to consider issues that were familiar to them.[22] The neutral principles approach promised to "free civil courts completely from entanglement in questions of religious doctrine, *polity*, and practice."[23]

The opinion still allowed for the examination of religious documents under some circumstances in considering the intent of the parties.[24] However, the Court still found that approach troublesome.[25] While the Court acknowledged that states may be in a position where they must examine the religious documents, the Court did not require that they consider those documents.[26] This left open the possibility that courts may bypass those documents altogether and simply apply secular property and contract law in settling the dispute.[27]

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21. *Id.* at 603.

22. *Id.*

23. *Id.* (emphasis added). There is reason to seriously doubt the promise of freedom from entanglement in questions of polity. Church property disputes are inherently intertwined with questions of identity, structure, and authority, all of which are issues of polity.

24. *Id.* at 605.

25. *Id.* at 604. The court identified the necessity of using religious documents as a "difficulty." This reveals the bias of the Court against the examination of religious documents when considering intent.

26. *Id.* at 605.

27. *See* Masterson v. Diocese of Nw. Texas, 422 S.W.3d 594 (Tex. 2014).

The Court disregarded the necessity for deference to the decisions of the highest authority within a particular church body.[28] Despite its stated disdain for courts speaking to issues of polity, the *Jones* court had no problem reaffirming that the default rule for religious governance should be majority rule.[29] In the name of not legislating church polity, the Court legislated church polity.

The passive-aggressive method of judicial interpretation is a hallmark of Justice Blackmun's jurisprudence. It is very similar to what he did in both *Roe v. Wade*[30] and *Garcia v. San Antonio Metropolitan Transit Authority*.[31] In both of those cases, he articulated an opinion that expanded the power of the Court over an area of law while simultaneously disclaiming judicial power. Whether this method was borne out of a nuanced judicial mind or a desire to be purposefully ambiguous to the point of deceit is unknown. However, in *Jones*, like in *Roe* and *Garcia*, it merely added to the confusion.

2. The Principled Dissent in *Jones*

Justice Powell took up the task of giving the dissent in *Jones*.[32] The dissent did not discount the basic principles of law that would decide such cases. Justice Powell stated, "Although the Court appears to accept established principles that I have thought would resolve this case, it superimposes on these principles a new structure of rules that will make the decision of these cases by civil courts more difficult."[33] The "new structure of rules" that Powell refered to was Blackmun's crafty placement of the courts between the general church and a congregation through the use of secular law.

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28. *Jones*, 443 U.S. at 605-06.

29. *Id.* at 607-08 (citing Bouldin v. Alexander, 82 U.S. 131 (1872)).

30. Roe v. Wade, 410 U.S. 113, 162-63 (1973) ("In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'").

31. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51, 554 (1985) ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. . . . [Restraints] must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'"(citation omitted)).

32. *Jones*, 443 U.S. at 610.

33. *Id.*

The dissent criticized the majority position, claiming that it allowed for the examination of church charters and constitutions only to the extent that they contained language indicating that the congregation was holding property in trust for the general church.[34] It is these documents that provide the basis for understanding what the church polity is and how that church polity affects the property rights of the parties.[35] The majority's position is that courts should examine these religious documents with a strictly and purely secular lens.[36] The *Jones* decision allows courts to reinterpret church documents by leaving out the portions that do not speak directly to civil property and trust law.[37]

One of the dissent's key arguments dealt with the absurdity of trying to half-way read a document.[38] The dissent pointed out that the courts would be denied relevant evidence of how the religious polity is structured if the church documents were not read in their context.[39] It stated, "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."[40] The dissent was correct in its prediction that the *Jones* majority approach to neutral principles was more likely to lead to confusion.[41]

3. Issue at Stake

The law respects the sacredness of assent and jurisdiction.[42] It is important that the courts give due deference to the mutual assent that the general church and its individual congregations entered into when they bound themselves together in a religious polity. While there are certainly First Amendment issues that this Note will touch upon, there is an even deeper legal issue relating to the nature of assent and the important role that the courts have in upholding the assent of the parties and in recognizing religious polities as distinct from other voluntary associations. The majority

34. *Id.* at 612.

35. Below, this Note will discuss the way in which the Jones decision serves to undermine the respect for religious polities traditionally found within the law.

36. *Jones*, 443 U.S. at 612.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Compare* Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530 (Va. 2013), *with* Masterson v. Diocese of Nw. Texas, 422 S.W.594 (Tex. 2014).

42. Assent is self-evidently crucial to the law of contracts as well as the Constitutional right to freedom of association. *See* U.S. CONST. amend. I.

position places a potent weapon in the hands of those who seek to undermine the authority and jurisdiction of the church.

4. The Broken Promise of *Jones*

The *Jones* Court promised that the need to examine questions of religious polity would be obviated entirely through the use of the neutral principles approach.[43] According to *Jones*, "The neutral-principles approach . . . obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes."[44] Yet, the Virginia Supreme Court faced a situation where The Falls Church contended "that it was not bound by the canons, including the Dennis Canon"[45] because "there is no evidence of mutual assent by The Falls Church with regard to [The Protestant Episcopal Church] and the Diocese having any rights to the property."[46] The Virginia Supreme Court concluded that "[a]s this argument relates to the nature of the relationship between the parties, we will address it here."[47] The *Jones* Court attempted to create an option that would eliminate a situation where, "civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property."[48] This analysis sought to circumvent the questions of assent and polity, but ultimately it posed the threat of bringing decisions that should be made within an ecclesiastical body under the authority of the State.

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

44. *Id.*

45. The Dennis Canon states,

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Episcopal Archives, http://www.episcopalarchives.org/pdf/CnC/CandC_2009pp11-60.pdf (last visited Nov. 8, 2015). This quote is found in Cannon 7, Section 4 within the cannon of the Episcopal Church.

46. Fall Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530, 540 (Va. 2013).

47. *Id.*

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

B. Falls Church v. Protestant Episcopal Church in the U.S.

The Falls Church was founded in 1732 as one of two congregations in the Truro parish.[49] In 1769, the church was built on the property that the Protestant Episcopal Church would later claim as its own.[50] The Protestant Episcopal Church ("TEC") was founded in 1789.[51] The Falls Church petitioned for, and was accepted to, membership in a Diocese of the Protestant Episcopal Church in 1836.[52]

In 2003, a conflict arose within the TEC regarding what many dissident members considered to be a break from orthodoxy on the part of the TEC.[53] The congregation of the Falls Church voted overwhelmingly to join with other churches in disaffiliating with the TEC on December 17, 2006.[54] Six other congregations in that Diocese joined with Falls Church, and together they became a part of the CANA congregations.[55]

After these congregations broke away, they filed petitions pursuant to Virginia Code § 57-9(A) to get the deeds to the property recognized as being in the name of the CANA congregations.[56] The TEC and the Diocese responded by filing a complaint, claiming that all personal and real property held by the congregations was being held in trust for them.[57] They claimed to have directed the trustees of the CANA congregations to transfer the property back to the general church.[58]

The trial court in *Falls Church* used several factors to conclude that the property belonged to the TEC, including: an examination of Virginia statutes, the deeds, the constitutions and canons of the church, and the course of dealing between the parties.[59]

In examining the deeds of the churches,[60] the trial court found that the first deed from 1746 conveyed the land to "the said Vestry of Truro Parish."[61] The second, third, and fourth deeds were made out to "trustees of

49. *Falls Church*, 740 S.E.2d at 534.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 535.
60. *Id.*
61. *Id.*

the Episcopal Church known and designated as the 'Falls Church,'" "Trustees for the Falls Church Episcopal Church," and "Trustees of the Falls Church."[62] There were also fifth and sixth deeds both conveying property to "Trustees of the Falls Church, Falls Church, Virginia."[63] Deeds seven through eleven were conveyed to "Trustees of the Falls Church (Episcopal)."[64]

The trial court in *Falls Church* concluded that the frequent designation of the church as Episcopal in the conveyances was an indication that the trust was a unit of the TEC.[65] The trial court held that a reasonable grantor would have concluded, based upon the circumstances surrounding the designations of the Falls Church in the conveyances, that they were transferring property to a local Episcopal Church and that the church would not be removed from the TEC or the Diocese without their consent.[66]

In considering the statutes, the trial court concluded that Virginia Code § 57-7.1 did not change Virginia's longstanding rule against courts recognizing trusts held for a general church.[67] Instead, it concluded that Virginia Code § 57-15 prohibited the the court from transferring the property without the transfer being the desired outcome of the hierarchical church leadership.[68]

The trial court then turned its attention to the constitutions and canons of the church.[69] The congregation had agreed to adhere to the canons and constitutions as well as the doctrine of the Episcopal Church.[70] This attachment extended beyond spiritual matters to administrative matters such as health and pension plans.[71] The trial court also noted that the extent of the general church's administrative control also extended specifically

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* The trial court stated that "each congregation was bound by the constitution and canons of the general church and must acknowledge the jurisdiction of the Bishop; all clergy must affirm they 'conform to the Doctrine, Discipline, and Worship of the Episcopal Church' to be ordained; all congregations use the Book of Common Prayer; . . ." *Id.*

71. *Id.* ("Bishops must regularly visit parishes to examine the state of the churches; and congregations must participate in the Diocesan health care plan, contribute to the Church Pension Fund, and purchase fire, casualty and workers' compensation insurance.").

over the use of the property.[72] Particularly, it pointed to the regulations that prohibited the congregation from alienating consecrated property without permission from the TEC or the Diocese.[73] Likewise, it noted that the Diocese retained the right to declare the property abandoned if it ceased to be used by a congregation of the TEC or the Diocese.[74]

When it came to the course of dealing between the parties, the trial court looked at several factors.[75] It looked at the fact that the congregation had joined the general church in accordance with the general church's rules.[76] It considered the church's reputation in the community as an Episcopal church.[77] Perhaps even more importantly, it considered the fact that the congregation sought permission from the Diocese before it encumbered property.[78] The Falls Church appealed this ruling, and the TEC and Diocese cross-appealed in regards to the trial court's interpretation of Virginia Code § 57-7.1.[79]

1. Issue in *Falls Church*

The Virginia Supreme Court, using a hybrid approach, partially collapsed the distinction between neutral principles of the law doctrine and the principle of deference. By stating that the prior existing relationship between the general church and the congregation alone was enough to establish that the property was being held in trust for the general church,[80] the court opened the door for future courts to create a more flexible approach in applying neutral principles.

The deferential approach articulated in the dissent of *Jones v. Wolf* would direct the civil court focus on "ascertaining, and then following, the decision made within the structure of church governance."[81] As a matter of fact, the majority in *Jones*, wanted to "free civil courts completely from

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 536.

80. *Id.* at 540 ("As a number of courts in other states have noted, the Dennis Canon 'merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [TEC] in 1789.'" (citation omitted)).

81. Jones v. Wolf, 443 U.S. 595, 618 (1979).

entanglement in questions of religious doctrine, polity, and practice."[82] Yet, the Virginia Supreme Court, claiming that Virginia Code § 57-7.1 would not incorporate the Dennis Canon,[83] looked to the polity of the church in coming to the conclusion that a trust existed.[84]

The holding of the Virginia Supreme Court was a step in the direction of a more deferential approach. This direction, if continued or adopted as standard by the United States Supreme Court, could allow churches to apply their ecclesiastical laws in regards to secular objects, including property.

III. HISTORY OF ECCLESIASTICAL PROPERTY DISPUTES

In order to gain a proper understanding of the issues surrounding the legal debate over implied trusts and ecclesiastical polities, it is important to understand the history of ecclesiastical property disputes. This article will explore the legal history behind church property disputes from before the time of Constantine up to the present. Understanding the development of the law in this matter should inform the reader's understanding of implied trusts in today's context.

A. Antiquity

Ecclesiastical property disputes are not a new phenomenon.[85] The early church historian Eusebius recorded a property dispute that occurred when a bishop, Paul of Samosata, was accused of teaching heterodox doctrine and was removed from the bishopric.[86] Upon the removal of Paul, the bishop Domnus was appointed to take over the church at Antioch.[87] Although he had lost the bishopric, Paul refused to relinquish control of the church

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82. *Id.* at 603.

83. *Falls Church*, 740 S.E.2d at 539 ("[A]ny express trusts purportedly created by the Dennis Canon were ineffective in Virginia.").

84. *Id.* at 540 ("In the present case, we need look no further than the Dennis Canon to find sufficient evidence of the necessary fiduciary relationship.").

85. EUSEBIUS, THE HISTORY OF THE CHURCH 248 (G.A. Williamson trans., Penguin Book 1965). Eusebius' account of the dispute between the Church and the wayward bishop Paul of Samosata is among the earliest accounts of an ecclesiastical property dispute being settled in a civil court. *Id.*

86. *Id.* Eusebius states that Paul of Samosata held "low, degraded opinions about Christ." *Id.* at 244. This charge sprang from Paul's regarding "Him as in His nature just an ordinary man." *Id.* Paul also sustained other charges, including robbing and manipulating his church, as well as depriving the injured of their rights. *Id.* at 246-47.

87. *Id.* at 248.

building.[88] The bishops appealed the issue to the Emperor Aurelian, who rendered a verdict for the bishops, and forced Paul to relinquish control.[89]

Such favorable legal treatment towards the church by the Roman government was more of an aberration than the norm before the reign of Constantine.[90] Before the Edict of Milan, Christians were subjected to harsh persecution under the Emperor Diocletian.[91]

In the years leading up to Diocletian's reign, churches had become more confident in their ability to acquire property and to expand architecturally.[92] Eusebius, who was a contemporary of this particular persecution, records that many Christians "[n]o longer satisfied with the old buildings . . . raised from the foundations in all the cities churches spacious in plan."[93] The Emperor Diocletian, eager to restore the glory of Rome through a renewed pagan piety, began a systematic persecution.[94] Part of the Diocletian persecution involved the seizure of church property.

The legal status of the church changed with the rise of Constantine to the imperial throne.[95] After Diocletian's death, control of the Roman Empire was divided between several emperors, among them was Constantine. Constantine ended the Diocletian persecution edicts in his portion of the empire, and began the process of providing restitution for the losses

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88. *Id.*

89. *Id.* Eusebius's full account is as follows:

> When Paul had lost both the orthodoxy of his faith and his bishopric, Domnus, as already stated, took over the ministry of the Antioch Church. But Paul absolutely refused to hand over the church building; so the Emperor Aurelian was appealed to, and he gave a perfectly just decision on the course to be followed: he ordered the building to be assigned to those to whom the bishops of the religion in Italy and Rome addressed a letter. In this way the man in question was thrown out of the church in the most ignominious manner by the secular authority.

Id.

90. *Id.* at 249 ("Such was the treatment that we received from Aurelian at that time. But as his reign went on, he changed his attitude towards us and was now pressed by some of his advisers to instigate a persecution against us . . . .").

91. Peter J. Leithart, *The Great Persecution*, FIRST THINGS (Mar. 28, 2012), http://www.firstthings.com/blogs/leithart/2012/03/great-persecution.

92. EUSEBIUS, *supra* note 85, at 257.

93. *Id.*

94. *Id.* at 258. Eusebius describes seeing "places of worship thrown down from top to bottom, to the very foundations, the inspired holy Scriptures committed to the flames in the middle of public squares . . . ." *Id.*

95. Peter J. Leithart, *Constantine and the Ecclesial Polis*, FIRST THINGS, (Mar. 10, 2009), http://www.firstthings.com/blogs/leithart/2009/03/constantine-and-ecclesial-polis.

suffered by the Christians in his region.[96] Upon the signing of the Edict of Milan, this process was extended to the entire empire.[97]

With legal recognition, the position of church property changed dramatically. Constantine, and then succeeding emperors, granted the church property.[98] Constantine engaged in an extravagant building program that constructed church buildings on the sites of landmark events in Christianity.[99] Constantine gave churches in Rome rent collected from various landed estates,[100] estimated at "more than four hundred pounds of gold per year,"[101] as well as large amounts of property.[102] These large gifts would "la[y] the foundations for the church's enduring wealth in later centuries."[103]

Even with the fall of the Roman Empire, Christianity in what used to be the Western Roman Empire and beyond continued to maintain property. Particularly, Christian missions were conducted among barbarian tribes, through use of monasteries maintained by the Benedictine monks. As antiquity came to a close and what we know as the Middle Ages dawned, the church was in a good position financially.[104]

B. Medieval

By the medieval period, the church had stupendous property holdings. "[I]t is said to have owned between one-fourth and one-third of the land of western Europe."[105] The church attained this land not only through gifts and taxes as mentioned above, but also through "agricultural, manufacturing, and commercial enterprises" maintained by the church through those properties.[106] The medieval period also resulted in the

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96. RODNEY STARK, THE TRIUMPH OF CHRISTIANITY 171 (2011).

97. *Constantine Christian History*, CHRISTIANITY TODAY (Aug. 8, 2008, 12:56 PM), http://www.christianitytoday.com/ch/131christians/rulers/constantine.html.

98. STARK, *supra* note 96, at 174.

99. *Id.* at 173-74. Constantine's building projects included churches on the sites of Jesus' tomb, the Mount of Olives, and the Nativity in Bethlehem. *Id.*

100. *Id.* at 174

101. *Id.* (internal quotations omitted).

102. *Id.* ("Constantine donated 'an extraordinary amount of property' to the church. Thus, 'massive grants of land and property were made . . . [and an] avalanche of precious metals.'").

103. *Id.*

104. *Id.*

105. HAROLD J. BERMAN, LAW AND REVOLUTION 237 (1983).

106. *Id.*

development of church canon law. These canons would speak to many issues, including issues of ecclesiastical property.[107]

Secular law's influence on canon property law surpasses its influence on other areas of canon law.[108] The church did not view property as having a sacramental character, thus secular law influenced canon property law more significantly than any other area of canon law.[109] The church saw property as a resource within the church's temporal power.[110]

Due to the feudal context of the medieval period, "ecclesiastical property rights were often closely interconnected with secular property rights."[111] The parish[112] would often hold the land of a bishopric[113] or abbey[114] and exercise feudal powers over that property.[115] There were even times when a bishopric might hold the same land as a baron.[116]

The interconnectedness created a dualistic approach to property law in regards to ecclesiastical property.[117] When a dispute arose over the ground rent owed by the parish to the bishopric or abbey, it would usually be settled in ecclesiastical courts according to canon law.[118] "[D]isputes over feudal dues and services owed by the bishopric or abbey to the baron would normally be within the jurisdiction of secular courts and would be settled by secular law[.]"[119] The church, in the exercise of its property rights, operated both within and outside of the feudal and urban economic orders.[120]

Although it was tied to secular law, canon law did not cede all property considerations to secular law.[121] There were actually ecclesiastical considerations and certain underlying canon law principles that continued

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107. *Id.*

108. *Id.* ("[T]he canon law of property was influenced by contemporary secular law to a much greater extent than was the canon law of family relations.").

109. *Id.* ("[I]t was never suggested that property—even ecclesiastical property—had a sacramental character.").

110. *Id.*

111. *Id.*

112. A parish is a jurisdictional unit of the church. *Id.*

113. A bishopric is land under the authority of a particular local bishop. *Id.*

114. An abbey is property related to the monastic orders. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 237-38.

118. *Id.*

119. *Id.* at 238. It should be noted that even in that context, "jurisdiction . . . might be a matter of contest between the ecclesiastical and the secular courts." *Id.*

120. *Id.*

121. *Id.*

to inform the medieval church's property law jurisprudence.[122] As a matter of fact, there were several contributions that carried over into secular law and continue to impact property law as a whole today.[123]

1. Impact of the Papal Revolution

To gain a complete understanding of the ecclesiastical position in regards to property, it is necessary to understand the development of ecclesiastical polity in relation to the state. Any proper understanding of this is not complete without an examination of the effect of the Papal Revolution. While modern scholars, often operating on a biased understanding of progress and history, have a hard time seeing anything "traditional" or "religious" as being revolutionary, it would be a great mistake to not see the monumental effect that the Papal Revolution had on Western Europe.

The Papal Revolution of Gregory VII is considered Europe's first "total revolution."[124] The Papal Revolution sparked over what is called the "investiture controversy," essentially a struggle between the king and the pope over who would have the power to appoint bishops.[125] This also raised the issue of who would elect the pope.[126] A fundamental struggle ensued between Gregory VII and the Holy Roman Emperor Henry IV.[127] In the course of the revolution, the doctrine of the two swords came to prominence.[128] This doctrine asserted that the church was supreme both in spiritual and temporal affairs.[129]

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122. *Id.*

123. *Id.* Harold Berman chronicles the impact of canon law rules on many subjects, including property law, it was used in the development of English common law. *See generally id.*

124. Peter J. Leithart, *Papal Revolution*, FIRST THINGS (Feb. 15, 2007), http://www.firstthings.com/blogs/leithart/2007/02/papal-revolution.

125. Robert Louis Wilken, *Gregory VII and the Politics of the Spirit*, FIRST THINGS (Jan. 1999), http://www.firstthings.com/article/1999/01/003-gregory-vii-andthe-politics-of-the-spirit.

126. Leithart, *supra* note 124.

127. The term fundamental is used here because the conflict struck at the very heart of what the Church was as a polity in relation to the state.

128. Leithart, *supra* note 124.

129. *See Doctrine of the Two Swords,* OXFORD REFERENCE, http://www.oxfordreference.com/view/10.1093/acref/9780198662624.001.0001/acref-9780198662624-e-5802 (last visited Oct. 4, 2015); *Resource Center, Dictionary: Two Swords,* CATHOLIC CULTURE, https://www.catholicculture.org/culture/library/dictionary/index.cfm?id=36967 (last visited Oct. 4, 2015) ("We are taught by the words of the Gospel that in this Church and under her control there are two swords, the spiritual and the temporal . . . both of these . . . the [spiritual] and the

The Papal Revolution created a dualism within the political world, contending that there were two sovereign powers.[130] Some have suggested that this dualism "created European freedom."[131] Dualism gave voice to the idea of a new sovereign, which was "realized [in the form of] 'the idea of a trans-local organization, a corporation.'"[132]

"Freedom of the church" was a rallying cry born out of the Papal Revolution.[133] The Magna Carta, one of the cornerstone documents of English liberty, states, "the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired."[134] That clause of the Magna Carta goes on to specifically protect the rights of the English Church to elect their own officials, free from the interference of the king.[135] This clause reflected an intent on the part of Bishop Stephen Langton, as well as the nobility, that the king not be allowed to interfere with the polity of the church.

Enjoying a newfound independence in the wake of the Papal Revolution, the church conducted itself in the manner of a trans-local corporation.[136] Under the canon law system, the constitutional structure of the church was expressed in the terms of corporation law.[137] Importantly, this included the

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temporal swords, are under the control of the Church. The first is wielded by the Church; the second is wielded on behalf of the church." (quoting Pope Boniface VIII)).

130. Leithart, *supra* note 124.

131. *Id.* (internal quotations omitted). European freedom can be said to have been created by the carving out of free space in civil society. *Id.*

132. *Id.*

133. *Id.*

134. MAGNA CARTA, cl. 1., http://legacy.forham.edu/halsall/source/ magnacarta.asp (last visited Nov. 21, 2015). The Magna Carta delineates the rights of the English Church as follows:

> First, that we have granted to God, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections - a right reckoned to be of the greatest necessity and importance to it - and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

Id.

135. *Id.*

136. Leithart, *supra* note 124. This was evidenced by the fact that the English Catholic Church was using confirmation from Pope Innocent III to assert its claims of independence from the crown.

137. BERMAN, *supra* note 105, at 225.

law of corporate jurisdiction over "particular classes of persons and particular types of subject matter."[138]

In terms of property law, ecclesiastical corporations owned ecclesiastical property.[139] Because property was owned by the corporation, it was "committed to the purposes of the corporation."[140] This tied the property to a particular purpose.[141] Some examples of how ecclesiastical corporations would find their expression include monastic houses, hospitals, universities, dioceses, and even the papacy itself.[142]

2. Ecclesiastical Corporation Officers as Trustees

The officers of these ecclesiastical corporations acted as trustees for the property owned by the ecclesiastical corporation in their charge.[143] As trustees, they had a legal duty under canon law to use the property for the benefit of those for whom the property was acquired.[144] This means that if the property were set aside for use as a hospital, then the officers of the hospital would be responsible for ensuring that the property was used for that purpose.[145] Interestingly, the secular English concept of trust that is considered in this Note, finds its origin in the canon law designation of property on the basis of its "use."[146]

While the trustee was technically considered the owner of the property, he was bound by law to administer the property for its intended use.[147] Originally, this rule was within the jurisdiction of canon law, but in England, through the progress of time, it eventually expanded to fall within the jurisdiction of the Chancellor's court.[148]

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138. *Id.*

139. *Id.* at 239.

140. *Id.*

141. *Id.* This will prove to be of significance when one considers the general direction that the law of implied trusts is trying to take ecclesiastical property ownership.

142. *Id.*

143. *Id.* It should be noted that the understanding of "trust" was somewhat different and less specific than one would mean when using the term today.

144. *Id.*

145. *Id.*

146. *Id.* ("[T]he English concept of the trust was derived historically from the concept of the 'use,' which was known and used throughout Europe from the twelfth century on, and which was developed in England in the chancellor's court in the fourteenth and fifteenth centuries.").

147. *Id.*

148. *Id.*

The three parties to a trust, and to the medieval "use," were first, a donor, now known as a settlor, defined as one who has placed the property in trust for someone else, second, the donee, and third, the beneficiary.[149] The ecclesiastical corporation had the distinction of being both the donee and the beneficiary.[150] When one would donate a gift to the church, and the ecclesiastical corporation's officers would exercise the right to possess, the right to transfer, or the right to use the property, the only condition was that they had to do so in accordance with their duties as trustees.[151] Another concept used by the medieval canonists was that of a "corporation of goods."[152] This concept has not been explicitly carried over into modern English law but does find expression in the civil law systems of the continent.[153] The corporation of goods personifies the purpose for which the property is to be used.[154] Under this arrangement, the corporation would consist not only of persons, but also of whatever good the ecclesiastical organization was created to achieve, strongly tying the use of the property to the purposes of the corporation.[155]

C. Reformation and Establishment of Religion

With the division of Christendom and the end of the medieval era, new realities emerged. More specifically, for English and American law, the establishment of the Church of England under Henry VIII marked the beginning of a shift in the relation of civil authority to ecclesiastical property.[156] Under Henry, the Church of England declared itself independent of papal authority, claiming continuity with the pre-separation church, but asserting new leadership.

The headship of the Church of England shifted from the pope to the king.[157] This change in headship resulted in the creation of new institutions

149. *Id.*

150. *Id.*

151. *Id.* This is still the rule in English and American corporate law. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 239-40.

155. *Id.*

156. *See Church History,* THE ANGLICAN DOMAIN, http://www.anglican.org/church/ChurchHistory.html (last visited Jan. 16, 2016).

157. R.B OUTHWAITE, THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS: 1500-1860 15 (2006).

and procedures to address appeals.[158] It also resulted in changes in the power of the church in relation to the crown. The English Reformation changed the context of the exercise of governmental power.[159] Before the reformation, the church and crown had operated with legal systems that were theoretically separate from one another, however, even before Henry initiated the break with Rome, this was beginning to change.[160]

At the end of the 15th century, and increasingly until Henry came to power, the church courts came under the supervision of the crown's legal apparatus.[161] While the church and state were technically independent of one another, time and circumstances had bound all of English society, including the church, together in a more unified state.[162] With increasing regularity, disputes that would normally be settled within ecclesiastical courts made their way into the king's court.[163] Certain inconspicuous litigation would "regularly appl[y] common rules of property, obligations, and wrongs to the affairs of the institutional church and to relationships within the parish about religious subject matter."[164]

When Henry became the head of the Church of England, it meant he became the head of the church court system in England.[165] While he allowed the church courts to survive, their context was changed.[166] Rather than being viewed as the English arm of a foreign entity, the church courts in England came to be viewed as an instrument under the control of the

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158. *Id.* While there were some new procedures instituted, the basic structure and administrative procedures within English ecclesiastical courts remained the same. *Id.*

159. ROBERT C. PALMER, SELLING THE CHURCH: THE ENGLISH PARISH IN LAW, COMMERCE, AND RELIGION: 1350-1550 237 (2002).

160. *Id.* One reason for this change was the social upheaval brought on by the Black Death. *Id.* at 48.

161. *Id.* at 237.

162. *Id.* at 15 (" State and church remained independent structures, as dictated by the flexible resolution of the Investiture Controversy of the eleventh century. Still, as in any society, the independence of different governance structures was in many ways restricted to form. Centuries and necessity had forged processes and accommodations that bound England together under the monarch into a comparatively cohesive state.").

163. *Id.* at 49.

164. PALMER, *supra* note 159, at 49 ("Church personnel often found royal courts more convenient than ecclesiastical courts for handling problems. The king's court acted on person and property, rather than on one's soul; in many contexts, that pragmatic approach was more effective.").

165. *Id.* at 237.

166. *Id.*

king.[167] This meant that there were new grounds for testing the relationship between these church courts and the king's court.[168]

Henry used the form of continuity to mask the changes occurring in both jurisdiction and law.[169] Under the new arrangement, property rights changed and governmental power centralized.[170] One result of this change was the dissolution of religious houses.[171] Religious houses had made extensive use of the trustee-style "uses" concept.[172] Specifically, religious houses had been operating as beneficiaries in England since the fourteenth century.[173] Because the use system had required the property to be directed for such a purpose as benefits the beneficiary, this created a moral dilemma for what to do with the property belonging to monasteries and religious houses.[174] Henry eliminated this problem by giving the monasteries the legal ownership interest instead of a merely beneficial interest.[175] As a practical matter, this move represented a localization of control. As mentioned earlier, under the medieval system, the church was both the donee and beneficiary.[176] The possibility of external influence and control was somewhat dissipated by localizing the control and giving legal interest to the monastery. A statute passed in 1531 limited parish endowments by use to twenty years.[177]

To create a framework for the new arrangement, Henry devised a statute of uses.[178] This statute expanded from the previous bill of primer seisen, which treated the beneficiary "as if he were" seised.[179] Under the statute the beneficiary was in seisin.[180] The significance of this shift is that these rights were no longer flowing as a matter of canon law jurisprudence, but rather through the statutes of a king. While the church enjoyed a non-adversarial

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167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *See* BERMAN, *supra* note 105.
173. PALMER, *supra* note 159, at 235.
174. *Id.* at 236.
175. *Id.*
176. *See supra* note 150.
177. PALMER, *supra* note 159, at 236.
178. *Id.*
179. *Id.* at 235.
180. *Id.*

relationship in which it could depend on the state for patronage, it also became more vulnerable to the state.[181]

D. Rise of Rationalism and Disestablishmentarianism

After the Church of England became the established church of the state, dissent grew against the church holding this status. It was not that the critics were charging the church with being corrupt, but the critics viewed the church as being too hierarchical and too large, a "vast property-owning organization."[182] Many Separatist and Puritan movements viewed this as antithetical to New Testament principles.[183]

Traditionally, theorists viewed the established church as a public service, provided by the government similar to transportation or protection.[184] However, in his 1736 work entitled, *Alliance between Church and State*, Bishop William Warburton suggested that churches exist apart from the state, and that the established church is merely the particular church that is chosen by the state to be established.[185] By the mid-nineteenth century, this was the mainstream view.[186] It is also the view of the American states that broke away from Britain and formed the United States.[187] This is evident by the First Amendment jurisprudence that cautions against giving a particular church the preeminent place of being "established."[188] Soon, not only in the former American colonies, but in other areas of the then-current British Empire, the Church was being disestablished.[189]

When the church became disestablished, the courts began to apply the same legal standards to the Church of England, or what had now become known as the Episcopal Church, as was applied to the dissenting churches under common law.[190] There were three principles that formed the jurisprudence towards the dissenting churches.[191] First, the court would not

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181. *Id.* at 49.

182. ROBERT E. RODES, JR., LAY AUTHORITY AND THE REFORMATION IN THE ENGLISH CHURCH: EDWARD I TO THE CIVIL WAR 187 (1982).

183. *Id.* at 188.

184. ROBERT E. RODES JR., LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND: CHARLES II TO THE WELFARE STATE 318 (1991).

185. *Id.*

186. *Id.*

187. *See generally* U.S. CONST. amend. I.

188. *Id.*

189. RHODES, *supra* note 184, at 321.

190. *Id.*

191. *Id.*

intervene unless there was a justiciable issue.[192] Usually a justiciable issue would include issues such as property, but specific religious ministrations would not be decided by the court.[193] Second, a trust for a religious body was treated in the same way any other charitable trust would be treated.[194] The court considered the trust instrument in making this determination.[195] So if a trust instrument stipulated that property was to be used for the purposes of a particular denomination, then the court would enforce that aspect of the instrument.[196] Likewise, if the instrument stipulated that the trustees submit to the authorities within a denomination, the court would enforce that stipulation.[197] Third, the individual members of a congregation impliedly agreed to abide by the rules of the denomination by participating in its affairs.[198]

In addition to the three principles, the British Judicial Committee added a fourth principle regarding churches that were once established and now, due to geographic and political changes were no longer established.[199] If the church had once had its affairs regulated by law, then its members and the trustees of its property would be considered to have agreed to those rules.[200] This Note has considered these principles because, even though the Episcopal Church is not established in any American state, the legal principles that lead to the establishment of an implied trust are applicable here.

E. The Modern Era and Recent History

Today it is common among legal scholars to view religious polity in terms of voluntary associations as opposed to ecclesiastical bodies existing

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* This is especially pertinent in *Falls Church v. Protestant Episcopal Church in the U.S.*, where the Virginia Supreme Court considered it significant that the Falls Church congregation had participated in the polity of the Episcopal Church. It found an implied trust on this basis. 740 S.E.2d 530, 541- 42 (Va. 2013).

199. RODES, *supra* note 184, at 321.

200. *Id.* This was used for the Church of England in the colonies, and for the Roman Catholic Church in French Canada. *Id.*

as unique entities.[201] Some legal scholars, many of whom make exclusivist claims to modernity, assume from the outset that religious bodies are completely on par and that they are the product of human choice as opposed to divine purpose.[202] Inherent with this view of the law is the assumption that courts and administrative agencies must always make decisions regarding religious polities within a civil legal framework.[203] During the course of the 19th and 20th centuries, there was a gradual move away from the trust doctrines related to purpose that had been present in previous centuries.

Under English common law, a system of implied trusts had been developed as a method for addressing intra-church property disputes.[204] Part of this implied trust system involved an examination of the doctrine of the church by the court, whereby the court determined whether one of the parties had diverted from the original doctrine of the church.[205] This method was treated unfavorably in some lower American courts.[206]

A string of United States Supreme Court decisions, beginning with *Watson v. Jones*, gradually chipped away at the common law maxim that the court could tie the use of church property to doctrinal purpose.[207] The *Watson* Court disapproved the departure-from-doctrine element.[208] The Court "rejected the English doctrine of implied trust by deferring to the decisions of church judicatory bodies."[209] It made the caveat that when the

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201. Martin E. Marty & James A. Serritella, *Religious Polity*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 85 (James A. Serritella et al. eds. 1st ed. 2006) ("They may resent it that . . . 'a church as church has no legal existence in the United States. It is represented legally by a civil corporation' and is 'a voluntary association of like-minded individuals, who are united on the basis of common beliefs for the purpose of accomplishing tangible and defined objectives.'").

202. *Id.* at 86.

203. *Id.*

204. H. Reese Hansen, *Religious Organizations and the Law of Trusts*, *in* RELIGIOUS ORANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 286 (James A. Serritella et. Al. eds. 1st ed. 2006).

205. *Id.*

206. Hansen, *supra* note 204, at 286 ("In 1846, the Vermont Supreme Court rejected the doctrine [of implied trusts] noting that it depended on judicial consideration of church doctrines, a practice that 'could not . . . be tolerated in this country.'").

207. *Id.* at 287 (citing Watson v. Jones, 80 U.S. 679 (1871)).

208. *Id.* at 334; *see generally* Watson v. Jones, 80 U.S. 679 (1872).

209. Hansen, *supra* note 204, at 287 (internal citation omitted).

church had a congregational or independent societal form of government, then the laws normally governing voluntary associations would be used.[210]

Because *Watson* involved only dicta against the departure-from-doctrine element, numerous state courts continued to follow the common law maxim.[211] Due to the possible need for religious bodies to change doctrines over time, these courts modified the departure-from-doctrine element.[212] It would require a "substantial" departure from doctrine before the court would intervene against the deviating party.[213] Some lamented the fact that this forced courts to touch the question of doctrine and to consider how important that particular doctrine was to the overall theology and practice of the church.[214]

Nearly a century later, the Court held in *Presbyterian Church in the United States v. Mary Elizabeth Hull Memorial Presbyterian Church* that the use of the departure-from-doctrine element was unconstitutional.[215] The Court did not eliminate the possibility of using implied trusts, but stated that only civil law principles may be considered in determining which party will prevail.[216] While the *Hull* Court discussed the use of neutral property and trust law principles, it affirmed the principle of deferring to the highest authority within a hierarchical religious polity.[217] The Court then sustained the permissibility of using neutral principles with its decision in *Jones v. Wolf*. Currently, each state has the choice of applying either neutral principles or deference, with some states applying a hybrid approach.[218]

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210. *Id.* This raises a constitutional question as to whether congregational bodies may be treated differently under the law as are hierarchical religious bodies.

211. Hansen, *supra* note 204, at 287.

212. *Id.*

213. *Id.*

214. *Id.* at 287-88.

215. *Id.* at 288.

216. *Id.* at 288 ("[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded . . . [T]he Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." (quoting Presbyterian Church in the United States v. Mary Elizabeth Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969))).

217. *Id.* at 289 (citing Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696 (1976)).

218. *Id.* at 291 ("Since *Hull* and *Jones*, state court decisions have tended to divide into three theoretical positions, two of which are roughly analogous to the strict deference and strict neutral principles positions of the Supreme Court. The third approach purports to

IV. FUTURE JUDICIAL POLICY AND THE *FALLS CHURCH* DECISION

A. How the Virginia Supreme Court Applied Neutral Principles

Historically, Virginia has disdained denominational trusts for property.[219] Hierarchical churches were prohibited from relying on denominational trusts whether those trusts were expressed or implied.[220] As a matter of fact, when the Dennis Canon was enacted into the canons of the Episcopal Church in 1979, the existing Virginia Code provision forbade holding property in trust for a hierarchical church.[221] Under Virginia Code § 57-7, the exercise of property rights were restricted to the congregational level of ecclesiastical governance.[222] It specifically made an allowance for the conveyance, devising, and dedication of land for "the use and benefit of any religious congregation."[223]

The General Assembly changed its approach in 1993 when it amended the Virginia Code to allow for hierarchical churches to hold property in trust.[224] Under Virginia Code § 57-7.1, property could be conveyed or held in trust by any "church, church diocese, religious congregation or religious society."[225] This meant that hierarchical churches could have congregations hold the property in trust for the larger congregational bodies. Regarding the change, Professor A.E. Dick Howard stated, "The General Assembly has acted to sweep away that anachronistic and unconstitutional provision. In enacting § 57–7.1, the legislature did what needed to be done."[226]

There is some question as to whether the General Assembly had the right to restrict the property rights of hierarchical churches in the first place.

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follow neutral principles, but invariably interprets the documents examined as imposing either an express or implied trust in favor of the church hierarchy on the disputed property.");

see also Presbyterian Church, 393 U.S. 440; Jones v. Wolf, 443 U.S. 595 (1979).

219. Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530, 537 (Va. 2013). "The General Assembly has not . . . validate[d] trusts for a general hierarchical church and such trusts would be invalid." Norfolk Presbytery v. Bollinger, 201 S.E.2d 752, 758 (Va. 1974).

220. *Falls Church*, 740 S.E.2d at 537.

221. *Id.* at 539.

222. *Id.* at 538.

223. VA. CODE ANN. § 57-7 (repealed 1993).

224. VA. CODE ANN. § 57-7.1 (West 2005).

225. *Id.*

226. *Falls Church*, 740 S.E.2d at 545 (McClanahan, J., concurring).

Justice McClanahan addressed that point in her concurrence.[227] It was her opinion that the majority wrongly assumed that the Dennis Canon was void because Virginia Code § 57-7 rendered it so.[228] In her opinion, the First Amendment prohibited former Code § 57-7, rendering it void in regards to its effect on the Dennis Canon passed in 1979.[229] The Establishment Clause of the First Amendment places a bar on government entities establishing any one religion.[230] This would also prevent the Commonwealth from treating one religious entity with more favor than another.

The majority did not agree with the constitutional argument and held that the express trust created by the Dennis Canon was not valid under Virginia law.[231] Even though an express trust would have been valid before the Virginia legislature enacted Code § 57-7, the statute as it existed served to invalidate the trust.[232] Therefore, the court stated that the Falls Church property was not being held in an express trust for the Episcopal Church.[233]

B. Hybrid Approach

While the Virginia Supreme Court used the language of "neutral principles" it was actually applying a hybrid approach.[234] The hybrid approach is identifiable based upon its use of the implied trust.[235] Patty Gerstenblith makes the point that the courts employing the hybrid approach, "[w]hile employing the language of neutral principles and examining church documents and state statutes . . . are nonetheless applying a concept that is entirely unique to church-related cases."[236] Neutral principles involve making use of the property and contract law

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227. *Id.*

228. *Id.*

229. *Id.* at 545.

230. *See generally* U.S. CONST. amend. I.

231. *Falls Church*, 740 S.E.2d at 539.

232. *Id.* "[U]nless the language shows a contrary intent, the language of an *inter vivos* trust should be construed according to the law in effect at the time the trust is executed." McGehee v. Edwards, 597 S.E.2d 99, 101 (Va. 2004).

233. *Falls Church*, 740 S.E.2d at 539 ("Thus, any express trusts purportedly created by the Dennis Canon were ineffective in Virginia.").

234. Patty Gerstenblith, *Civil Court Resolution of Property Disputes among Religious Organizations, in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 335 (James A. Serritella et al. eds. 2006).

235. *Id.* ("[T]hose courts that apply the 'hybrid' approach to resolve church property disputes, although claiming to adopt neutral principles, actually use the implied trust theory.").

236. *Id.*

already available and at the disposal of the judges.[237] This is one of the key reasons that Justice Blackmun gave in *Jones* for applying the neutral principles approach.[238] For those who advocate use of the neutral principles approach exclusively, anything outside of these secular principles is not truly a neutral principles approach.[239]

C. Implied Trust

There are two circumstances when an implied trust is applied.[240] The first is a resulting trust that arises when "circumstances indicate that the settlor did not intend the titleholder to take the entire interest in the property."[241] The other type of implied trust is a constructive trust, which is used as a matter of equity.[242] In *Falls Church*, the Virginia Supreme Court employed a constructive trust.[243]

As noted above, the court applied a constructive trust because the express trust set forth in the Dennis Canon was created before the Virginia General Assembly amended the Virginia Code to allow for hierarchical corporations to have property held for the general church in trust.[244] Because there was a lack of statutory authority for the court to draw upon, it had to employ a constructive trust to achieve an equitable result.[245]

The implied trust can be traced back to a time when religious organizations were not recognized as corporations, a situation that still exists in Virginia, and were prevented from owning property in their own right.[246] Instead, property conveyance would be made to the individual minister or priest.[247] This system was an early antecedent to the corporation sole.[248] There were other circumstances where the trust held by the religious

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237. Jones v. Wolf, 443 U.S. 595, 603 (1979).

238. *Id.*

239. Gerstenblith, *supra* note 234, at 335.

240. *Id.* at 331.

241. *Id.*

242. *Id.* at 331-332

243. Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530, 540 (Va. 2013).

244. *Id.* at 539.

245. *Id.* at 539-540.

246. Gerstenblith, *supra* note 234, at 333.

247. *Id.*

248. *Id.* A corporation sole is a corporation consisting of one person.

leader was considered held for the benefit of the church or entire denomination.[249]

D. Implied Trust and the Connection to Departure-From-Doctrine Theory

Critics of the implied trust theory compare it to the departure-from-doctrine theory that the Supreme Court disapproved in *Watson*, and declared unconstitutional in *Hull*.[250] While critics acknowledge that the doctrine element is no longer considered, they maintain that the deference to the hierarchy that results from the implied trust is similar.[251] Although the modern implied trust approach does not include an analysis of doctrine, it does defer to the hierarchy of the religious polity.[252] This creates a situation where "the hierarchy remains the beneficiary of the implied trust, regardless of any doctrinal changes, and the faction loyal to the hierarchy retains control of the local entity and its property."[253] The assumption is that the local entity has impliedly agreed to follow the regulations of the national organization.[254] An examination of the relationship will determine whether the local entity has agreed to the rules that the national organization has set forth.[255] In *Falls Church*, the court considered the relationship between the Falls Church and the main Protestant Episcopal Church.[256] It considered the fact that Falls Church had received visiting bishops from the general church, as well as the fact that Falls Church had sought permission from the Diocese before encumbering property in the past.[257] It is clear, then, that the Virginia Supreme Court followed the implied trust method of examining the relationship between the parties.

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249. *Id.*

250. *Id.* at 334

251. *Id.* at 334 ("Without the requirement of loyalty to the original religious doctrine . . . the hierarchy remains the beneficiary of the implied trust . . . .").

252. *Id.*

253. *Id.*

254. *Id.*

255. *See id.*

256. Falls Church v. Protestant Episcopal Church in the U.S., 740 S.E.2d 530, 540-41 (Va. 2013).

257. *Id.* at 535.

V. DIRECTION THAT THE COURTS SHOULD TAKE

A. Resurrect the Departure-from-Doctrine Principle

While the continued use of the implied trust doctrine is a good step, the courts should follow through with the original intent of the implied trust doctrine and reinstate the common law departure-from-doctrine principle. There are two reasons why the Supreme Court should consider establishing new precedent in this matter. First, the goal of an implied trust, historically, has been to preserve the property for a particular purpose. If property cannot be tied to purpose, then the need for an implied trust is greatly diminished or eliminated. Second, there is no need for the court to redefine the purpose for a particular piece of property. If property is to be held in trust for a particular doctrinal or religious purpose and the court is unable to even mention or consider that religious doctrine, then the court must either arbitrarily declare the property to not be held in trust, or it must arbitrarily change the purpose for holding the property.

The historical purpose of the implied trust doctrine is tied to retaining the doctrinal loyalty of whatever party is in control of the encumbered parcel. The Supreme Court of Pennsylvania perhaps stated the issue best when it held that "[t]he guarantee of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches."[258] The court went on to explain how the religious freedom element in question was the freedom of the dissenting congregation to leave and establish a new church on new property.[259] There was not a freedom, however, to use property that had been granted in the form of a trust for another purpose or in pursuit of another doctrine than was intended in that trust.[260] This was the American view adopted from England where property was still tied to doctrinal adherence as per the common law.[261] The departure-from-doctrine element was only slightly modified to distinguish between fundamental and immaterial deviations.[262] It was not until later in American jurisprudence that the Supreme Court and other courts decoupled doctrine from purpose and, in effect, forbade the use of implied

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258. Justin M. Gardner, *Ecclesiastical Divorce in Hierarchical Denominations and the Resulting Custody Battle over Church Property: How the Supreme Court Has Needlessly Rendered Church Property Trusts Ineffectual*, 6 AVE MARIA L. REV. 235, 249-50 (2007).

259. *Id.* at 250.

260. *Id.*

261. *Id.* at 249 ("The implied trust doctrine, with its corollary departure-from-doctrine test, became the accepted practice of England . . . .").

262. *Id.*

trusts to secure doctrinal ends.[263] While the Court has decoupled a departure-from-doctrine element from the implied trust doctrine, their reasons for doing so are not entirely sound. The *Watson* Court and subsequent courts assumed that the judiciary is forbidden from considering religious doctrine. This, however, is not entirely true.

This raises the second point. It is unnecessary and improper for courts to redefine the purposes for which an implied trust exists. There are other instances where courts have recognized and given application to a certain holding on the basis of religious doctrine.[264] Recently, in *United States v. Meyers*, Mitchell Meyers claimed that he was the founder and reverend of the Church of Marijuana and that he had a religious command to use, grow, possess, and distribute marijuana.[265] The Tenth Circuit Court of Appeals affirmed Meyers' conviction on the basis that his beliefs were not sufficient to constitute religious belief.[266] It examined whether the "religion" made metaphysical claims and maintained rituals and a belief system.[267] The court was able to use a determination regarding religious doctrine in coming to its conclusion. An inability to do this would have led to the court simply having to take Mr. Meyers' word that he was the founder of a new religion.

There is a difference between applying preexisting religious doctrines or laws that the parties have bound themselves to and making pronouncements regarding what that religious law or doctrine is.[268] It would not be a violation of the First Amendment for the courts to acknowledge the factual existence of the religious doctrines of a denomination and to determine whether, as a matter of fact, the congregation or general church has deviated from that doctrinal standard.

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263. The first time the U.S. Supreme Court took up a church property issue in *Watson v. Jones*, it did not employ the older English common law departure from doctrine principle. The Court noted that there was no express trust tying the property to the propagation of any special religious dogma, only an understanding that the property was to remain with whatever body could legitimately claim to be the congregation. Watson v. Jones, 80 U.S. 679, 726-27 (1871).

264. Gardner, *supra* note 258, at 258.

265. *Id.* at 260.

266. *Id.*

267. *Id.*

268. *Id.* at 261. One example used to explain this is that the courts cannot tell the Roman Catholic Church who the Pope should be; however, it can acknowledge that there is a Pope. The first is a normative determination; the second is a factual determination. *Id.*

Even after *Watson*, various state courts did not have a problem making these factual determinations.[269]

If the departure-from-doctrine element were restored, the outcome of *Falls Church v. Protestant Episcopal Church in the U.S.* may have been different. The question would have been whether the Virginia Supreme Court believed that the general church's move from standard Christian orthodoxy on various matters constituted a fundamental departure. One of the issues being debated is the nature of marriage. Because issues such as marriage are so fundamental to the church's self-understanding,[270] the Court would likely find a departure by either the individual congregation or the general church on this matter to be a fundamental departure.

B. Deference to Religious Polities is Currently the Best Option

In the alternative, due to the precedent set in *Hull*, the best option for courts to pursue is deference to the decisions of religious polities. The Virginia Supreme Court recognized that without the departure-from-doctrine element, the application of an implied trust would tie the purpose of the property to use for the benefit of the general church. Congregations are by their nature temporary. The congregation that existed in the Falls Church of 1828 is not the same congregation that exists there today. The congregation has considered itself, throughout its history, to be a constituent part of the Episcopal Church. The Episcopal Church continues to exist as a corporate body and therefore, the implied trust must be understood in deference to the highest authority within the religious polity.

The application of a deference model would have produced the same result here as in *Falls Church*. Because the Virginia Supreme Court employed a hybrid approach,[271] it applied an implied trust, which arrived at the same result as would a strict deference model.

VI. CONCLUSION

In a pluralistic society it is important that the religious customs and practices of various groups be given the freedom to operate, provided they do so within the boundaries of the law. It is legitimate for religious polities

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269. Gerstenblith, *supra* note 234, at 334. The departure-from-doctrine element was disapproved in *Watson v. Jones* but was not held unconstitutional until the *Hull* decision. *Id.*

270. Marriage is a sacrament of the Episcopal Church. THE EPISCOPAL CHURCH, WHAT WE BELIEVE, *The Sacraments*, http://www.episcopalchurch.org/page/sacraments (last visited Dec. 29, 2014).

271. *See supra* Part IV(B).

to create rules for how their material possessions are held and used. The court's role is to ensure that the corporate constitutions and contractual understandings that exist between the factions of these religious polities be enforced.

Some legal scholars, who are more than happy to see contracts regarding business matters performed, suddenly become squeamish when presented with enforcing the terms of a religious polity. Perhaps it is that they are not knowledgeable enough in the history or traditions of the common law to feel comfortable making such decisions. It could be that they are worried that any legal recognition of religious polity or rules will be a violation of the First Amendment. A more sinister possibility is that some of them want to see religious polities receive limited or no recognition at all, due to a desire to further push religion out of public life. Whatever the reason may be, courts would do well to consider the historical and legal ramifications of undermining religious polities. If religious polities are important to the functioning of a pluralistic society, then this issue is perhaps of paramount importance to the ability of our society to operate in cohesion.