

POSSESSION IS NINE TENTHS OF THE LAW: BUT WHO
REALLY OWNS A CHURCH'S PROPERTY IN THE WAKE OF A
RELIGIOUS SPLIT WITHIN A HIERARCHICAL CHURCH?

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INTRODUCTION

Courts across the country face a perplexing legal issue regarding the ownership of church property. In the wake of the ordination of an openly gay bishop in 2003, local congregations have broken away from the Protestant Episcopal Church in the United States of America, leading to contentious property disputes over both the real and personal property of the churches.¹ This continual religious saga² has lead many legal scholars and ordinary citizens alike to wonder who should be entitled to the property after the split. The problem that arises in adjudicating this legal issue is the sparse continuity in court decisions addressing property ownership in the wake of a religious “divorce.” With limited guidelines articulated by the Supreme Court,³ the states are free to craft their own arsenal for handling church property disputes.⁴ As social issues⁵ increasingly stimulate American religious debate, the need for courts to develop a bright-line rule for handling church divisions is ever present, considering the likelihood that these issues will continue to drive a wedge between congregations and higher ecclesiastical bodies.⁶ Virginia provides a perfect starting point for crafting a bright-line rule that all states should eventually follow, considering the existence of a post-Civil War statute meant to handle such religious property disputes.

Beginning in December 2006, fifteen traditionalist Virginia Episcopal parishes voted to break away from the Episcopal Diocese of Virginia (the “Diocese”) and the Episcopal Church of the United

1. Neela Banerjee, *Church Dissidents Lose Property Appeal*, N.Y. TIMES, June 28, 2007, available at <http://www.nytimes.com/2007/06/28/us/28church.html>.

2. While the saga should certainly be characterized as religious by nature of the parties involved, it does not automatically mean that a court’s resolution of such church property disputes violates the First Amendment. See *infra* Part I.B.

3. See *infra* Part I.B.2.

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

5. Such issues include whether the Bible recognizes homosexuality and gay marriage, the hierarchical church’s responsibility to the poor, and a woman’s place within the church hierarchy, to name a few. As American society continues to move forward, the nation will confront new social issues, and at some point, the highly contentious issues will affect religion.

6. See Michael Paulson, *Episcopal Leaders Act To Avert a Schism*, BOSTON GLOBE, Sept. 26, 2007, at A1 (discussing the attempt of Episcopal bishops in the United States “to head off a schism over gay rights and biblical interpretation”).

States (the “Episcopal Church”).⁷ The decision to disaffiliate with the Diocese and Episcopal Church⁸ stemmed from a disagreement over the Episcopal Church’s position on homosexuality, representing what the parishes considered a deeper affront to the teachings of the Christian faith and Scripture.⁹ The parishes voted to affiliate with the Convocation of Anglicans in North America (“CANA”), a branch of the Anglican Church of Nigeria.¹⁰ The parishes also incorporated their own diocese, the Anglican District of Virginia (“ADV”) on December 5, 2006.¹¹ As a result of the separation, the local parishes and the Episcopal Church, along with the Diocese, have both claimed ownership of the real and personal property presently occupied and held by the parishes’ trustees.¹²

The courts left to resolve these disputes have a choice between two different Supreme Court frameworks: the deference approach and the neutral principles doctrine.¹³ The deference approach

7. Laurie Goodstein, *National Briefing South: Virginia: Church Claims Ownership of Property*, N.Y. TIMES, Jan. 20, 2007, at A12. Members of the fifteen Virginia congregations represent about 7 percent of the Diocese of Virginia. Michelle Boorstein, *Trial Begins in Clash Over Virginia Church Property*, WASH. POST, Nov. 14, 2007, at B01.

8. See *infra* Part II.A. for a discussion on the difference between the Diocese and the Episcopal Church.

9. Anglican District of Virginia, Legal Background, <http://www.anglicandistrictofvirginia.org/> (follow “Legal Defense”) (last visited Sept. 20, 2008) [hereinafter Legal Background]; see also Alan Cooperman & Michelle Boorstein, *Congregants in Legal Limbo Over Who Gets the House*, WASH. POST, Jan. 29, 2007, at B03 (“The theological disputes go back more than 30 years to controversies over the ordination of women and changes in the Book of Common Prayer. Conservatives say that consecration of New Hampshire Bishop V. Gene Robinson, who is gay, was the latest move by the Episcopal Church away from Christian orthodoxy.”); Boorstein, *supra* note 7 (“Traditional Anglicans are frustrated with decades of what they see as watered-down Christianity, and the dispute threatens to split the Communion.”).

10. Legal Background, *supra* note 9. The Anglican Church of Nigeria is a constituent member of the Anglican Communion, comprising over seventy-seven million members worldwide. *Id.* The Anglican Communion serves as the worldwide affiliation for Anglican Churches across the globe in full communion with the Church of England and its primate, the Archbishop of Canterbury. The Anglican Communion Official Website, Anglican Communion Information Leaflet, <http://www.anglicancommunion.org/resources/acis/pdf/ac.pdf> (last visited Sept. 20, 2008) [hereinafter Information Leaflet]. See *infra* Part II.A for a discussion of the organization of the Episcopal Church.

11. Legal Background, *supra* note 9.

12. Only eleven of the fifteen breakaway congregations are involved in the litigation over the church property in Northern Virginia worth an estimated \$30 million. Boorstein, *supra* note 7.

13. See *infra* Part I.

requires courts to accept the decision regarding property ownership made by the hierarchical church's judicial bodies,¹⁴ while the neutral principles approach allows courts to determine the question of property ownership so long as the decision is based on neutral principles of law.¹⁵ Under the neutral principles of law doctrine, states are free to craft their own mechanism for handling religious property disputes so long as their courts refrain from deciding any doctrinal issues.

Virginia enacted a statute long before the existence of the current church property dispute within its borders and long before the establishment of the neutral principles of law doctrine in *Jones*. Virginia Code section 57-9 specifically addresses who retains legal title to church property when a division occurs within a hierarchical church. The statute grants congregations the right to determine, by majority vote, to which branch of the church the congregation wishes to belong if a division occurs within the church.¹⁶ If the determination is approved by the court, it shall be conclusive as to the title to and control of any property held in trust for the congregation.¹⁷ The key interpretive question of Virginia Code section 57-9 is how one defines a "division" within a church.

This Note argues that, in order to create uniformity within the Commonwealth of Virginia,¹⁸ "division" as used in section 57-9 should mean a factional separation within the hierarchical church between the national church and an aggregate of congregations. A factional separation only occurs if an *aggregate* of congregations, determined on a macro-level, disaffiliates with the national church due to distinct views of church doctrine. The nature of the church doctrine has no relevance to the determination of division; the analysis should focus solely on whether the aggregate of congregations are separating from the national church because of the *same* doctrinal dispute. If no such division has occurred and a parish

14. See generally *Watson v. Jones*, 80 U.S. 679 (1871).

15. See generally *Jones v. Wolf*, 443 U.S. 595 (1979).

16. VA. CODE ANN. § 57-9(A) (2007).

17. *Id.*

18. Cooperman & Boorstein, *supra* note 9 ("[I]ndependent legal experts say part of the problem is that the law in this area has become increasingly unsettled as courts in various states have taken differing approaches and arrived at differing conclusions about who gets the assets in a church divorce.").

votes to disaffiliate from the church, then the parish abandons the property held by the parish's trustees. The hierarchical church to which the parish previously belonged would then become the rightful owner of the property by nature of their claim to the property and the invalid action of the local church in voting to disaffiliate.

In order to settle the present dispute among the eleven Virginia Episcopal parishes, as well as any future disputes among congregations and the hierarchical church to which they belonged, courts should adopt the bright-line rule proposed by this Note. Such an approach will be beneficial for the judicial system because it will enable courts to resolve church property disputes expeditiously by addressing the sole question of whether a division existed within the church. Churches within Virginia will benefit equally from a bright-line rule because knowing how a court will resolve their property dispute may prevent congregations from taking certain separational actions in the first place. Likewise, a bright-line rule may persuade congregations to settle their disputes internally as opposed to seeking recourse in the judicial system.

Part I of this Note traces the development of the Supreme Court's jurisprudence on how courts should decide church property disputes and the implications of the Court's decisions on the ability of states to approach the property issue. Part II analyzes the Canons and Constitution of the Episcopal Church regarding church property disputes and how these religious laws should factor into courts' decisions as to the rightful owner of the contested church property. Part III addresses the constitutionality of Virginia Code section 57-9, specifically whether the existence and application of the statute violates the Establishment Clause or Free Exercise Clause of the First Amendment. Part IV explores the crucial question of how courts should define the term "division," as used in Virginia Code section 57-9; the answer to this question will center on how courts have defined "division" in other contexts, as well as how courts should interpret the statute from a policy perspective. Part IV discusses the property law theory of abandonment and its application to the present church property disputes. Finally, this Note considers the benefits of creating a bright-line rule for resolving church property disputes considering the likelihood that such

disputes will continue to erupt across the country as religious beliefs held by local parishes and the hierarchical church diverge.

I. THE EVOLUTION OF THE SUPREME COURT'S JURISPRUDENCE ON HOW TO RESOLVE CHURCH PROPERTY DISPUTES

The Supreme Court has articulated two divergent methods for resolving church property disputes: the deference approach and the neutral principles doctrine.¹⁹ The Supreme Court first articulated the deference approach as the proper means for handling intra-church property disputes,²⁰ and not until a century later did the Court accept a different manner for resolving property disputes in the wake of a church divorce.²¹ The deference approach requires courts to accept the resolution reached by judicial bodies of the hierarchical church on intra-church disputes.²² The neutral principles doctrine, on the other hand, focuses on courts resolving church property disputes by interpreting church documents relating to the contested property without deciding any questions of religious doctrine.²³ Both approaches articulated by the Supreme Court reveal

19. Kathleen E. Reeder, Note, *Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits*, 40 COLUM. J.L. & SOC. PROBS. 125, 129 (2006) ("While both approaches have their adherents, neither is applied with great consistency, and legal scholars have written extensively about how difficult it is for local parishes to order their affairs in the face of this analytical quagmire."); see also Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1863 (1998) ("A look at appellate decisions, which develop alternatives among the options the Supreme Court has left open, reveals that the law is less straightforward than one might suppose from reading the Court's jurisprudence.")

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

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

22. *Watson*, 80 U.S. at 727.

23. *Jones*, 443 U.S. at 602-03. The Supreme Court articulated the following rationale for the neutral principles approach:

[I]t 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.

Id. at 603.

an uneasiness by the judicial system to intervene in disputes involving issues of religious doctrine.²⁴

A. The Deference Approach: The Supreme Court's Initial Attempt at Solving Church Property Disputes

1. The Presbyterian Church and Its Doctrinal Division over Slavery

The Supreme Court's first taste of a religious property dispute came in the seminal case of *Watson v. Jones*.²⁵ In *Watson*, the members of the Walnut Street Presbyterian Church of Louisville, Kentucky, divided into two distinct bodies, each claiming exclusive use of the property owned by the local church.²⁶ The dispute began shortly after the Civil War ended, when the General Assembly of the Presbyterian Church issued resolutions expressly supporting the emancipation of slaves within the states formerly belonging to the Confederacy.²⁷ The resolutions also instructed the lower branches of the church hierarchy to require anyone applying for membership or a ministerial position who had been found guilty of aiding the Confederacy or advocating slavery as a divine institution to repent those sins before being accepted into the church.²⁸ A few months later, the Presbytery of Louisville published a pamphlet denouncing the General Assembly's resolutions, expressly declaring that it would not follow the Assembly's instructions for admission

24. The Supreme Court in *Watson* revealed its uneasiness by simply deferring to the church hierarchy's decision regarding property ownership, while the Court in *Jones* warned courts not to address any questions regarding the doctrinal dispute between the parties.

25. Slavery drove a wedge between local churches and the national church during the Civil War Era just as homosexuality is driving a wedge between local Episcopal churches and the national church today. See Greenawalt, *supra* note 19, at 1847-52, for the history behind *Watson v. Jones*.

26. *Watson*, 80 U.S. at 681.

27. *Id.* at 690-91. The hierarchical structure of the Presbyterian Church consists of the following tribunals in ascending order: (1) the Church Session, composed of the elders of the local church; (2) the Presbytery, composed of the local churches in a certain geographical region; (3) the Synod, composed of all Presbyteries generally within a state; and (4) the General Assembly, the governing body that reigns over the entire church structure. *Id.* at 727; *Presbyterian Church v. Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 441-42 (1969).

28. *Watson*, 80 U.S. at 691.

of its new members.²⁹ In refusing to be governed by the resolution, the Presbytery invited all members of the Presbyterian Church who shared in the Presbytery's beliefs to join in their resistance.³⁰

The Walnut Street Church, under the jurisdiction of the Presbytery of Louisville, divided into two factions, one supporting the General Assembly and its denunciation of slavery, and the other supporting the Presbytery and its resistance of the "usurpation of authority" by the Assembly.³¹ The General Assembly ultimately declared that the faction of the Presbytery and the Synod of Kentucky—which had refused to adhere to the Assembly's resolutions—no longer acted under the true doctrine of the Presbyterian Church in the United States of America.³² These factions were permanently excluded from representation in the Assembly.³³ The other factions were declared the true Presbytery of Louisville and Synod of Kentucky.³⁴ Both sides claimed a right to possession of the Walnut Street Church property, and a protracted legal struggle resulted, ending up in the hands of the Supreme Court.

2. The Supreme Court's Categorization of Church Property Disputes

The Supreme Court in *Watson* articulated three different categories of church property disputes. The first category includes express trust disputes in which the contested property has been expressly devoted by deed or will to the teaching of a specific religious doctrine.³⁵ The second are congregational church disputes in which the church property is held by an independent organization with no obligation to any higher authority.³⁶ The third category

29. *Id.*

30. *Id.*

31. *Id.* at 692.

32. *Id.* The division over the authority of the Assembly's resolutions occurred not only on the level of the local congregation within the Walnut Street Church, but on the level of the Presbytery of Louisville and the Synod of Kentucky. *Id.* at 727. Each opposing party asserted that it constituted the true Presbytery and the true Synod, while both recognizing the General Assembly as the highest branch of the Presbyterian Church in the United States. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 722.

36. *Id.*

consists of hierarchical church disputes in which the congregation holding the property is a “subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control”³⁷

In the first category, the court must determine whether the property has been diverted away from the trust and whether there are persons qualified within the meaning of the original dedication who are willing to teach the doctrines prescribed in the trust.³⁸ If such persons exist, then they have complete authority to prevent the property from being used in contravention of the trust, even if a majority of the congregation wishes to use the property in support of a conflicting doctrine.³⁹ In the second category, when a schism results in the independent congregation and both factions claim a right to use the church property, ordinary principles that govern “voluntary associations” should control the court’s decision.⁴⁰ If the church vests power in a governing body, then the governing body has sole authority to determine which faction controls the property.⁴¹ The court makes no inquiry into the religious opinion of the congregation, solely focusing on the governing structure in place for making congregational decisions.⁴²

The third category of church property disputes encompassed the property quarrel of the Presbytery Church at issue in *Watson*.⁴³ The Court stated that the property of the Walnut Street Church was not devoted forever by an express trust to the support of any special religious doctrine, but rather had been purchased for the use of a

37. *Id.* at 722-23.

38. *Id.* at 723.

39. *Id.*

40. *Id.* at 725.

41. *Id.*

42. The Supreme Court decided *Watson* decades before the Court incorporated the Establishment Clause against the states through the Due Process Clause of the Fourteenth Amendment. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947). Even though the Establishment Clause did not apply to the states, the Supreme Court allowed the principles behind it to influence its decision in *Watson*.

43. The Episcopal Church, like the Presbyterian Church, is also a hierarchical organization. A general convention and presiding bishop govern the national church while a diocesan convention and local bishop govern each local diocese. Natalie L. Yaw, Comment, *Cross Fire: Judicial Intervention in Church Property Disputes After Rasmussen v. Bunyan*, 2006 MICH. ST. L. REV. 813, 817 (2006).

religious congregation.⁴⁴ The Court further declared that “so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property.”⁴⁵ Essentially, a local congregation is entitled to continued use of the church property so long as it adheres to the doctrines of the church canon law. Because the local congregation is a member of a much larger religious organization, property succession determinations must be made by the higher organization whose orders and judgments the lower congregation is bound to follow. The Court concluded:

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws ... is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.⁴⁶

Based on this deferential approach to church hierarchy, the Court affirmed the circuit court decision granting the property rights to those members of the church in alliance with the General Assembly.⁴⁷ The Court reasoned that local congregations in a hierarchical church give implied consent to the church governing body to resolve all church matters. Thus, any decision made by the hierarchy regarding a division among lower branches must be final on the issue of church property.⁴⁸

44. *Watson*, 80 U.S. at 726.

45. *Id.*

46. *Id.* at 727.

47. *Id.* at 735.

48. *Id.* at 729.

The bases for the Court’s approach are not hard to grasp. If civil courts were to deny church property to a body that would otherwise control it because the body has been guilty of a “departure from doctrine,” civil courts would address matters for which they are woefully ill-suited, and the legal rule would frustrate changes in religious understandings.

Greenawalt, *supra* note 19, at 1851.

3. *The Flaws in the Supreme Court's Uneasiness To Decide Church Property Disputes*

The problem with the deference approach is that it almost invariably favors the national church in the wake of the religious divorce.⁴⁹ While the deference approach allows a court to remove itself from deciding questions of faith by establishing a bright-line rule for courts to follow when faced with such a contentious religious issue,⁵⁰ the rule should not be so bright that the national church always prevails. The only cases that courts would review would be those in which the church authoritative body decided against the local church, because if the hierarchy awarded the property to the local church, then there would be no need to appeal to the courts. Then-Justice Rehnquist noted this problem with the deference approach in his dissent in *Serbian Eastern Orthodox Diocese v. Milivojevich*,⁵¹ stating that the approach makes “available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations”⁵² This so-called rubber-stamping by the courts is the fatal flaw of the deference approach. A bright-line rule certainly is warranted in these religious property disputes, but the courts should not adopt one that always favors the national church’s property claim.

Another problem inherent in the Court’s deference approach is the implied consent theory that local churches, by nature of belonging to the hierarchical organization, give their consent to any decisions made by those bodies higher in the church structure. Professor Kent Greenawalt captures one of the defects in the implied consent theory by noting that, while local congregations generally consent to the hierarchy’s decisions, this consent is conditional on the hierarchy following the rules of the church—or at least not radically shifting the church’s tenets of faith, like admit-

49. Reeder, *supra* note 19, at 133-35 (“When applying the deference approach, the deck is essentially stacked in favor of the national church, which acts as both a party to the dispute and an adjudicator whose decision will be entitled to great deference by the courts.”); Greenawalt, *supra* note 19, at 1864 (“Although the highest judicial authority in a church might award property to a local church against the national legislature and executive, the typical consequence of deference is that local church property is held for the general church.”).

50. See Reeder, *supra* note 19, at 133.

51. 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting).

52. *Id.*

ting women or gays as priests for the first time, or aligning with an atheist government.⁵³ A generalization that members give implied consent to whatever the hierarchy does is untenable because it fails to take into account the individualized conceptions of the church by each member.⁵⁴

In addition to the fallacy that local churches give unequivocal support to the hierarchy's decision-making body, the implied consent theory implicates the old-English doctrine of implied trust, which the Supreme Court rejected in *Watson*. The English doctrine of implied trust is the legal fiction that local church property is held in trust for the advancement of the hierarchical church's religious doctrine and that it is the duty of the courts to determine the nature of the church's original doctrine and award the property to the faction adhering to that doctrine.⁵⁵ Even though the Court rejected the implied trust doctrine, it essentially perpetuated a similar legal fiction by declaring that local churches give implied consent to the decision-making bodies of the hierarchical organization.⁵⁶

The Court rejected the implied trust doctrine in favor of the implied consent theory because the Court wished to defer to church authoritative bodies instead of determining which faction continued to adhere to the original tenets of faith, as required by the implied trust doctrine.⁵⁷ As noted earlier, by giving implied consent, local

53. Greenawalt, *supra* note 19, at 1874. Kathleen Reeder makes a similar observation regarding the implied consent theory of *Watson*:

This implied consent approach rather simplistically accepts that once a local church has become a member of the national church and received some benefits of affiliation, it is subject to the decisions of the national church.... None of these factors proves or even addresses the intent of the local church, let alone any property donor who may lurk in the historical background. Rather, this approach overwhelmingly favors the national church and accepts a one-dimensional concept of consent that the law is wary to import into any other area.

Reeder, *supra* note 19, at 136-37 (footnote omitted).

54. Reeder, *supra* note 19, at 136-37.

55. Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1146 (1962).

56. See Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 559 (1990) ("In place of a finding of actual intent to create a trust in favor of the hierarchy, courts have relied primarily on the concept of implied consent to the hierarchy's rules.").

57. See *Watson v. Jones*, 80 U.S. 679, 727-29 (1879).

churches almost invariably lose the property dispute.⁵⁸ If the national church or diocese retains the property in the wake of a doctrinal division, this effectively creates a trust-like doctrine: the local church holds the property for the benefit of the hierarchy, and any schism over the hierarchy's tenets of faith which leads the local church to disaffiliate will result in the property belonging to the higher church body. By giving its implied consent to the judicial bodies of the church, a local church's property rights exist only as long as the church remains in unison with the tenets held by the judicial body. If the judicial bodies are likely to rule in favor of the national church or diocese, then the property must be said to be held in some type of trust for the hierarchical organization because it ultimately makes the determination of possession in its own favor. Even though the determination of which faction continues to adhere to the original doctrines of the church is eliminated by the implied consent theory,⁵⁹ the deference approach cannot escape criticism for creating a new mechanism for hierarchical churches to keep what they consider their property in the wake of a doctrinal rift.⁶⁰

B. A New Outlook on Church Property Disputes: The Supreme Court's Neutral Principles Doctrine

1. Laying the Groundwork for the Neutral Principles Approach

The Supreme Court adhered to the three part analysis—and, specifically, the deference approach—for decades following *Watson v. Jones*. Some believe, however, that *Watson* essentially established the neutral principles doctrine later articulated in *Jones v. Wolf* rather than the deference approach historically accredited to the case.⁶¹ They view the property dispute at issue in *Watson* as nominal in comparison to the religious dispute over the morality of slavery.⁶²

58. See *supra* note 49 and accompanying text.

59. It is this elimination that led the Supreme Court to believe that it had rejected the English doctrine of implied trust in favor of an approach that focused on the decisions of the judicial tribunals of the hierarchical church, which use their own ecclesiastical laws and religious faith to settle the church property dispute.

60. See *infra* Part III.B.

61. See, e.g., John E. Fennelly, *Property Disputes and Religious Schisms: Who Is the Church?*, 9 ST. THOMAS L. REV. 319, 321 (1997).

62. *Id.*

These scholars argue that the Court understood the gravity of the religious doctrinal dispute, and by deferring resolution to the church hierarchy, it followed neutral principles of law.⁶³ While some validity may exist in this analysis of *Watson*, most legal scholars generally accredit *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*⁶⁴ as the Supreme Court case ushering in the notion of applying neutral principles of law to religious property disputes, as opposed to only deferring to the hierarchical church's adjudication of the dispute.⁶⁵

In *Blue Hull*, two local Georgia churches withdrew from the Presbyterian Church of the United States over doctrinal disputes regarding the national church's endorsement of ordaining women, opposition to the Vietnam War, and support for removing prayer from public schools.⁶⁶ The Presbyterian Church acknowledged the withdrawal by taking possession of the church property.⁶⁷ Instead of appealing the decision of the commission appointed by the Presbytery of Savannah to the higher tribunals of the Presbyterian Church, the local churches went straight to the courts.⁶⁸ The dissidents filed suit to enjoin the national church from trespassing on the church property, which they believed the local churches legally possessed based on Georgia's implied trust theory.⁶⁹ The trial court submitted the case to the jury with the instruction to apply Georgia's departure-from-doctrine test, the legal analysis employed when the implied trust theory applies to resolve a church property dispute in the wake of doctrinal division.⁷⁰ Accordingly, local church property was to be considered held in trust for the national church

63. *Id.* The Court, while recognizing that the issue had to be decided, followed a minimalist course that would neither impinge on religious freedom nor immerse the judiciary in doctrinal controversy. To effectuate the primary concern, religious liberty, the Court turned to neutral common law concepts of voluntary associations and contract. *Watson*, thus, is the first example of neutral principles being used by the Supreme Court to resolve what was essentially a religious dispute.

64. 393 U.S. 440 (1969).

65. Reeder, *supra* note 19, at 138; Yaw, *supra* note 43, at 823 (“[*Blue Hull*] was perhaps the first case that recognized the possibility of applying neutral principles of law to ecclesiastical property disputes without erasing the line between church and state.”).

66. 393 U.S. at 442 n.1 (1969).

67. *Id.* at 443.

68. *Id.*

69. *Id.*

70. *Id.*

so long as the national church adhered to its tenets of faith practiced at the time of the local church's affiliation.⁷¹ The departure-from-doctrine test required the court to determine whether actions of the hierarchical church constituted such "substantial departure" from the practices and beliefs existing at the time of the local parish's affiliation that the court had to terminate the implied trust in favor of the hierarchical church.⁷²

Applying this test, the court left the jury to decide whether the Presbyterian Church fundamentally abandoned its original tenets to the point that its new tenets were completely irreconcilable with the purpose for which the Presbyterian Church was established.⁷³ The jury found in favor of the local churches, resulting in the termination of the trust and enjoinder of the national church from trespassing on the property owned by the dissidents.⁷⁴ With the Georgia Supreme Court affirming the decision, the Supreme Court granted certiorari to consider the implications of the decision and the departure-from-doctrine test under the First Amendment.⁷⁵

The Supreme Court unequivocally rejected the implied trust theory as violating the First Amendment because of its requisite departure-from-doctrine test,⁷⁶ which the Court declared as unconstitutionally requiring civil courts to determine matters "at the very core of a religion—the interpretation of particular church

71. *Id.*

72. *Id.* at 449-50. The departure-from-doctrine test involved a two part determination for resolving intra-church property disputes: (1) the court first decided whether the actions of the hierarchical church departed substantially from prior doctrine; and (2) if the court found a substantial departure, then it had to determine whether the issue on which the hierarchical church had departed is of such importance to the theology of the church to require the implied trust be terminated. *Id.* at 450.

73. *Id.* at 443-44.

74. *Id.* at 444.

75. *Id.* When the Supreme Court decided *Watson v. Jones*, it had not yet declared that the First Amendment applied to the states through the Fourteenth Amendment. *Yaw*, *supra* note 43, at 821. Thus, its rejection in *Watson* of the implied trust theory was not based on a violation of the First Amendment by the states, but rather "American notions of religious liberty." Fennelly, *supra* note 61, at 322.

76. On remand, the Georgia Supreme Court concluded that the implied trust theory no longer could be used to resolve church property disputes given the Supreme Court's finding that the departure-from-doctrine test violated both the Establishment Clause and the Free Exercise Clause of the First Amendment. *Presbyterian Church v. E. Heights Church*, 225 Ga. 259 (1969).

doctrines and the importance of those doctrines to religion.”⁷⁷ Despite acknowledging that the First Amendment circumscribes the role of civil courts when resolving church property disputes, the Supreme Court admitted that the courts have the ability to decide such religious property disputes without immersing themselves in decisions of doctrinal dispute:

Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without “establishing” churches to which property is awarded. But *First Amendment* values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.⁷⁸

By recognizing that neutral principles exist to resolve property disputes in a religious “divorce” case, the Supreme Court laid the groundwork for its decision a decade later in *Jones v. Wolf*.

2. *Jones v. Wolf: Neutral Principles Guide the Way in a Church Doctrinal Divorce*

In *Jones v. Wolf*, the Presbyterian Church yet again served as the vehicle for the Supreme Court to articulate a new approach for resolving intra-church property disputes in a hierarchical church organization: the neutral principles doctrine.⁷⁹ The majority of a local Georgia Presbyterian church voted to separate from the Presbyterian Church in the United States and unite instead with the Presbyterian Church in America.⁸⁰ The majority faction retained the church property, forcing the minority members of the church to conduct their religious activities at another location.⁸¹ In response to the schism, the Presbytery encompassing the local church appointed a commission to investigate and hopefully resolve the

77. *Blue Hull*, 393 U.S. at 450.

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

79. 443 U.S. 595 (1979).

80. *Id.* at 598.

81. *Id.*

dispute.⁸² In holding true to the assertion that the national church will likely always find in its favor, the commission declared that the minority faction constituted the true congregation of the local Presbyterian church.⁸³ The majority faction ignored the commission's opinion by continuing to possess the church property and by not appealing the commission's decision to a higher Presbyterian Church tribunal.⁸⁴ In light of the majority's actions and the commission's determination, the minority faction sought a declaratory and injunctive order establishing their right to exclusive possession of the property and expelling the majority faction from the premises.⁸⁵ The Georgia trial court applied Georgia's neutral principles of law approach, adopted in the wake of Georgia's last run-in with the Supreme Court over a religious property dispute incorrectly decided on doctrinal grounds.⁸⁶

Justice Blackmun defined the issue before the Court as whether civil courts may resolve a church property dispute on the basis of neutral principles of law or whether they must defer to the resolution of the hierarchical church in order to avoid any First or Fourteenth Amendment problems.⁸⁷ The Supreme Court recognized that church disputes solely regarding the doctrinal position of the church must be left to the highest tribunal of the hierarchical church organization for resolution.⁸⁸ But absent this First Amendment restriction on civil courts, states were free to adopt any method for resolving church property disputes.⁸⁹ The Court specifically endorsed the neutral principles doctrine, in the form developed by Georgia over the past decade, as one such constitutionally acceptable method for resolving church property disputes.⁹⁰

To apply neutral principles to a church property dispute, courts must look at deed language, terms of local church charters, state statutes governing the holding of church property, and provisions in

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 598-99.

86. *Id.* at 599.

87. *Id.* at 597.

88. *Id.* at 602.

89. *Id.*

90. *Id.* at 602-03.

church constitutions⁹¹ concerning ownership and control of church property.⁹² When examining these documents, the court must look for any language indicating that the property titled to the local church is held in trust for the hierarchical church organization.⁹³ The court must analyze these documents on purely secular terms and must “not ... rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust.”⁹⁴ If the property is held in trust for the hierarchical church, then the court must grant control of the property to the national church; if no trust was created in favor of the hierarchical church, then the dissident majority faction may be entitled to ownership.⁹⁵ On its face, the Supreme Court seemed to articulate a simple and straightforward method for resolving church property disputes in a manner not offensive to the First Amendment.

The premise behind the neutral principles doctrine is that courts should rely on concepts of property law and authoritative church documents that can be interpreted without invoking religious doctrine and without deciding whether the local or national church departed from the tenets of the true church when resolving intra-church property disputes. The Court enumerated several advantages of applying the neutral principles method to church property disputes:

The 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

91. The neutral principles approach does not preclude the courts from looking at religious documents to resolve church property disputes. Using religious documents to determine the rightful owner of real and personal property does not implicate questions of religious doctrine so long as the court interprets the doctrine in light of secular concepts of law. *Id.* at 604.

92. *Id.* at 603-04.

93. *Id.* at 604.

94. *Id.*

95. *Id.* at 611 (Powell, J., dissenting).

ordering private rights and obligations to reflect the intentions of the parties.⁹⁶

The Court ultimately remanded the case back to the Georgia courts to determine which faction was entitled to the property as a matter of state law.⁹⁷ Justice Blackmun left one final warning to the Georgia courts: if the resolution of the property dispute hinges on determinations of religious doctrine, then the courts must defer to the decisions of the hierarchical church tribunals because only those authoritative bodies are vested with power to decide disputes over doctrine.⁹⁸

The Supreme Court's endorsement of the neutral principles doctrine certainly lacked unanimous support from the justices. Justices Powell, Stewart, White, and Chief Justice Burger all dissented, believing that the neutral principles doctrine in practice would lead only to more involvement by the courts in religious affairs.⁹⁹ The dissent disagreed with the majority's analysis that the case involved a dispute over the ownership of church property because ownership of the property was clearly evidenced by the deeds placing title in the local Presbyterian church.¹⁰⁰ Rather, the true issue in such hierarchical church property disputes, according to the dissent, was which faction should be entitled to control and possession of the property,¹⁰¹ a question that almost inevitably entangles the courts in matters of religious doctrine and belief. Furthermore, the dissent decried the likelihood that the neutral principles approach would lead to more confusion than understanding¹⁰² because of the lack of standards provided by the majority, as

96. *Id.* at 603 (majority opinion).

97. *Id.* at 609-10.

98. *Id.* at 604 ("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.").

99. *Id.* at 610 (Powell, J., dissenting); Reeder, *supra* note 19, at 143 ("Justice Powell's dissenting opinion in *Jones* recognized that the neutral principles approach was not a cure-all for the ills of deference").

100. *Jones*, 443 U.S. at 610 (Powell, J., dissenting).

101. *Id.*

102. Fennelly, *supra* note 61, at 334 ("[N]eutral principles, as the dissenters noted, was left undefined in the majority opinion. Thus, rather than adhering to a long-standing and widely

well as the intrinsic doctrinal content of the church documents the majority proposed as guiding the neutral principles analysis.¹⁰³ Because of the constitutional implications inherent in the neutral principles method, the dissent recommended that state courts continue to defer to the decisions of the ecclesiastical bodies of the hierarchical church organizations:

Disputes among church members over the control of church property arise almost invariably out of disagreements regarding doctrine and practice. Because of the religious nature of these disputes, civil courts should decide them according to principles that do not interfere with the free exercise of religion in accordance with church polity and doctrine. The only course that achieves this constitutional requirement is acceptance by civil courts of the decisions reached within the polity chosen by the church members themselves. The classic statement of this view is found in *Watson v. Jones*.¹⁰⁴

The dissent's criticism of the neutral principles approach certainly struck a chord with legal scholars who suggested that the Supreme Court should have continued to endorse the *Watson* deference approach for resolving intra-church property disputes in the wake of a doctrinal divorce.¹⁰⁵

The takeaway from *Jones v. Wolf*, however, is not the articulation of the neutral principles doctrine or the dissent's favoritism for the deference approach. Rather, it is the freedom of the states to choose for themselves which method to employ when resolving church

accepted rule, state courts instead departed from *Watson*, and were set adrift in a sea of constitutional uncertainty.”).

103. *Jones*, 443 U.S. at 612-13.

104. *Id.* at 616-17 (citations omitted).

105. See Fennelly, *supra* note 61, at 333-34 (“From a stare decisis standpoint, it is difficult to understand the direction taken by the majority in *Wolf*. *Watson* had delineated a clear and workable test for resolving intra-church disputes that were invariably doctrinal in nature. The majority advanced no argument that *Watson* was wrongly decided, had unforeseen negative consequences, or in any way outlived its usefulness. Its rationale had gained wide acceptance at the state level and, therefore, gave stability and predictability to an admittedly difficult area of constitutional law.”); Reeder, *supra* note 19, at 144 (“How fresh is the neutral principles approach articulated in *Jones*? Does it truly provide a framework for a more equitable assessment of which party should control the disputed property?”). *But see* Greenawalt, *supra* note 19, at 1901 (“The flaws of the [deference] approach are great enough to make some type of neutral principles approach preferable.”).

property disputes. It is this freedom, which the Supreme Court declared the states have, that has resulted in uncertainty in determining the likely outcome of a church property dispute.¹⁰⁶ The legal system needs to address this uncertainty because church property disputes are not merely intra-state, considering that the hierarchical church body usually exists on the national level. The Commonwealth of Virginia has the potential to provide an example for the rest of the Union as to how such disputes can be resolved in an efficient and straightforward manner.

II. THE LAW OF THE CHURCH: THE CONSTITUTION AND CANONS OF THE EPISCOPAL CHURCH

A. *The Hierarchical Organization of the Episcopal Church*

In 1789, the Protestant Episcopal Church was formally organized in Philadelphia as the successor to the Church of England in the colonies.¹⁰⁷ Unlike the Roman Catholic Church, there is no single governing structure vested with universal authority for all member churches of the Episcopal Church.¹⁰⁸ The Anglican Communion serves as the worldwide affiliation for Anglican Churches¹⁰⁹ across the globe in full communion with the Church of England and its primate, the Archbishop of Canterbury.¹¹⁰ The Archbishop of Canterbury, however, has no formal authority outside of the jurisdiction of the Church of England.¹¹¹ “The churches of the Anglican Communion are held together by bonds of affection and

106. See Greenawalt, *supra* note 19, at 1895 (“Knowing that a court will use a neutral principles approach alone may not provide competing claimants with much of a guide as to how a case will be decided.”).

107. Anglican Timeline, <http://justus.anglican.org/resources/timeline/11ecusa.html> (last visited Sept. 20, 2008).

108. See Richard Vara, *What Will the Church Decide?: Episcopal Bishops Gather To Discuss Future in Anglican Communion*, HOUS. CHRON., Mar. 10, 2007, at R1.

109. Not all members of the Anglican Communion use the word Anglican in their names. Anglican.org, About Our Church, <http://www.anglican.org/church/index.html> (last visited Sept. 20, 2008). The Episcopal Church of the United States, the province of the Anglican Communion covering the United States, uses the word Episcopal rather than Anglican. See Vara, *supra* note 108. The use of the word Episcopal makes no difference in regard to membership to the Anglican Communion. Anglican.org, About Our Church, *supra*.

110. See Vara, *supra* note 108.

111. See *id.*

common loyalty, expressed through links with the 'Instruments of Communion'—the Archbishop of Canterbury as the focus for unity, the Lambeth Conference, the Primates Meeting and the Anglican Consultative Council."¹¹²

Despite the lack of an overarching governing body for all Anglican Churches within the Anglican Communion, a hierarchy does exist within the Episcopal Church on the national or regional level. Each national or regional church makes decisions pertaining to the dioceses and parishes within its hierarchical structure.¹¹³ The lowest level of the hierarchy comprises the local churches, also referred to as parishes or congregations, led by a priest and an elected group of laity called the vestry.¹¹⁴ Parishes are organized into geographical units called dioceses, governed by a bishop with the role of leading, supervising, and uniting the church.¹¹⁵ The Protestant Episcopal Church of the United States is composed of all the Episcopal dioceses across the country.¹¹⁶ Church property disputes, like the one ongoing in Virginia, typically occur when the local parish chooses to disaffiliate with its diocese. Generally, the discord in doctrinal belief occurs between the local church and the national church; thus, when the parish votes to break away from the diocese, it disaffiliates with the national church as well.

B. Applicable Canons of the Episcopal Church to Church Property Disputes

The national church has developed both a constitution and canons to govern the dioceses and parishes. These church laws are meant to provide a certain level of uniformity within the Episcopal Church in the United States, as well as a mechanism for resolving church disputes that may arise on the local level. Two canons are especially important to the current church property disputes in the Episcopal Church across the country: Canon II.6.2 and Canon I.7.3. The former states that no trustee or other body authorized by law to hold property for any diocese or parish may alienate or encumber any

112. Information Leaflet, *supra* note 10.

113. *Id.*

114. Reeder, *supra* note 19, at 130-31.

115. *Id.*

116. *Id.* at 131.

church property, which has been used solely for church services, without the consent of the bishop.¹¹⁷ Canon I.7.3 states that no trustee or other body authorized by civil or canon law to hold, manage, or administer real property for any parish shall encumber or alienate the property without the written consent of the bishop and standing committee of the diocese to which the parish belongs.¹¹⁸

These canons demonstrate that local churches derive their authority to exercise control over the church property from their unison with the diocese and national church.¹¹⁹ If the parishes must seek authority from the bishop to alienate the property, then the national church must view the diocese as the true owner of the church property. Thus, the parishes have no right to possess the property in any manner not aligned with the higher bodies of the church. When a majority of the parish votes to disaffiliate with the diocese and national church, then, according to a literal interpretation of the canons, the parish must relinquish its right to possession because it is no longer holding the property for the diocese.¹²⁰ Despite the implications of these canons, a crucial point to recognize is that the local parish trustees—not the bishop, the diocese, or the national church—hold legal title to the property. Thus, the religious laws of the Episcopal Church simply declare that any decision regarding a parish's church property is vested in the bishop, regardless of the status of title.

III. THE HISTORY AND CONSTITUTIONALITY OF VIRGINIA CODE SECTION 57-9

After the Civil War, Virginia passed a law to govern the property disputes of churches splitting over doctrinal differences regarding slavery and secession.¹²¹ At present, Virginia Code section 57-9 will

117. THE EPISCOPAL CHURCH, CONSTITUTION & CANONS, Canon II.6.2, at 62 (2006), available at http://www.episcopalarchives.org/CandC_2006.pdf.

118. *Id.* Canon I.7.3, at 39.

119. The canons of the Episcopal Church incorporate the implied consent theory articulated by the Supreme Court in *Watson v. Jones*. See *supra* Part I.A.3.

120. The only way this literal interpretation can be avoided is if the diocese actually consents to the breakaway faction taking the property, an outcome that is extremely unlikely to play out in practice.

121. Julia Duin, *Episcopal Dispute Hinges on 1860s Law*, WASH. TIMES, Nov. 12, 2007.

determine the fate of the “largest property dispute in the history of the Episcopal Church ...”¹²² Aside from potentially resolving the property dispute in Northern Virginia—a dispute intriguing to many because of George Washington’s affiliation with one of the parishes¹²³—this statute will continue to be employed by the courts as the mechanism for settling church divorces in the future. In line with the Supreme Court’s grant of freedom to the states in *Jones v. Wolf* to resolve church property disputes in any manner not infringing on protections afforded by the First Amendment, Virginia Code section 57-9 has the potential to serve as a bright-line rule, applicable *outside* the Commonwealth, based on neutral principles of property law and fundamental conceptions of the English language. The Virginia statute and its focus on division is one solution other states should adopt in order to resolve hierarchical church property disputes.

A. Religious Discord in Nineteenth Century Virginia: The Virginia Religious Freedom Act

In 1867, four years prior to the Supreme Court’s decision in *Watson v. Jones*,¹²⁴ the Virginia General Assembly passed the Virginia Religious Freedom Act, the statute now codified as Virginia Code section 57-9.¹²⁵ John Baldwin, then Speaker of the House of Delegates,¹²⁶ was the impetus behind the passage of the Virginia Religious Freedom Act.¹²⁷ The legislation came in response to

122. *Id.* “Tens of millions of dollars of Virginia real estate are at stake in a trial that began yesterday in Fairfax County Circuit Court, where priests, members of bitterly divided churches and lawyers filled the pews.” Boorstein, *supra* note 7.

123. See COLONIAL CHURCHES: A SERIES OF SKETCHES OF CHURCHES IN THE ORIGINAL COLONY 129-30 (W.M. Clark ed., Southern Churchman 1907).

124. 80 U.S. 679 (1871).

125. See *Finley v. Brent*, 12 S.E. 228, 230 (Va. 1890).

126. HAMILTON JAMES ECKENRODE, THE POLITICAL HISTORY OF VIRGINIA DURING THE RECONSTRUCTION 41 (The Johns Hopkins Press 1904).

127. Posting of Robert L. McCan to Daily Episcopalian, <http://www.episcopalcafe.com/daily/dioceses/> (Dec. 18, 2007, 4:21 EST). As a Methodist in Augusta County, Baldwin was not immune to this religious strife because eighteen Methodist congregations sought to separate from the northern branch of the church. In fact, Baldwin successfully advocated in court for the position of the local Methodist congregations when they took advantage of the law in seeking to keep their property after a majority voted to break away and affiliate with the southern branch of the church. *Id.*

numerous denominational splits in the nineteenth century over the central issues of the Civil War—slavery and federalism.¹²⁸

B. Virginia Code Section 57-9: Violation of the First Amendment or Neutral Principle of Law?

The history of Virginia Code section 57-9 sheds light on its application to the present property dispute and its application to future denominational splits. The statute's enactment in 1867 provided a means for Virginia courts to resolve church property disputes vexing the Reconstruction era. However, the Supreme Court quickly preempted the statute's application in *Watson* by requiring state courts to accept as final the decision of the highest church judicatory to which the property matter had been referred.¹²⁹ In light of the Court's most recent precedent,¹³⁰ the question becomes whether Virginia Code section 57-9 applies neutral principles of law.

The Supreme Court clearly stated in *Jones* that state courts are not required to defer to regional or national church leaders when a property dispute erupts in a hierarchical church.¹³¹ Even prior to *Jones*, the Court declared that civil courts do not violate the Free Exercise Clause by merely "opening their doors" to church property disputes.¹³² Additionally, by applying neutral principles of law applicable to all property disputes,¹³³ courts are not promoting one religious theory over another and thus are not violating the Establishment Clause.¹³⁴

Despite the Supreme Court's general assertion that a civil court's adjudication of a church property dispute does not violate the First Amendment, the First Amendment tests must be applied to Virginia Code section 57-9 to ensure the constitutionality of the statute. In

128. *See id.*

129. *See Watson*, 80 U.S. at 727.

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

131. *Id.* at 602.

132. *Presbyterian Church v. Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

133. *Id.*

134. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion").

Lemon v. Kurtzman,¹³⁵ Chief Justice Burger articulated the famous three-part *Lemon* test to determine whether a statute violates the Establishment Clause. A statute is constitutional so long as (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it refrains from excessively entangling the state with religion.¹³⁶ Virginia Code section 57-9 has a secular purpose in seeking to resolve a property matter within the state's borders. By adopting this Note's proposed definition of division,¹³⁷ the primary effect of the statute will not be the advancement of one religion over another because neither the local congregation nor the national church is guaranteed to win the property every time. Finally, a court's application of the statute does not result in excessive entanglement with religion because the court will not be deciding any doctrinal questions. The focus is solely on the existence of a division, which refrains from coming even close to answering which party adheres to the true tenets of the faith.

Additionally, an examination of the Supreme Court's decision in *Employment Division v. Smith*¹³⁸ confirms the Court's previous holding in *Blue Hull* that a civil court's resolution of a church property dispute does not violate the Free Exercise Clause. The Court held in *Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"¹³⁹ The Episcopal Church, therefore, is not relieved of the obligation to comply with Virginia Code section 57-9 merely because the statute potentially allows for local congregations to keep title to their property when disaffiliating with the Episcopal Church even though the Church's canons require approval of the governing bishop. The key component of the *Smith* test is the requirement that the law be neutral and of general applicability.¹⁴⁰ This requirement goes hand-in-hand with the requirement in *Jones* that courts apply neutral

135. 403 U.S. 602 (1971).

136. *Id.* at 612-13.

137. *See infra* Part IV.C.1.

138. 494 U.S. 872 (1990).

139. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

140. *See id.*

principles of law. If Virginia courts recognize this Note's definition of division, then they will meet the requirements of *Smith* and *Jones*, thus avoiding any First Amendment problems.

IV. HOW TO DEFINE DIVISION: DOES WEBSTER'S DEFINITION APPLY TO VIRGINIA CODE SECTION 57-9?

A. The Application of Virginia Code Section 57-9 to Hierarchical Church Property Disputes

Central to the creation of a bright-line rule is defining "division" in Virginia Code section 57-9, which reads as follows:

If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth.¹⁴¹

When congregations vote to disaffiliate with the diocese, and thus the national hierarchical church, they typically initiate a section 57-9 proceeding in the Virginia courts, seeking recognition of their majority vote and the state of title to the property in their name.¹⁴² The diocese and national church quickly follow suit by filing their

141. VA. CODE ANN. § 57-9(A) (West 2007); see also *Recent Decisions*, 54 VA. L. REV. 1444, 1457-58 (1968) ("Attempts to reverse this rule [that a local church grants its property to a general hierarchical church for all time] legislatively have been made in Alabama and Mississippi where statutes have been enacted which grant local congregations the right to secede from hierarchical churches and retain local church property when a specified majority of the congregation agrees that substantial changes in the social policies of the national churches have occurred." (footnotes omitted)).

142. See Boorstein, *supra* note 7.

own complaint against the breakaway churches, requesting that the court declare the diocese the rightful owner of all property and grant an injunction forcing the majority congregation members to stop trespassing on the property.¹⁴³ Based on the language of the statute, if a standard definition of division is employed by the courts, then the question of who owns the property can be settled in one proceeding without the need for both sides of the religious dispute to file complaints. This is because Virginia Code section 57-9 says that the court's ruling on the parish's vote to disaffiliate "shall be conclusive as to the title to and control of any property"¹⁴⁴ According to this language, the trial judge's decision regarding division should determine the issue of ownership between the local church and the national church.

The issue of ownership of the property will thus hinge on whether the local congregation adequately exercised its section 57-9 rights.¹⁴⁵ If the church voted to break away from the diocese and national church when no division within the broader church existed, then the church abandons whatever ownership interest it had in the property, leaving the property subject to the "find" of the national church. The issue of division will apply only in those cases where the local church formerly belonged to the hierarchical church organization and the branch with which the majority of the local church votes to affiliate belongs to the overarching church, or religion, encompassing the hierarchical church.¹⁴⁶

143. *Id.*

144. VA. CODE ANN. § 57-9(A).

145. In order to adequately exercise their section 57-9 rights, the local congregations must satisfy the procedural requirements of the statute in addition to filing suit. For example, section 57-9 requires a *majority vote of members over the age of eighteen. Id.*

146. *Id.* For purposes of resolving church property disputes, the Supreme Court of Virginia distinguishes between an independent congregation and one that is part of a hierarchical church, applying different standards of legal analysis in each type of case. *See Norfolk Presbytery v. Bollinger*, 201 S.E.2d 752, 755 (Va. 1974); *see also Baber v. Caldwell*, 152 S.E.2d 23, 26 (Va. 1967).

B. Division as Defined by the Warring Factions

1. Breakaway and the Formation of a New Polity: The Definition of the Virginia Episcopal Congregations

The breakaway congregations contend that there was a division in the Diocese and Episcopal Church as a result of the Episcopal Church's decisions "to repudiate past positions on human sexuality and the authority of Scripture."¹⁴⁷ The parishes in Virginia that voted to disaffiliate with the Episcopal Church have suggested their own interpretation of division in Virginia Code section 57-9. In recognizing that division is undefined in the statute, the local churches make two key arguments for how Virginia courts should define division.¹⁴⁸ The parishes' first argument is that division should be defined according to the traditional understanding of division, both in 1867 and today, as "a schism or rupture in a church (typically over doctrinal issues)."¹⁴⁹ The parishes' second argument is that division should be defined based on the legislative intent.¹⁵⁰ Legislative intent must be determined by the plain meaning of the words used.¹⁵¹ The plain meaning of the words stems from the dictionary meaning of the words. The plain meaning of the word "division" should encompass both the modern definition of division, as well as the definition at the time of the statute's enactment.

The term "division" has been defined in virtually the same manner since the statute's enactment during the Civil War Era. "[D]ivision" simply means "the state of being divided into parts or branches; partition; severance."¹⁵² The local parishes, therefore, assert that according to its plain meaning, division in a church "is just what it sounds like—a breaking into parts, separation, severance, or partition."¹⁵³ The problem with this plain meaning

147. CANA Congregations' Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Va. Code § 57-9, at 3-4, *In re Multi-Circuit Episcopal Church Litigation*, No. 2007-248724 (Va. Cir. Ct. Aug. 29, 2007) [hereinafter CANA Mem. of Law].

148. *See id.* at 5-6.

149. *Id.* at 5.

150. *Id.* at 6.

151. *Id.* (citing *Richmond v. Confrere Club of Richmond, Inc.*, 387 S.E.2d 471, 473 (Va. 1990)).

152. *Id.* (quoting 1 OXFORD ENGLISH DICTIONARY 558 (1971)).

153. *Id.*

argument is that it is extremely circular. By defining division as occurring when the parishes in a hierarchical church doctrinally separate from the church by forming a new polity, no determination on the issue of division need be made because, by filing the section 57-9 proceeding, the parish concedes that it has “separated” from the church. Therefore, any time the local church decides to separate from the hierarchical church structure, the local church would be entitled to the property so long as the procedural requirements of Virginia Code section 57-9 are satisfied.¹⁵⁴ This is essentially the inverse of “the diocese and national church always wins” rule. Virginia courts must apply a more rigorous standard than merely deciding whether a congregation has broken away¹⁵⁵ because a rule that results in one side continually prevailing is not a rule that should be followed by the courts.¹⁵⁶

2. Formal Approval of the Breakaway: The Definition of the Episcopal Church

The Diocese and Episcopal Church rebut these arguments, claiming that in order for a division to occur within the church there must have been formal approval of the new governing polity of the denomination that left the church.¹⁵⁷ The Episcopal Church, therefore, argues that a division can only occur within the meaning of Virginia Code section 57-9 if the national church (or a commission established on behalf of the church) formally approves the local church’s decision to disaffiliate and join another branch of the Anglican Communion. If the court were to follow the Episcopal Church’s definition of division, then a very paternalistic rule would

154. See *supra* note 145 and accompanying text.

155. The problem inherent in deciding whether a division occurs is the question of what factors the court can allow to guide its decision. In *Jones v. Wolf*, the Supreme Court made it abundantly clear that, while civil courts may use neutral principles of law to decide church property disputes, including such documents as church constitutions, courts cannot resolve doctrinal disputes and thus any property disputes that hinge on the resolution of church doctrine. See *supra* Part I.B.2.

156. Legal scholars made this same criticism when arguing against the deference approach established by the Supreme Court in *Watson*. See *supra* note 49 and accompanying text.

157. CANA Mem. of Law, *supra* note 147, at 6.

develop, giving the church hierarchy complete power over the decision of church property ownership.¹⁵⁸

Applying the Episcopal Church's proposed definition would essentially revert to *Watson's* deference approach because even though the church tribunal would not be settling the issue of property ownership, its decision regarding the local church's desire to break away from the national church would essentially conclude the issue of ownership.¹⁵⁹ Virginia Code section 57-9 only allows for the majority congregation to retain control and ownership of the property if a division occurs; the national church's interpretation of how to determine whether a division occurred hinges on whether the national church gives its approval. If the national church *does* approve of the local church's decision to leave the church hierarchy, a division has occurred and the local church gets the property. Understanding this implication, the national church, to retain the property, would never recognize the local church's decision to leave. Because the deference approach results in the national church triumphing over the local church every time—unless, of course, the national church decides graciously to let the breakaway church retain the property—division as used in section 57-9 should not be interpreted in such a manner that leads to a *Watson* approach to handling church property disputes.¹⁶⁰

Another fatal flaw in the Episcopal Church's definition of division is that it seemingly involves implied consent and thus the implied trust theory.¹⁶¹ If the determination of whether a division has occurred depends on whether the Episcopal Church approves the decision to disaffiliate, then the local church is giving its implied consent to the hierarchy to determine the issue of property ownership. The local church then must be holding the property in an

158. Generally speaking, the national church should have the final word when it comes to any matter within the purview of the hierarchical church because it is the highest body in the church structure. History has proven, however, that hierarchical churches are not static. Doctrinal rifts have resulted in new hierarchical and congregational religious organizations. Local parishes would be frustrated in initiating a widespread movement to break away from the hierarchical church if the Virginia courts endorse the Episcopal Church's paternalistic rule for resolving church property disputes. Thus, as a matter of policy, division should not be defined in such a way as to hinder religious movements similar to those of the past that have fundamentally shaped religion in America.

159. *See supra* note 49 and accompanying text.

160. *See supra* Part I.A.2.

161. *See supra* Part I.A.3.

implied trust for the benefit of the national church. The Supreme Court of Virginia has declared that the implied trust theory is inapplicable to church property disputes. In *Norfolk Presbytery v. Bollinger*,¹⁶² the court stated, “As express trusts for supercongregational churches are invalid under Virginia law no implied trusts for such denominations may be upheld.”¹⁶³ If Virginia courts cannot apply any form of the implied trust theory, then they cannot adhere to the deference approach, and consequently, the definition of division the Diocese and Episcopal Church propose.¹⁶⁴ Instead, Virginia courts *must* adopt a method of resolving intra-church property disputes more in line with the neutral principles doctrine.¹⁶⁵ The courts can accomplish this feat by properly defining division.

C. The Definition Solution and the Application of Property Law

1. The Best Definition: A Middle Ground Between the Local Churches and the Episcopal Church

Division within a church should be defined in such a way that neither side of the church property dispute is guaranteed to win every time. A legal rule promising that the same side to a dispute will always triumph is a dysfunctional legal rule.¹⁶⁶ Whenever a

162. 201 S.E.2d 752 (Va. 1974).

163. *Id.* at 758.

164. *Id.* at 756 (“We are not bound by the rule of *Watson v. Jones*, ... however, for that case rested on federal law. Moreover, it did not hold that the implied trust doctrine was the only constitutional rule for resolving church property disputes.”).

165. The Virginia Supreme Court basically advocated the neutral principles approach before the Supreme Court endorsed it in *Jones v. Wolf* by declaring that “it is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church.” *Id.* at 756-57. A year after the Supreme Court articulated the neutral principles doctrine in *Jones*, the Virginia Supreme Court stated that to establish a proprietary interest of the national hierarchical church in the church property of the local congregation, the language of the deeds and the constitution of the general church should be considered by the trial court in the application of neutral principles of law. *Green v. Lewis*, 272 S.E.2d 181, 185-86 (Va. 1980) (holding that the breakaway congregation could not eliminate the central church’s interest in the property by unilateral action).

166. Take, for example, the law of negligence. Neither the plaintiff nor the defendant is ensured a successful outcome every time a complaint is filed. The outcome will hinge on whether the defendant owed the plaintiff a duty of care, whether the defendant breached that

complete separation into factions between the national church and an aggregate of congregations occurs within the hierarchical church and each faction has a distinct view regarding key church doctrine, then the courts should recognize a division as required by Virginia Code section 57-9. While the courts must look at the doctrinal positions of each faction, they will not determine which side of the dispute adheres to the true tenets of the religion and thus no potential First Amendment infringements will arise.¹⁶⁷

The definition of division can thus be broken down into its key parts. First, the court must determine whether a factional separation has occurred. The court should only find that a factional separation has occurred if an aggregate of congregations, determined on a macro-level, have disaffiliated with the national church and either created their own polity or joined a preexisting polity within the overarching church to which the national church also belongs. For example, the Episcopal Church of the United States is a constituent member of the Anglican Communion.¹⁶⁸ If an aggregate of local Anglican congregations within the Episcopal Church of the United States have decided to leave the Episcopal Church and instead affiliate with another constituent member of the Anglican Communion, this would meet the factional separation requirement of division.

Part of the factional separation requirement is the determination of whether an *aggregate* of congregations have separated. This analysis will require the court to look at the church on the national level to determine whether a separation around the same doctrinal dispute is occurring. This macro-level analysis will ensure that a separation is happening on a level beyond a single local church filing a section 57-9 proceeding. Thus, one local congregation's decision to leave its diocese and the national church will never

duty, and whether the breach was the proximate cause of the plaintiff's damages. Courts and state legislatures have clearly defined when a duty is owed and the legal standard for breach of the duty of care. The question will be whether such a breach has occurred based on the attendant facts. Likewise, by following the definition of division proposed by this Note, neither the local congregation nor the national church is ensured success. Rather, the court will apply the rule regarding division, just as it does the rules of other legal regimes, to the facts of the case.

167. See *supra* Part III.B.

168. See Information Leaflet, *supra* note 10.

suffice for purposes of Virginia Code section 57-9.¹⁶⁹ A division can hardly be said to have occurred when only one church out of thousands has decided to leave. There is also a timing component to this part of the definition. The congregations must be separating close enough in time for the court to find that the separation resulted from the same doctrinal issue.¹⁷⁰ If too much time has elapsed when looking at the aggregate of congregations, then the court must assume that the congregations chose to separate for different reasons. The type of doctrinal dispute needed to cause a division for purposes of section 57-9 must be of such magnitude that a large number of churches separate around the same time.

The second part of this Note's proposed definition of division is the requirement that the local churches separate because of the same doctrinal dispute. The nature of the church doctrine has no relevance to the determination of division; the analysis should solely focus on whether the aggregate of congregations are separating from the national church because of the *same* doctrinal dispute. The determination of whether the same doctrinal dispute motivates all the churches will not entangle the courts into matters of religion.¹⁷¹ The courts will look at only the reasons articulated by each local congregation for leaving the church and determine whether these reasons are essentially alike.¹⁷² The courts will not be endorsing either faction's beliefs and thus will not be establishing any religion.¹⁷³

If a court finds that the two requirements of division have been met, then a division has occurred for purposes of section 57-9, and

169. It is irrelevant that a "division" exists between the particular parish and the national church because division for purposes of section 57-9 should not exist on a singular level.

170. This requirement does not mean that congregations must coordinate their separation from the national church. The court should solely focus on the raw number of churches separating. While there is potential for churches to collude in order to take title from the national church, the risk of collusion is irrelevant because those churches which chose to separate in unison would have separated regardless of the other churches.

171. *See supra* Part III.B.

172. For example, if an aggregate of congregations separates from the national church because it holds a more traditionalist view of human sexuality, this would be sufficient to find that the congregations separated based on the same doctrinal dispute. But, if half of the congregations separates because of their conservative view of human sexuality while the other half separates because they disagree with the national church's fiscal spending, this would not be the same doctrinal dispute.

173. *See supra* Part III.B.

the only hurdle for the majority faction of the local church to overcome in retaining property ownership is following the statutory procedure.¹⁷⁴ If no such division has occurred, then the local church's actions result in abandonment of property.

2. Property Law to the Rescue: Abandonment Ends the Church Dispute

When a local church votes to separate from the hierarchical church to which it formerly belonged when no division occurs,¹⁷⁵ the church essentially abandons the property and the hierarchical church becomes the rightful owner.¹⁷⁶ The legal rule of abandonment prevents courts from having to decide the issue of ownership in two separate suits because the national church will no longer have to file a separate lawsuit seeking ownership of the property and an injunction against the local church from trespassing because the resolution of the section 57-9 proceeding will end the dispute on ownership.

“[I]ntention is a prime factor in determining whether there has been an abandonment. And courts must determine intent from what the actor said and did; intent, though subjective, is determined from the objective facts at hand.”¹⁷⁷ The objective fact at hand is that the local church voted to disaffiliate with the church when no division actually existed.¹⁷⁸ This action manifests intent to abandon the property previously possessed by the trustees of the parish. The hierarchical church to which the parish previously belonged then becomes the rightful owner of the property by nature of its claim to

174. Virginia Code section 57-9 requires that the vote pursuant to a division be made only by members of the congregation, that the members be at least eighteen years of age, and that the vote be supported by a majority. VA. CODE ANN. § 57-9 (West 2007).

175. See *supra* Part IV.C.1.

176.

Abandonment of tangible personal property means that the owner thereof voluntarily relinquishes possession thereof with the intention of terminating his ownership, and with no intention of vesting title in another. When such property has been so abandoned, the first person who takes possession thereof for the purpose of ownership generally and in the absence of special circumstances, acquires title thereto.

Talley v. Drumheller, 130 S.E. 385, 388 (Va. 1925).

177. Hawley v. Commonwealth, 144 S.E.2d 314, 317 (Va. 1965).

178. See *supra* Part IV.C.1.

the property and the invalid action of the local parish in voting to break away and affiliate with another polity of the overarching church. This settles the question of who owns the church property.

CONCLUSION

Despite the difficulty of crafting bright-line rules to settle complex legal issues, courts have the ability to establish clear-cut methods for handling problems that come before the bench. A church property dispute in the wake of doctrinal discord within a hierarchical church organization is one example of a legal issue conducive to resolution by a bright-line rule.¹⁷⁹ The Supreme Court in *Watson v. Jones* proposed a bright-line rule of complete deference to the decision of the church hierarchy tribunal resolving the property dispute. The fatal flaw of the deference approach is that its application is one-sided in favor of the national church. Additionally, the implied consent theory underlying the reasoning of the deference approach results in the application of the implied trust theory, which Virginia has expressly rejected. Recognizing the need to craft an alternative method for handling church property disputes, the Supreme Court, a century later in *Jones v. Wolf*, endorsed the neutral principles doctrine crafted by the Georgia courts. Once again, inherent problems arose in this newer method for resolving church disputes, namely confusion over what exactly are neutral principles of law and how courts should apply them. The Supreme Court did, however, grant states the freedom to decide church property disputes in any manner so long as the method employed does not violate the First Amendment protection against the establishment of religion and the guarantee of the separation of church and state.

During the Civil War Era, Virginia crafted a statute to handle church property disputes. The statute has great potential to resolve the issue of who owns the church property in the wake of a religious divorce. Key to becoming a bright-line rule, the term “division,”

179. While the brightest line would be a rule that the national church always wins, or alternatively, that the local congregation always gets the property, the purpose of the legal system is not merely to rubber-stamp the decision of one litigant every time a dispute arises. Thus, a bright-line rule that enables the courts to clearly resolve an issue without ensuring that the same side always wins fits well within the American legal system.

central to Virginia Code section 57-9, must be defined to ensure that the courts are not involved in deciding doctrinal disputes and that neither side of the dispute is certain to win every time discord arises. If division within a church is defined as a complete separation into factions with distinct views of key church doctrine, then the courts will be able to settle the property disputes in a swift and timely manner. This rule will have staying power as new property disputes arise in Virginia within hierarchical church organizations.

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