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ADJUDICATING CHURCH PROPERTY DISPUTES

WHO KEEPS PARISH PROPERTY WHEN A CONGREGATION SECEDES FROM A DENOMINATION?

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INTRODUCTION

In 1 Corinthians 6, after warning Christians that it is "an utter failure for you that you go to law against one another" St. Paul asks: "Dare any of you, having a matter against another, go to law before the unrighteous, and not before the saints? Why do you not rather accept wrong? Would you not rather let yourselves be cheated?" [1]The answer to his final question appears to be "No": in the past two decades, several major Christian denominations- prominent among them the Presbyterian and Episcopal (Anglican) churches- have experienced internal division over issues of biblical authority and LGBTQ sexuality. Hundreds of local congregations have voted to withdraw from these national denominations, forcing the question: Who owns the parish property, the congregation or the denomination?

In some cases, the answer is clear: sometimes the deed to the property states that it is held for the benefit of the denomination, and other times the property is subject to an express trust agreement in favor of the denomination. As Judge M. McConnell notes, "[i]n these cases, there is little doubt that the denomination owns the property, and in all likelihood there will be no litigation." [2] However, in other cases the parish's deeds are held in benefit for the local church congregation, and fail to so much as mention the denomination. In such cases, litigation may ensue, and these cases are notoriously difficult for secular courts to resolve, and often lead to unpredictable rulings.

This uncertainty comes at the cost of expensive litigation and unstable property rights, which can cripple a parish's ability to raise funds, borrow money, or obtain insurance. [3]

Historically, secular courts have adopted one of two approaches: either they have attempted to decipher whether the parish or the denomination most adheres to the historical principles of the Church, and have awarded the property to the faction that most closely does so (an approach known as the English Rule); or they have automatically deferred to the judgment of the internal church hierarchy (an approach known as Hierarchical Deference). Today, both these approaches are widely recognized as inconsistent with Churches' First Amendment rights to be free from state interference in their internal affairs and to order their affairs in accordance with their own convictions. [4]

It was in recognition of this inconsistency that the Supreme Court of the United States introduced, in a 1989 decision, Jones v. Wolf, a third approach, Neutral Principles. This third approach has two variations: Strict and Hybrid. The strict approach courts to rely exclusively on ordinary principles of property, trust, and contract law, while the hybrid, though relying on theses principles, further takes into account internal church rules. Both approaches have their own advantages and their disadvantages.

HISTORY OF INTERPRETATIONAL APPROACHES

1817 THE ENGLIGH RULE
ATTORNEY-GENERAL V. PEARSON (U.K.)

Holds that the court should award property to the faction that best adheres to the "original institution" of the Church.

In 1817 a Protestant meetinghouse split into Trinitarian and Unitarian factions. Both factions claimed the right to control the property. Faced with the task of adjudicating this case, and with a deed that did not explicitly limit the property's use to any particular form of worship, the English court held that it would ascertain "the nature of the original institution," and award the property to "those adhering to the [orthodox] system [of the Church]." [5] The court decided in favor of the Unitarian faction.

The court's reasoning was based on the "logic of donor intent": donors donate to a church that adheres to a particular religious doctrine, and allowing a church to use those donations to "propagate a substantially different doctrine [would] do violence to the intention of the donors." [6] *Prima facie*, the rule seems commonsense, and it was the dominant interpretational approach for over 150 years. However, the approach has two main drawbacks: (1) it requires civil courts to resolve theological disputes about church doctrine, which they do not have the requisite expertise to do; and (2) taken literally, "the English rule would forbid any evolution of church doctrine, lest the church lose its property to a faction of traditionalists." [7] Both of these amount to violations of religious liberty.

1872 HIERARCHICAL DEFERENCE
WATSON V. JONES (U.S.)

Holds that the court should defer to the highest internal church body.

In a 1872 decision, when adjudicating between the pro- and anti-slavery factions of a Presbyterian Church in Kentucky, the United States Supreme Court adopted an approach known as Hierarchical Deference, ruling in favour of the church's nationally supported anti-slavery faction. According to the court, the question at issue was to "which of two bodies shall be recognized"—the local pro-slavery faction or the national anti-slavery faction. [8] As Judge McConnell recounts: "[t]his, the Court said, was an "ecclesiastical" question, which could only be decided by "the highest…church judicatories." Because the highest authority within the Presbyterian Church was the national assembly, and it had recognized the anti-slavery faction as legitimate, the Court was bound to award the property to that faction." [9] The Court reasoned that parishioners who join a religious association imply consent to the association's ecclesiastical decisions, and that the court's deference on ecclesiastical matters was necessary to respect this implied consent. The primary problem with this approach- not to be explicitly recognized by the court for nearly a century- is that it creates ratchet effect in favour of the hierarchy, thereby preventing churches from evolving democratically.

1979 NEUTRAL PRINCIPLES
JONES V. WOLF (U.S.)

Holds that the court should require churches to codify internal church law in formal secular law.

In its last relevant major decision, the Court issued an opinion advocating an approach deemed "Neutral Principles", identifying two advantages of this approach over the Hierarchical Deference approach. First, "[t]he 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." [10] Second, it is "flexible enough to accommodate all forms of religious organization and polity." [11] This is well and good. However, when it came to the issue of how neutral principles should be applied in practice, the *Jones* contained ambiguous language, and appears to advocate two distinct approaches. Judge McConnell clarifies:

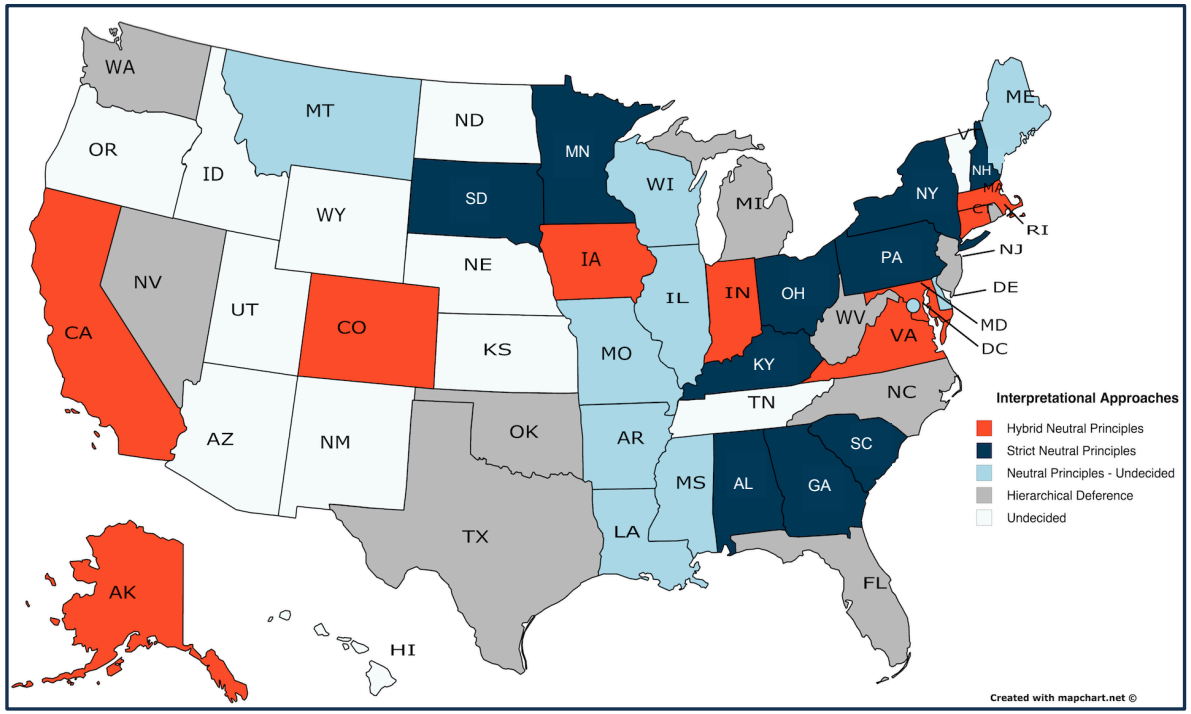
STRICT NEUTRAL PRINCIPLES

""At one point, the opinion suggests that the neutral principles approach should be "completely secular in operation," meaning that courts should rely "exclusively on objective, well- established concepts of trust and property law," as applied to the deeds, corporate charters, and formal trust agreements. According to this view, as long as courts avoid religious questions, church property disputes can be resolved just like other property disputes within a voluntary association." [12]

HYBRID NEUTRAL PRINCIPLES

""Another passage in the opinion, however, suggests that in addition to legal documents establishing title, courts may examine certain religious documents, such as a church constitution in reaching their decisions." [13] These religious documents can- and often do- contradict secular legal documents, leading some decisions made by courts utilizing the Hybrid approach to depart from those made while adhering to the strict approach.

Though "[a]ny precise count should be considered with caution, as the law in some states is ambiguous, inconsistent, or in flux", [14] of the twenty-nine American states that have explicitly adopted neutral principles, nine have adopted the strict approach, eight have adopted the Hybrid approach, and twelve remain unclear or undecided on the matter.



ARGUMENT: PRO-HYBRID NP

Below are three objections to the strict approach of neutral principles.

1. The strict approach of neutral principles requires churches to codify their internal law in secular law. This can create a ratchet effect in favour of the congregation, which is to say that the strict approach forces hierarchical denominations to go through a "congregational" period in order to embody their laws in legally cognizable form. This is because certain legal instruments, notable among them trusts, require two party agreement, which is to say that an agreement holding parish property in trust for the denomination must be formally co-signed by that parish's congregation. This forces the hierarchy to negotiate the property with parishes that should- on the church's self-understanding- be deferential. In this way the strict approach potentially infringes on religious freedom.

2. The strict approach maintains that internal church law is not binding in secular court. However, the internal rules, regulations, and bylaws of many other voluntary associations (like unions and condominiums) are accorded respect in secular courts and used in the decision-making procedure of these courts. *Primo facie*, there is no reason churches should be treated any differently than these associations.

3. No legal system is complete, which means that courts must face penumbra cases—cases in which rights are implied but not explicit. When the strict approach is applied these penumbra cases become the responsibility of secular courts instead of internal church judicatories. However, when the case is complex- as penumbra cases are apt to be- secular courts are often lack the knowledge necessary to make a just decision.

REFERENCES

1 1 Corinthians 6; 1-8.
2 Michael McConnell and Luke Goodrich, *On Resolving Church Property Disputes*, 58 Arizona L. Rev. (2016) p. 309.
3 Ibid., 310.
4 Ibid., 316.
5 (1817) 36 Eng. Rep. 135; 3 Mer. 400ff.
6 McConnell, *On Resolving Church Property Disputes*. p. 311.
7 Ibid., 313.
8 Watson v. Jones, 80 U.S. at 717 (1872).
9 McConnell, *On Resolving Church Property Disputes*. p. 314.
10 Jones v. Wolf 443 U.S. at 603 (1979)
11 Ibid.
12 McConnell, *On Resolving Church Property Disputes*. p. 319.
13 Jones v. Wolf 443 U.S. at 604 (1979)
14 Jeffery Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 32 Pepperdine L. Rev. 2 (2008) p. 457.