

## CHURCH PROPERTY OWNERSHIP: SCHISM AND PROPERTY IN THE EPISCOPAL CHURCH

DEBORAH J. KEMP\*

MARCIA J. STAFF\*\*

### I. INTRODUCTION

In 2007, a former bishop in the Episcopal Church of the U.S.A. (ECUSA), John David Schofield, announced that the Diocese of San Joaquin in California had left the national church and had realigned with the Anglican Church in the Southern Cone, located in South America.<sup>1</sup> Schofield objected to the ordination to priesthood of openly gay men and of women whether gay or straight.<sup>2</sup> By 2007, the ECUSA had not only ordained a number of gay men and women priests,<sup>3</sup> but had also elected an openly gay man to be bishop<sup>4</sup> and had elected a woman to be the presiding bishop,<sup>5</sup> the highest ecclesiastical position in the ECUSA.<sup>6</sup>

The ECUSA is a hierarchical church, structurally resembling the U.S. Federal judicial system. It is also a branch of the worldwide Anglican Communion,<sup>7</sup> consisting of forty-four provinces of Anglican churches. It is headed by the Archbishop of Canterbury, an ecclesiastical position that dates to the 6th century. ECUSA headquarters are in New York City, and it administers 110 dioceses, of which the Diocese of San Joaquin is one. The various dioceses are combined into eleven provinces. The ECUSA is headed by the Presiding Bishop, currently Katherine Jefferts-Schori. Each diocese is headed by a bishop who is elected by the House of Bishops and who recognizes and administers a number of parishes and

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\*J.D., Professor, California State University, Fresno.

\*\* J.D., Professor, University of North Texas.

<sup>1</sup> See Ellen Lee, *Episcopal Fold Loses 1<sup>st</sup> Diocese in Valley*, S.F. CHRON., Dec. 9, 2007, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> Whether women and gay men could serve as priests in a diocese was left to each diocese. ECUSA did not adopt a policy.

<sup>4</sup> Brian Murphy, *Will Fight Over Gay Clergy Split Anglicans?*, CHI. SUN-TIMES, June 9, 2006, at A10.

<sup>5</sup> Katharine Jefferts Schori was elected Presiding Bishop of The Episcopal Church in June 2006. She serves as Chief Pastor and Primate to The Episcopal Church members in sixteen countries and 110 dioceses. See *Our Presiding Bishop*,

[http://ecusa.anglican.org/78694\\_ENG\\_HTM.htm](http://ecusa.anglican.org/78694_ENG_HTM.htm) (last visited Feb. 27, 2010).

<sup>6</sup> ECUSA is part of the Anglican Council, which does not exercise control over ECUSA. Anglican churches throughout the world are united in fundamental religious beliefs, but not in control over church property. The Roman Catholic Church has property rights to church property in the United States. See generally *The Anglican Communion Official Website, The Anglican Communion Covenant* <http://www.anglicancommunion.org/> (last visited Apr. 1, 2010).

<sup>7</sup> See generally *id.*

missions. The parishes and missions are headed by priests (rectors) who have been appointed by the diocesan bishop. Each of the ecclesiastical levels has corresponding lay representative bodies which assist in church administration.

The ECUSA inhibited Schofield, an action similar to excommunication in the Catholic Church.<sup>8</sup> Schofield believes he removed the diocese from the ECUSA, but the ECUSA believes the diocese remained, that Schofield and his followers left both the diocese and the ECUSA. Schofield took parish and diocesan property when he left. The bishop of the diocese has the legal right to control the diocesan property. Through inhibition, Schofield has ceased to be the bishop of the diocese. However, he continues to occupy and otherwise control real and personal church property. He still calls his domain the Diocese of San Joaquin and has aligned it with the newly constituted Anglican Church of North America (ACNA).<sup>9</sup> Some parishes in the diocese remained with the ECUSA, but others went with Schofield. It is not entirely clear whether the parishes left the ECUSA due to doctrinal disagreement or because Schofield possesses the physical property where the parishioners worship. The ECUSA appointed an interim bishop to preside over the Episcopal Diocese of San Joaquin.<sup>10</sup>

The ECUSA and remaining Diocese of San Joaquin sued in California state courts for return of the property, which was ordered on July 21, 2009.<sup>11</sup> An appeal by Schofield is pending. On February 8, 2010, the Episcopal Diocese of San Joaquin filed a new action seeking the return of diocesan property.<sup>12</sup> During the pendency of the Schofield litigation, the Supreme Court of California published *The Episcopal Church Cases*,<sup>13</sup> an opinion regarding ownership of property that had been held by parishes which had seceded from the Diocese of Los Angeles. The Court decided that the property belongs to the diocese and the national church. Two questions were left unanswered in *The Episcopal Church Cases*. First, who has rights to property when the secession is done by a diocese rather than by a parish? Second, to what extent do parishioner donors, missions, and parishes, have authority to provide for future property settlements before schisms occur?

In the case of the property owned by the Diocese of San Joaquin and the ECUSA, substantial amounts of the property have already been largely expended by Schofield, in mounting his defense and in forming his new diocese. In all possible remaining scenarios, parishioners of both the seceding and remaining dioceses will have lost a substantial amount of church property wealth. Had the law been clear

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<sup>8</sup> See Episcopal Life Online, *Presiding Bishop Inhibits San Joaquin Bishop*, [http://ecusa.anglican.org/79901\\_93559\\_ENG\\_HTM.htm](http://ecusa.anglican.org/79901_93559_ENG_HTM.htm) (last visited Apr. 1, 2010).

<sup>9</sup> See The Diocese of San Joaquin An Anglican Diocese in North America, *About Us*, <http://www.dioceseofsanjoaquin.net/> (last visited Apr. 12, 2010).

<sup>10</sup> See The Episcopal Diocese of San Joaquin, *Provisional Bishop: Bishop Jerry A. Lamb* <http://diosanjoaquin.org/bishop/index.html> (last visited Apr. 12, 2010).

<sup>11</sup> *Diocese of San Joaquin v. Schofield*, No. 08 CECG 01425 (Super. Ct. of Cal. Fresno County, July 21, 2009) Order on Plaintiff's Motion for Summary Adjudication [hereinafter MSA Order].

<sup>12</sup> See Pat McCaughan, *San Joaquin: Diocese Seeks Return of Property Held by Breakaway Congregation*, [http://www.episcopalchurch.org/81803\\_119353\\_ENG\\_HTM.htm](http://www.episcopalchurch.org/81803_119353_ENG_HTM.htm) (last visited Feb. 10, 2010).

<sup>13</sup> 198 P.3d 66 (2009).

when Schofield removed himself, the parishes and diocese could have avoided much of the property waste and the accompanying psychical damage to parishioners.

Other dioceses in ECUSA are seceding, or have seceded, from the ECUSA,<sup>14</sup> so the California cases will be influential. The U.S. Supreme Court's recent neutral principles of law approach to church property dispensation decisions provides little concrete advice. It primarily lists factors to consider when deciding church property ownership rights. The U.S. Supreme Court opinion did not provide mandatory and detailed guidelines that would enable the courts and churches to arrange for rapid decisions; it left the door open for states and churches to provide their own guidelines.

The Church of England, foundation of the Anglican Communion, was created through secession from the Roman Catholic Church. The Nicene Creed, developed in the 4<sup>th</sup> century during the Council of Nicea, establishes the universal belief doctrine of the churches in the Anglican Communion. Members pledge membership in one holy, Catholic, and apostolic church.<sup>15</sup> Apostolic succession is "the doctrine asserting that the chosen successors of the apostles enjoyed through God's grace the same authority, power, and responsibility as was conferred upon the apostles by Jesus. Therefore present-day bishops, as the successors of previous bishops, going back to the apostles, have this power by virtue of this unbroken chain."<sup>16</sup> Because of the Apostolic succession doctrine, Schofield's authority as bishop is unclear.

Because the stakes are so high for all concerned—ranging from parishioners who have made investments of "time and treasure" into their local churches to the continued authority of the ECUSA—the authors advocate that the federal and state courts, as well as the ECUSA, should make clear and fair guidelines as to church property ownership upon the occurrence of a schism. Further, they should provide an abbreviated legal action for property dispensation decisions that could alleviate the severe emotional trauma that results from delays in resolution of property ownership disputes. It is hoped that consistency in the case decisions will benefit church members by establishing concrete guidelines that would allow state courts to rapidly decide church property dispensation.<sup>17</sup> In Part II, the authors summarize the

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<sup>14</sup> Others are Pittsburgh, Dallas-Ft. Worth, Quincy, Ill. See Rachel Zoll, *Diocese of Fort Worth Splits from Episcopal Church*, HOUS. BELIEF, Nov. 15, 2008, available at <http://www.chron.com/disp/story.mpl/life/religion/6114331.html>.

<sup>15</sup> See THE EPISCOPAL CHURCH, BOOK OF COMMON PRAYER (1979). While Roman Catholic Church members recite an almost identical creed, they do not include the Anglican Church in their "holy, Catholic, and apostolic church." Anglicans, on the other hand, recognize apostolic succession in the Roman church as well as in the English church. It is similar to the Apostle's Creed when used in other contexts. "Apostolic" means church doctrines hold that bishops have a direct line of succession from the twelve apostles.

<sup>16</sup> See THE FREE DICTIONARY BY FARLEX, Apostolic succession, <http://encyclopedia2.thefreedictionary.com/Apostolic+succession> (last visited Feb. 7, 2010).

<sup>17</sup> In *Jones v. Wolf*, 443 U.S. 595, 599 (1979), the Supreme Court suggested that churches provide for property dispensation in their constitutions, bylaws, and canons, assuming the state courts will respect the church laws. Were the state courts to give effect to the holding, they could make a type of no fault divorce, even using mediation if necessary. In no case should church property disputes be permitted to affect the lives of the parishioners for more than a few months. The case involving the Diocese of San Joaquin has lasted three years and is now

Supreme Court cases that dictate the amount of involvement the state courts can have when deciding church legal disputes without violating the First Amendment's freedom of religion and religious establishment clauses. In Part III, the authors examine other United States, California, and Episcopal Church cases relevant to the issues of church property. In Part IV, the authors review the scholarship regarding judicial involvement in religious disputes, seeking advice for courts in future cases. Finally, in Part V, the authors examine the situation in the Diocese of San Joaquin and consider how learning from the previous cases and scholarship might have helped resolve the dispute more quickly and equitably.

## II. MAJOR SUPREME COURT CASES AND THE DENNIS CANON

The U.S. Supreme Court has espoused two separate yet related doctrines to guide state courts in resolving property disputes that may arise as a result of doctrinal schism within churches. The first is the rule of deference which requires courts to refrain from deciding rights with respect to ecclesiastical doctrine. The second clarifies the first to permit courts to decide property rights in church disputes by applying neutral principles of law.

In *Watson v. Jones*<sup>18</sup> a parish was split between pro-slavery and anti-slavery members. The United States Supreme Court examined the English method of resolving property disputes when a church splits, called the "departure from doctrine" approach.<sup>19</sup> The doctrine requires the court to determine which side in the split most closely adhered to the religious doctrines that were followed at the time the property at issue was given to the church.<sup>20</sup> This was considered a trust approach in that the church was to care for the property in trust for the donor of the property, and use it as contemplated by the donor at the time of the donation.<sup>21</sup> The Court decided not to apply the doctrine, stating that application of the doctrine required the courts to interfere with people's free exercise of religion. Courts in the United States are constrained by the First Amendment, both to refrain from discriminating against religion and to refrain from establishing a religion. Asking which religious doctrine is the better, as is done in the English approach, clearly violates the First Amendment.

Instead, the Court created the deference approach, which requires courts to defer to the church's laws, customs, rules, and orders.<sup>22</sup> The Court recognized two classes of churches: congregational and hierarchical. Congregational churches are much less controlled by a central entity, so each congregation is free to manage its own property. The courts would presumably defer to the local church's decisions. Hierarchical churches, like Anglican churches, would be treated more like appeals

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on appeal. The authors believe this is excessive and effectively amounts to the government interfering with the parishioners' free exercise of their religion.

<sup>18</sup> 80 U.S. 679 (1979).

<sup>19</sup> *Id.* at 727-28.

<sup>20</sup> See *New v. Kroeger*, 167 Cal. App. 4th 800, 808-11 (Cal. Ct. App. 2009) (explaining the structure of the Episcopal Church and its constituent parts).

<sup>21</sup> 80 U.S. at 727-28.

<sup>22</sup> *Id.* at 727.

from administrative agencies. The highest tribunal in the national church would make the decision to which the court would be expected to defer.<sup>23</sup> Historically, most of the cases are brought by hierarchical churches like the Roman Catholic and the Episcopalian.<sup>24</sup>

In a series of cases over the next century, the Supreme Court developed and applied a variety of principles in cases of church secessions. In *Presbyterian Church in the United States v. Mary Elizabeth Hull Memorial Presbyterian Church (Hull)*,<sup>25</sup> the U. S. Supreme Court overruled a Georgia state court's use of the theory of implied trust when a property dispute arose within a hierarchical church organization. The Court specifically rejected Georgia's use of the implied trust theory and held "[t]he Georgia courts have violated the command of the First Amendment."<sup>26</sup> While not specifying what the "other way of resolving church property disputes" was, the *Hull* Court was the first to mention the words *neutral principles of law* while applying the deference approach used in *Watson v. Jones*. The Court noted that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which the property is awarded."<sup>27</sup> However, the Court provided no guidance as to where the neutral principles were to be found.

In several more cases, the Supreme Court continued to refer to neutral principles in passing in rulings on church property disputes but provided very little guidance on the application of such principles.<sup>28</sup> Finally, almost a century after *Watson v. Jones*, in 1979 the Supreme Court decided *Jones v. Wolf*<sup>29</sup> and developed what is now referred to as the neutral principles of law approach to be used in property disputes within hierarchical churches.

The Vineville Presbyterian Church of Macon, Georgia held the deed to property on which the church was located. The Vineville church was a member of the Augusta-Macon Presbytery of the Presbyterian Church of the United States (PCUS). In 1973, at a meeting of the church congregation, 164 enrolled members voted to separate from the PCUS. Ninety-four members opposed the separation.<sup>30</sup> The Augusta-Macon Presbytery appointed a commission to resolve the dispute between the members of the congregation. The commission ruled that the minority constituted the "'true congregation' of the Vineville Presbyterian Church."<sup>31</sup> The majority faction did not appeal the commission's ruling but retained control of the

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<sup>23</sup> *Id.*

<sup>24</sup> The Episcopal Church acquired substantial wealth before the Revolution and during the early days of the United States of America. See generally THEODORE DREISER, *THE CHURCH AND WEALTH IN AMERICA* (1931), available at [http://www.infidels.org/library/historical/theodore\\_dreiser/church\\_and\\_wealth\\_in\\_america.html](http://www.infidels.org/library/historical/theodore_dreiser/church_and_wealth_in_america.html).

<sup>25</sup> 393 U.S. 440 (1969).

<sup>26</sup> *Id.* at 447.

<sup>27</sup> *Id.* at 449.

<sup>28</sup> See, e.g., *Serbian Oorthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 n.15 (1976); *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (1970).

<sup>29</sup> 443 U.S. 595 (1979).

<sup>30</sup> *Id.* at 597.

<sup>31</sup> *Id.*

church property. The minority filed suit in federal court where the complaint was dismissed for lack of jurisdiction.<sup>32</sup> The minority then brought a class action in state court in Georgia seeking to establish the minority's right to exclusive use and possession of the church property. The trial court applied Georgia's neutral principles of law approach and awarded the property to the majority. The Supreme Court of Georgia affirmed.<sup>33</sup>

The U. S. Supreme Court granted certiorari to address the question "whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church."<sup>34</sup> Writing for the majority in a divided decision, Justice Brennan further refined the question as follows: "The only question presented by this case is which faction of the formerly united Vineville congregation is entitled to possess and enjoy the property located at 2193 Vineville Avenue in Macon, Ga."<sup>35</sup>

While recognizing that the State has a legitimate interest in the resolution of property disputes within churches, the Court said the First Amendment requires courts to defer to the resolution of issues of religious doctrine by the highest judicial body of a hierarchical church organization.<sup>36</sup> However, the Court concluded that the First Amendment does not dictate what method a state must follow in resolving a property dispute within a church and a state can adopt any method for settling church property disputes "so long as it involves no consideration of doctrinal matters."<sup>37</sup>

While taking care to scrutinize the documents in purely secular terms, the Court suggested that the neutral principles approach would allow a court to examine the constitution and canons of the general church, deeds, the articles of incorporation, and state corporate law.<sup>38</sup> The majority extolled the advantages of the neutral principles approach as being totally secular yet flexible, writing that the approach relies "exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges."<sup>39</sup> The Court advised:

Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.<sup>40</sup>

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<sup>32</sup> Lucas v. Hope, 515 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

<sup>33</sup> Jones v. Wolf, 243 S.E.2d 860 (1978), *aff'd*, 443 U.S. 595 (1978).

<sup>34</sup> Jones v. Wolf, 443 U.S. at 597.

<sup>35</sup> *Id.* at 602.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Doctrinal matters include ritual, liturgy of worship, or tenets of the faith.

<sup>38</sup> *Id.* at 604.

<sup>39</sup> *Id.* at 603.

<sup>40</sup> *Id.* at 603-04.

The majority advised hierarchical churches that want to prepare for schism:

At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.<sup>41</sup>

It is difficult to imagine a powerful, wealthy national church voluntarily amending its constitution and canons to give a parish or individual parishioner the right to take the parish buildings and personal property with it when it leaves the national body. One can conclude that in a hierarchical church, the power, wealth and property will stay with the national church. That is the same result as would have occurred with the previous deference approach.

The Supreme Court's *Jones v. Wolf* decision inspired the ECUSA to enact its own laws on property. The following, known as the Dennis Canon, was added in 1976 to the canons of the Episcopal Church:

All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.<sup>42</sup>

The canon is clearly drafted to comply with the Supreme Court's indication that courts would enforce church laws that provide for property disposition and that specify that the local congregation holds property in trust for the diocese or national church.<sup>43</sup> What has yet to be determined is whether the holding of *Jones v. Wolf* and the Dennis Canon will produce a decision against a schismatic diocese, since neither the Dennis Canon nor the *Jones v. Wolf* decision seem to contemplate anything

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<sup>41</sup> *Id.* at 606.

<sup>42</sup> Church Publishing Inc., *Canons of the General Convention, 7.04 and 7.05*, [http://www.churchpublishing.org/general\\_convention/pdf\\_const\\_2003/Constitution.pdf](http://www.churchpublishing.org/general_convention/pdf_const_2003/Constitution.pdf) The canon is named after the bishop of New York, Walter Dennis, who drafted the amendment.

<sup>43</sup> See *supra* text accompanying notes 40-41. One commentator posited that the "courts' application of the Dennis Canon almost always produces pro-diocese, anti-parish decisions." Kathleen E. Reeder, *Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits*, 40 COLUM. J.L. & SOC. PROBS. 125, 126 (2006).

above a parish disassociating with the national church. In both church and case law, the diocese is equated with the national church.

### III. OTHER CALIFORNIA AND EPISCOPAL CASES

#### A. *The Episcopal Church as Part of the Church of England*

The first U. S. Supreme Court case involving a dispute over church property was *Terrett v. Taylor*,<sup>44</sup> wherein the Court decided the ECUSA's rights to property that had been held by the Church of England prior to the Revolutionary War.<sup>45</sup> When it was a colony, Virginia made the Church of England its official church. When the United States of America was formed, Virginia granted the property that had been owned by the Church of England to the ECUSA and changed its state law to recognize separation between church and state.<sup>46</sup> Virginia then took ownership of the church's unoccupied "glebe" lands, land that had been donated by England for the church to rent out to tenants.<sup>47</sup> Apparently the church had incorporated, and the Court said the state could not take private property. Through application of corporation law, the Court held that the church was entitled to the land.<sup>48</sup> Perhaps it was instinctive that the Court used the neutral principles of law approach over two hundred years before *Jones v. Wolf*.

The second case, *All Saints Parish v. Diocese of South Carolina*,<sup>49</sup> is more recent, but in it the court relied on a deed to land that had been granted by England in 1745 to three individuals to start a parish church. Two hundred fifty-five years later, members of the parish seceded from the diocese and national church and claimed the church building and grounds belonged to the heirs of the three early grantees and not to the ECUSA.<sup>50</sup> The South Carolina court applied its understanding of neutral principles of law and found that under secular law the record owner of the deed to land is the rightful owner.<sup>51</sup> In the United States, Episcopal churches were created through a 1706 church act of the English Parliament that gave permission to start

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<sup>44</sup> 13 U.S. 43 (1815). See ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 104-05 (1964).

<sup>45</sup> See Michael W. McConnell, *Symposium: 2000-2001 Supreme Court Review: The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7-21 (2001). See generally Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

<sup>46</sup> McConnell, *supra* note 45, at 7-21.

<sup>47</sup> 13 U.S. 43 (1815); see also McConnell, *supra* note 45, at nn. 13 & 14.

<sup>48</sup> 13 U.S. at 43; see also McConnell, *supra* note 45, at n. 33.

<sup>49</sup> *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, No. 2000-22-720 (S.C. 15th Jud. Cir. Oct. 10, 2001) (granting summary judgment for defendants), *rev'd*, 358 S.C. 209, 595 S.E.2d 253 (S.C. App. 2004).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; see also Sarah M. Montgomery, *Note: Drawing the Line: The Civil Courts' Resolution of Church Property Disputes: The Established Church and All Saints' Episcopal Church, Waccamaw*, 54 S.C. L. REV. 203 (2002).

Anglican churches in the colonies.<sup>52</sup> After the colonies became independent, South Carolina enacted its constitution, which provided that South Carolina left the Church of England and reorganized as the Protestant Episcopal Church of South Carolina. Other states did the same. The South Carolina Supreme Court reversed the lower court, but still found that the hierarchical provisions of church property ownership and the new Dennis Canon took second place to the prior deed.<sup>53</sup> The court found that the majority portion of the parish, the section that had seceded, was the rightful owner of the disputed property.<sup>54</sup> The South Carolina courts interpreted the neutral principles approach differently than did the California Supreme Court in its 2009 *Episcopal Church Cases*,<sup>55</sup> summarized hereafter. The *Jones v. Wolf* opinion has not resulted in uniformity and predictability in the law of church property dispensation upon schism within the ECUSA. The above South Carolina decision not only applies the neutral principles of law approach differently, but it departs from the earlier *Watson v. Jones* deference approach, which required courts to follow the decision of the hierarchical church's highest tribunal.

### B. California Cases After *Jones v. Wolf*

There has been a lack of consistency within California itself as regards interpretation of the neutral principles approach. Perhaps the Supreme Court of California's recent decision on ownership of ECUSA property will lead to consistency. In California two appellate courts within a year of one another applied the same neutral principles of law approach, but arrived at different results and used different methods.<sup>56</sup> In *Guardian Angel Polish Nat. Catholic Church of Los Angeles v. Grotnik*,<sup>57</sup> the parish seceded from the diocese and the national church, created a parish board of directors and filed its own articles of incorporation. The Second District appellate court ordered the property returned to the national church and invalidated the parish's actions, saying the board needed to be approved by the national church. Since the action had been approved, the board's actions on behalf of the parish were invalid.<sup>58</sup>

A different result obtained in *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist*.<sup>59</sup> The local church had filed articles of incorporation to sever its ties with the United Methodist Church and to hold property in trust for itself only.<sup>60</sup> The court acknowledged the existence of the trust, but also found the articles of incorporation were valid, which would revoke the trust. The court criticized *Grotnik* for saying it was applying neutral principles but

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<sup>52</sup> Montgomery, *supra* note 51, at 206-07.

<sup>53</sup> 385 S.C. at 449.

<sup>54</sup> *Id.* at 451.

<sup>55</sup> 45 Cal. 4th 467 (2009).

<sup>56</sup> See Ashley Alderman, *Note: Where's the Wall?: Church Property Disputes Within the Civil Courts and the Need for Consistent Application of the Law*, 39 GA. L. REV. 1027, 1047-50 (2005).

<sup>57</sup> 118 Cal. App. 4th 919, 13 Cal. Rptr. 3d 552 (Cal. App. 2nd 2004).

<sup>58</sup> *Id.* at 926.

<sup>59</sup> 121 Cal. App. 4th 754, 17 Cal Rptr. 3d 442 (Cal. App. 4th 2004).

<sup>60</sup> *Id.* at 758.

then invalidating the articles of incorporation, which were otherwise valid.<sup>61</sup> The court noted that its result were at odds with the result in *Grotnik*.<sup>62</sup>

In *The Episcopal Church Cases* the Supreme Court of California used a property dispute resulting from parishes in the Diocese of Los Angeles disaffiliating from the larger, general church “to decide how the secular courts of the state should resolve disputes over church property.”<sup>63</sup> The trial court had found the local parishes had ownership of the disputed property. The Court of Appeals and the California Supreme Court found that the diocese and national church had ownership of the disputed property. All three courts applied their interpretations of the neutral principles of law approach. The Court succinctly explained its application of the First Amendment and *Jones v. Wolf*.<sup>64</sup>

As is common with hierarchical churches, when the court applied the neutral principles of law doctrine it awarded the property to the general church and not to the parishes that had left the church, saying, “When it disaffiliated from the general church, the local church did not have the right to take the church property with it.”<sup>65</sup> The court held:

[W]e conclude that secular courts called on to resolve church property disputes should proceed as follows: State courts must not decide questions of religious doctrine; those are for the church to resolve. Accordingly, if resolution of a property dispute involves a point of doctrine, the court must defer to the position of the highest ecclesiastical authority that has decided the point. But to the extent the court can resolve a property dispute without reference to church doctrine, it should apply neutral principles of law. The court should consider sources such as the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes,

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<sup>61</sup> *Id.* at 771.

<sup>62</sup> *Id.*

<sup>63</sup> 45 Cal. 4th 467, 472 (2009).

<sup>64</sup> *Id.* at 485. The court wrote:

State courts must not decide questions of religious doctrine; those are for the church to resolve. Accordingly, if resolution of the property dispute involves a doctrinal dispute, the court must defer to the position of the highest ecclesiastical authority that has decided the doctrinal point. But to the extent the court can resolve the property dispute without reference to church doctrine, it should use what the United States Supreme Court has called the “neutral principles of law” approach. The court should consider sources such as the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property, such as Corporations Code section 9142.

*Id.*

<sup>65</sup> *Id.* at 473.

including statutes specifically concerning religious property, such as Corporations Code section 9142.<sup>66</sup>

Apparently the Supreme Court of California did feel bound to consider deeds, California corporation law, and other contrary sources of secular law that might contradict the decision of the “highest ecclesiastical authority,” as was done by the South Carolina Supreme Court in *All Saints Parish v. Diocese of South Carolina*,<sup>67</sup> summarized in the preceding section. The South Carolina Supreme Court had a different interpretation of how neutral principles would be applied. In addition, Justice Kennard’s dissent in *The Episcopal Church Cases* pointed out that the majority’s opinion was not actually based on neutral principles of law.

Applying California’s statute in resolving church property disputes, the majority concludes that the Episcopal Church now is the owner of the St. James Parish property in question. I agree. But that conclusion is not based on neutral principles of law. *No principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner.* If a neutral principle of law approach were applied here, the Episcopal Church might well lose because the 1950 deed to the disputed property is in the name of St. James Parish, and the Episcopal Church’s 1979 declaration that the parish was holding the property in trust for the Episcopal Church is of no legal consequence.<sup>68</sup>

The most recent California decision involving church property ownership upon schism decided whether when an entire diocese secedes from the ECUSA the bishop can take the diocesan property and align itself with another member of the

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<sup>66</sup> *Id.* at 485.

<sup>67</sup> *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, No. 2000-22-720 (S.C. 15th Jud. Cir. Oct. 10, 2001) (granting summary judgment for defendants), *reversed*, 358 S.C. 209, 595 S.E.2d 253 (S.C.App. 2004).

<sup>68</sup> 45 Cal. 4th 467, 495 (2009) (emphasis added); *see also* *New v. Kroeger*, 167 Cal. App. 4th 800, 84 Cal. Rptr. 3d 464 (4th Ct. App. 2008). Therein the trial court from the Diocese of San Diego granted judgment to church members who had voted to leave the church and to affiliate with another church. The seceding members refused to give over the property and to resign their positions on the vestry, the governing board. The appellate court reversed and ordered the trial court to award the property to the loyalists. This result is consistent with the Supreme Court of California’s decision in *The Episcopal Church Cases*. The *New* appellate court made clear that applying the neutral principles of law approach to hierarchical church disputes is very similar to the *Watson v. Jones* deference approach. The court actually clarified *Jones v. Wolf* by pointing out that courts applying neutral principles can look not only to the state property and corporate law, but also to the church’s articles, constitution, and canons. The court went on to hold that—regardless of the theory being applied—the property of the parish belonged to the loyalists. *Id.*

Anglican Communion. In *Diocese of San Joaquin v. Schofield*,<sup>69</sup> the Superior Court of California, Fresno County, held that based on neutral principles and the governing documents of the ECUSA and the diocese, the Diocese of San Joaquin could not take diocesan property upon secession from the ECUSA.

The defendants, the former Bishop of the Diocese of San Joaquin, John David Schofield, and his followers contended that

defendant Schofield was authorized to revise the articles of “The Protestant Episcopal Bishop of San Joaquin, a corporation sole” in 2006 and 2008, and that defendant Schofield may continue as the incumbent of “The Protestant Episcopal Bishop of San Joaquin, a corporation sole” and as President of the Episcopal Foundation and the Investment Trust after leaving the Episcopal Church and being deposed.<sup>70</sup>

The plaintiffs, the Episcopal Diocese of San Joaquin, its current Bishop Jerry Lamb and the ECUSA, contended that

the amendments to the articles of the corporation sole were ultra vires, invalid and void, and that defendant Schofield may not continue as the incumbent of “The Protestant Episcopal Bishop of San Joaquin, a corporation sole,” or as President of the Episcopal Foundation of the Investment Trust, after leaving the Episcopal Church and being deposed.<sup>71</sup>

In addressing the issues before it, the court followed the decision of the Supreme Court of California in *The Episcopal Church Cases*<sup>72</sup> and applied the neutral principles of law approach for hierarchical churches.<sup>73</sup>

The court noted that the defendants' argument related to the relationship between a diocese and the Episcopal General Convention and that the issue was a case of first impression.<sup>74</sup> The court described the ECUSA as a constitutional government, having the General Convention, a legislative body with two houses--a House of Bishops and a House of Deputies--each with the right to enact legislation

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<sup>69</sup> No. 08 CECG 01425, Order on Plaintiff's Motion for Summary Adjudication (Super. Ct. of Cal. Fresno County, July 21, 2009) [hereafter MSA Order].

<sup>70</sup> MSA order, *supra* note 69, at 3.

<sup>71</sup> *Id.* at 3-4.

<sup>72</sup> 45 Cal. 4th 467 (2009); *see also supra* notes 63-68 and accompanying text.

<sup>73</sup> To define the characteristics of a hierarchical church, the court cited *New v. Kroeger*, 167 Cal. App.4th 800 (2009). In a hierarchical church, an individual local congregation that affiliates with the national church body becomes a member of a much larger and more important religious organization, under its government and control, and bound by its orders and judgments. In contrast, a congregational church is defined as one strictly independent of other ecclesiastical associations, and one that so far as church government is concerned, owes no fealty or obligation to any higher authority. *Id.* at 816; *see also supra* notes 22-24 and accompanying text.

<sup>74</sup> MSA order, *supra* note 69, at 5.

called canons. The court said it is a judicial function to interpret written instruments, including the canons of the church,<sup>75</sup> which establish the relationship of diocese to national church.

Schofield argued that the diocese has equal power with the national church and can disaffiliate from the national church while retaining its property. In 2008 Schofield had amended the San Joaquin Diocese's constitution, removing the accession clause and inserting new language about joining the Province of the Southern Cone. The court noted that the diocese "acceded to the Constitution of the Protestant Episcopal Church in the United States of American and recognized the authority of the General Convention of the same."<sup>76</sup> Based on this premise, the court held that the 2008 amendments to the Diocese's Constitution were ultra vires and void. The court recognized Bishop Lamb as the incumbent bishop of the Diocese of San Joaquin and as the President of the Episcopal Foundation and Investment Trust.<sup>77</sup>

The effects of latter two decisions above those are that the Diocese of San Joaquin and the ECUSA are the proper owners of the property and that Schofield's removal of the property from diocesan control was wrongful. The property has not been returned. Schofield has filed an appeal. On February 10, 2010, the Diocese of San Joaquin filed a new action seeking the return of diocesan property.<sup>78</sup>

#### IV. SCHOLARSHIP AND ANALYSIS

Cameron Ellis wrote that the neutral principles doctrine is so undefined that it lacks a guarantee of predictability.<sup>79</sup> Presumably, predictability of result is desirable for churches that are considering withdrawal from a larger church. Ellis found three issues among the scholarly criticism: 1) adaptability of doctrine, 2) inconsistency of doctrine, and 3) "varying degrees of artificial formalism needed to make [doctrine] constitutional."<sup>80</sup> The last issue is the same as that recognized by Justice Kennard in *The Episcopal Church Cases*, that the decisions do not accurately apply secular law. Ellis identified the lack of consistency and admitted that is an aspect of all judicial decision making.

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<sup>75</sup> *Id.* at 6.

<sup>76</sup> *Id.* at 7.

<sup>77</sup> *Id.* at 7-9. Using the deference approach, the court stated: "Both the United States Supreme Court and California courts have held that in the case of hierarchical religious entities the civil courts must accept as binding and defer to decisions by religious tribunals with respect to religious doctrine, practice, faith, ecclesiastical rule, discipline, custom, law membership, polity, clergy credentials and discipline, as well as religious entity governance and administration." *Id.* at 10.

<sup>78</sup> See The Episcopal Diocese of San Joaquin, *Episcopal Diocese Seeks Return of Property*, [http://diosanjoaquin.org/dfc/newsdetail\\_2/197](http://diosanjoaquin.org/dfc/newsdetail_2/197) (last visited April 1, 2010).

<sup>79</sup> Cameron W. Ellis, Note: *Church Factionalism and Judicial Resolution: A Reconsideration of the Neutral Principles Approach*, 60 ALA. L. REV. 1001, 1005 (2009). He responded to and applied two economic based articles on church property dispensation decisions. See *id.* at 1023-24.

<sup>80</sup> *Id.* at 1006.

There is a lack of consistency in disputes featuring the Presbyterian and Episcopal denominations, which is indicative of the Approach's shortfalls. . . . Turning to the Episcopal cases, the difficulty begins when the courts mix the deference approach with the neutral-principles approach. Essentially, the courts have a tendency to find for a national church on the basis of neutral principles. However, even in an explicit application of neutral principles, the courts deciding Episcopal cases diverge. Although two courts examined the exact same articles of incorporation, canons, and church constitutional rules, the courts arrived at different interpretations of the creator's intent. Consequently, one case found for the local church and the other for the national.<sup>81</sup>

However, there may be no difference between this problem of disparate results and the normal, secular differences inherent in any analysis from one court to another. Ellis assumes the court should consider what the parties contemplated when they gave the property, made the church, or whatever action was taken.<sup>82</sup> The court will have to consider some degree of church doctrine when a donor gives land to the church "contingent on the continued adherence to a particular doctrine, belief, or practice."<sup>83</sup>

The *Jones v. Wolf* Court gave four reasons the neutral principles approach was desirable.<sup>84</sup> Ellis found each reason deficient in application.

1. Regarding the Supreme Court's assertion that the use of neutral principles is completely secular, Ellis noted that there is a difference between a facially secular approach and applying neutral principles secularly.<sup>85</sup>
2. Regarding the Court's assertion that neutral principles can be applied in all forms of religious organizations, Ellis noted that Episcopal, Presbyterian and Methodist churches dominate the number of disputes, in spite of comprising a mere 17.3% of the church population.<sup>86</sup> Thus, the doctrine remains untested for a majority of church forms.
3. While the Supreme Court stated that neutral principles would free civil courts from entanglement with religious doctrine and practice, Ellis

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1007-08.

<sup>83</sup> *Id.* Ellis suggests that the courts simply use the deference approach in the case of hierarchical churches. *Id.*

<sup>84</sup> *Jones v. Wolfe*, 443 U.S. 595, 603-04.

<sup>85</sup> See Ellis, *supra* note 79, at 1011.

<sup>86</sup> *Id.* at 1012. Roman Catholic and Baptist are the largest denominations. The Roman Catholic Church is hierarchical along the same model as the Episcopal Church. The Baptist Church is congregational, so when there is a split in it, the courts tend to give the property to the parish, or the equivalent in the Baptist organization. This was true before the *Jones v. Wolf* decision and will most likely be unchanged by it.

noted "it is difficult to delineate doctrine, polity, and practice from church government."<sup>87</sup>

4. Regarding the Supreme Court statement that neutral principles will allow churches to order private rights and obligations to reflect the intentions of the parties, Ellis noted that this would require churches to change their governing documents after 1979 to reorder private rights. While the ECUSA did enact the Dennis Canon,<sup>88</sup> it has no provision for the donor being able to protect his or her individual intentions.

Church ownership often embodies competing expectations. Parishes or even dioceses probably hold the deeds to the church property. If the court uses the deference approach, it will find that the property is owned in trust for the national church, at least in hierarchical churches like the Episcopal Church. But if the court applies the neutral principles approach, it may find that the property is owned in trust for the national church, or that the property belongs to a parish that holds the legal deed to the property. Thus the neutral principles approach has not resulted in uniform treatment and has spawned contentious litigation over church property.<sup>89</sup> Because the neutral principles approach has not made church splits any less contentious, individuals who want to give to charity may be more inclined to give to a secular charity than to a religion, since she may want to have control over the dispensation of the gift.<sup>90</sup> If that proves to be the case, the neutral principles approach may be unconstitutional in its application because it would put a burden on religion, causing donors to give to secular charities.<sup>91</sup>

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<sup>87</sup> See *infra* notes 42-43 and accompanying text.

<sup>88</sup> See Ellis, *supra* note 79, at 1016.

<sup>89</sup> *Id.* at 1016-17. For instance, the Pennsylvania Supreme Court found that, even though the national church did, after *Jones v. Wolf*, provide in its constitution that parish property was held in trust for the national church, the national church had not intended to form an implied trust at the time the parish formed as part of the national church. The Court awarded the property to the parish over the claims of the national Presbyterian Church. See *Presbytery of Beaver-Butler of United Presbyterian Church in the U. S. v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1324-25 (Pa. 1985); see also *Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*, 405 S.W.3d 301, 306 (Ark. 2001) (local church holding deed had right to take property).

<sup>90</sup> See Ellis, *supra* note 79, at 1021.

<sup>91</sup> *Id.* at 1022. Professor Ellis states:

Under the deference standard, hierarchical churches like the Catholic Church had their decisions regarding dispensation of property made immune from judicial scrutiny. Congregational churches like a Baptist affiliation were subject to a neutral principles-type analysis in an effort to determine who the controlling majority was. The deference approach created uncertainty in some organizations about whether they fell into the hierarchical or congregational category—the Approach provides clarity. However, the Approach does not allow hierarchical church forms the same clear deference as the previous test. Regarding hierarchical churches, the deprivation of a clear bright-line test may indicate an increased burden on hierarchical churches, and therefore constitutional concerns, when

In an article in the *Columbia Journal of Law and Social Problems*, Kathleen E. Reeder argues that expectations of parishioners, particularly those who have donated property to the church, should be considered when deciding property rights during church schisms.<sup>92</sup> Reeder suggests that a broad interpretation of the neutral principles approach would have courts using common law contract law to produce fair results that comport with expectations of the parties.

There is no doubt that serious issues of fairness are raised by the fact that most donations of property were made to churches before the *Jones v. Wolf* decision, and in the Episcopal Church, before the Dennis Canon was adopted. At least prospectively, *Jones v. Wolf* seems to allow individual parishioners to contract with national church, diocese for contingent gifts, or for return of the property to the individual's estate if church does not abide by doctrines parishioner approves.<sup>93</sup>

The judicial interpretation of the deference approach may allow courts to defer to church doctrine that is contrary to common law and Locke's social contract theory of government.<sup>94</sup> So there may be an unjust property dispensation and indeed the cases seem to favor the national church in most decisions involving hierarchical churches. Reeder suggests that this deference may go too far and quotes sources suggesting that church may be hierarchical in religious doctrine and practice but not necessarily in property ownership matters.<sup>95</sup> Reeder admits that *Jones v. Wolf* really did not change the deference approach as regards resolving property disputes in hierarchical churches.<sup>96</sup>

Reeder's concern is that under neutral principles the courts will not apply the property and contract law that the court would apply in a purely secular property case.<sup>97</sup> Reeder suggests that a better approach to applying neutral principles is a five factor consideration:

1. Assessments to diocese
2. Purchase and maintenance of property
3. Expectations of parishioner-donors,
4. Change in membership before approval, and

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compared to the previous approach. Since the increased uncertainty hierarchical churches have may force them to draft redundant clauses, which may still not have the desired effect, it is likely that planning for the dispensation of property and assets for a hierarchal organization is more difficult than the planning under the deference regime.

*Id.*

<sup>92</sup> See Reeder, *supra* note 43, at 128.

<sup>93</sup> *Id.* at 164.

<sup>94</sup> *Id.* at 135-36.

<sup>95</sup> *Id.* at 137.

<sup>96</sup> *Id.* at 142-44.

<sup>97</sup> *Id.* at 144. "Even if the neutral principles approach is a new way of resolving church property disputes, restrictions on evaluation of religious texts mean that courts will necessarily employ a less-searching inquiry than they would with comparable non-religious voluntary associations." *Id.*

5. Lack of bargaining power for new churches.<sup>98</sup>

Reeder suggests that a careful consideration of these factors would allow the court to understand the particular facts and law surrounding each case.<sup>99</sup>

If the court treats the church as it would a corporation, with the church existing apart from its members as an independent corporate entity, that may be consistent with neutral principles. But are donations by parishioners equivalent to a purchase of shares, of portions of ownership? The parallels between a corporation and a church are difficult to sustain.

California's corporate sole statute recognizes that the church as a legal entity is not quite the same as a corporation as a legal entity.<sup>100</sup> California courts have interpreted that part of the corporations code in a manner to make clear that the corporate sole is the church and not the individual. As in the case of the Diocese of San Joaquin, legal entity resides in the diocese as part of the Episcopal Church and not with the individual who held the title of bishop.<sup>101</sup>

## V. THE CHAOTIC STATE OF THE EPISCOPAL CHURCH AND NEUTRAL PRINCIPLES

The Supreme Court has said the church can provide in advance for property dispensation upon schism, and the ECUSA has attempted to do so. It still needs to provide foolproof procedures to award the property without delay. Delay is psychologically damaging to individual church members and the church organizations. The current unsettled property disputes occurring in the ECUSA churches due to doctrinal differences are extremely expensive and unproductive.

As the Supreme Court advised in *Jones v. Wolf*:

Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.<sup>102</sup>

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<sup>98</sup> *Id.* at 158-59.

<sup>99</sup> *Id.* at 158.

<sup>100</sup> CAL. CORP. CODE § 10002 (2010).

<sup>101</sup> *Diocese of San Joaquin v. Schofield*, No. 08 CECG 01425 (Super. Ct. of Cal. Fresno County, July 21, 2009) (Order on Plaintiff's Motion for Summary Adjudication), pp. 10-12.

<sup>102</sup> *Jones v. Wolfe*, 443 U.S. 595, 604-05(1979). The majority of the Court provided a blue print of sorts for hierarchical churches who want to prepare for schism. The court wrote:

At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden

Yet in spite of the adoption of the Dennis Cannon and the Supreme Court's adoption of the neutral principles approach in church property disputes, the legal issues related to the ECUSA, its diocese, its parishes and its members continue to be chaotic and unsettled. The Supreme Court's decision may have caused part of the inordinate confusion in the ECUSA by also providing that each state could adopt its own neutral principles of law that it would apply to church property disputes within each state's boundaries. Diocese in Pennsylvania, Texas, California, and other states cannot predict what the law on church property dispensation upon schism is in any state that has not already decided, since each state must make its own blueprint for neutral principles of law that would be used to resolve the controversy in that state. Most state law favors the national church when the church organization is hierarchical. However, the application of neutral principles varies widely from state to state and how it will be applied to any set of facts, including the case of the Diocese of San Joaquin, currently on appeal, is far from certain.

While Schofield and the Diocese of San Joaquin were the first to actually sever from the ECUSA and take diocesan property in the process, parishes have been disassociating from diocese for a long time. This situation was less predictable because Schofield attempted to remove the entire diocese from membership in the ECUSA and to align the diocese with the Anglican Communion, the worldwide aggregation of churches that embraces Anglican doctrine. Neither the courts nor the ECUSA had provided for a schism at that high of a level, both generally treating the diocese as the equivalent of the ECUSA itself. From a corporeal viewpoint, it is not possible to leave the ECUSA and become part of the Anglican Communion, because the ECUSA is part of the Anglican Communion and is recognized by the Archbishop of Canterbury, the head of the Anglican Communion. Thus, Schofield and the Diocese of San Joaquin were already part of the Anglican Communion. The newly formed Anglican Church of North America has not been recognized as part of the Anglican Communion, so Schofield's "Diocese of San Joaquin" lacks Anglican legitimacy at this point.

The canons of the ECUSA do not distinguish between the diocese and the national church. The drafters of the canons, just as the judges deciding property rights upon hierarchical church schisms, did not contemplate secession at the diocesan level. Even the newest canon, the Dennis Canon, which dictates that parishes hold property in trust for the church, indicates that the trust is in favor of the diocese and the national church, as if they are one and the same.<sup>103</sup>

The California courts could look for guidance to Pennsylvania where the Diocese of Pittsburgh's bishop Robert Duncan also left the ECUSA and sought to

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involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

*Id.* at 606.

<sup>103</sup> Canons of the General Convention, *supra* note 42, at 7.04 and 7.0.

take the parishes with him.<sup>104</sup> Several issues were addressed in a judicially recognized settlement.<sup>105</sup> First, parishes in the diocese which did not align with the Network,<sup>106</sup> but remained with the ECUSA, were permitted to remain Episcopal. Second, the diocesan assessments were returned to the parishes which remained with the ECUSA. Third, the church property remained with the parish and with the ECUSA. The former bishop and the parishes which left the ECUSA did not take the church property.<sup>107</sup> Yet it is not yet known whether the settlement will be upheld upon judicial review.<sup>108</sup> The out of court settlements are indeed much quicker and less property is wasted as a result of expensive litigation, but they are often subject to judicial review and continuing litigation. Thus, the expense and trauma to the parishioners of the diocese caused by protracted litigation and uncertainty continue.

The Supreme Court of California in *The Episcopal Church Cases* applied church canons that infer the diocese and bishop are the equivalent of the national church, hence there may be a breakdown of the hierarchical structure at the diocesan level. As previously explained, the constitution and canons of the ECUSA are the highest ecclesiastical laws of the ECUSA. For instance Canon II.6 has the bishop and diocese as being in charge of the property. All alienation of church property in the diocese only needs the bishop's approval, as well as the standing committee of the laity.<sup>109</sup> In addition, Section 3 prohibits vestries, trustees, or others from

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<sup>104</sup> There is a similarity between the secessions of the Diocese of Pittsburg and the Diocese of San Joaquin. The constitutional amendments that the Pittsburgh Diocese passed were similar to the amendments that were voted in at the convention for the Diocese of San Joaquin. The amendments may contravene the canons of the ECUSA and, if so, are not valid. The amendments to the canons and constitution of the Diocese of San Joaquin removed allegiance from the national church. They made the bishop the last word, the final authority, on any church ecclesiastical or property issues.

<sup>105</sup> On October 14, 2005 the parties entered into a Stipulation and Court Order stating that the parties had reached an "amicable resolution" to litigation over the control of property in the event of a separation from the Episcopal Church. The parties agreed in the 2005 Stipulation that "their claims in this action have been settled and resolved." *Calvary Episcopal Church v. The Right Reverend William Duncan*, No. GD-03-020941, C.P. Allegheny County Pa. Stipulation (Oct. 14, 2005).

<sup>106</sup> The former name of the Anglican group now calling itself Anglican Church of North America (ACNA) is The Network.

<sup>107</sup> *Calvary Episcopal Church v. The Right Reverend William Duncan*, No. GD-03-020941, C.P. Allegheny County Pa. Stipulation, Oct. 14, 2005; Order, Jan. 29, 2010, [http://www.episcopalpgh.org/docs/01292010\\_court\\_order.pdf](http://www.episcopalpgh.org/docs/01292010_court_order.pdf).

<sup>108</sup> On February 26, 2010 attorneys representing the former leaders of the diocese sought to appeal the decision of the Court of Common Pleas of Allegheny County that determined the rightful trustee of diocesan assets to be the continuing Episcopal Diocese of Pittsburgh of the Episcopal Church in the United States. See *Episcopal Diocese of Pittsburgh, Statement Regarding an Appeal in the Diocesan Assets Case*, Feb. 25, 2010, <http://www.episcopalpgh.org/statement-regarding-appeal-02252010/>.

<sup>109</sup> Canon II. 6 of the canons of the general convention of the Episcopal Church provides in part:

Sec. 1. No Church or Chapel shall be consecrated until the Bishop shall have been sufficiently satisfied that the building and the ground on which it is erected are secured for ownership and use by a Parish, Mission,

encumbering or alienating property “without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese.”<sup>110</sup> There is no mention of the national church having authority over diocesan property.<sup>111</sup> Those provisions predate the 1979 Dennis Canon which does mention the national church, but clearly contemplates it as equivalent to the national church. So there is a degree of ambiguity in the laws of the ECUSA.<sup>112</sup>

The ECUSA’s viewpoint is that the canons empower the diocese to control the parishes and churches within its jurisdiction, but the power is subject to the diocese being part of the ECUSA. A bishop who leaves the ECUSA does not represent the diocese and therefore has no authority over the real and personal property held by and for the parishes. In other words, the diocese is an entity similar to a corporation and has an existence separate from its officers, directors, and shareholders. If this

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Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons.

Sec. 2. It shall not be lawful for any Vestry, Trustees, or other body authorized by laws of any State or Territory to hold property for any Diocese, Parish or Congregation, to encumber or alienate any dedicated and consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service, belonging to the Parish or Congregation which they represent, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.

Sec. 4. Any dedicated and consecrated Church or Chapel shall be subject to the trust declared with respect to real and personal property held by any Parish, Mission, or Congregation. . . .

<sup>110</sup> Canons of the General Convention, *supra* note 42, at 7.04 & 7.05.

<sup>111</sup> This may be the central issue before the appellate court in the Diocese of San Joaquin case. One scholar seemed to agree. Speaking to *The Fresno Bee*, Frank Kirkpatrick, professor of religion at Trinity College in Hartford, Conn. and author of *THE EPISCOPAL CHURCH IN CRISIS* (2008), said, “Nationally, the [Episcopal] church has been successful most of the time, but the breakaway San Joaquin diocese contends that this case is different. It is the first time the U.S. Episcopal Church is pitted against a diocese—as opposed to an individual parish—in a property dispute.” See John Ellis, *Valley Properties Contested After Church Split*, *FRESNO BEE*, Dec. 12, 2009, at A1, available at <http://www.fresnobee.com/lifestyle/faith-and-values/story/1746401.html>.

<sup>112</sup> Title I, Canon 7, Sec. 4. States:

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

were able to be made clear without expensive litigation, there would be much less wasting of church assets through needless litigation.

Consider also that if the Supreme Court's concept of deference to the decisions of the highest ecclesiastical body were taken literally, as in the Roman Catholic Church that has the Pope in Rome, the Anglican Communion is the highest ecclesiastical body, with its "headquarters" in England with the Church of England and its highest office held by the Archbishop of Canterbury in England. If that is the case, the ecclesiastical law of that body may violate the First Amendment's prohibition of entanglement between church and state. Currently U.S. courts treat Anglican churches as independent from one another, so that the hierarchy stops at the national level. This view is inconsistent with previous reference to the Anglican Communion as the umbrella organization embodying all the national Anglican and Episcopalian churches. If the Anglican Communion is the highest authority on ecclesiastical matters and has authority to decide who owns church property when schisms occur, the U.S. Supreme Court will have to decide whether U.S. courts should defer to Anglican Communion decisions, realizing that it operates under a legal system that is fundamentally different from the U.S. system as regards separation of church and state. This would make the chaotic situation worse.

In the meantime, litigation among dioceses, parishes, and the ECUSA is escalating. The investment of "time and treasure" that individual parishioners make to sustain the life of a parish is tremendous and essential to the life of the parish, the diocese, and the ECUSA. Without parishes and their parishioners, there is no need for the diocese or the ECUSA. There needs to be uniform clarification of the application of neutral principles to the ECUSA. A commentator noted, "A church may be hierarchical in religious doctrine and practice but not necessarily in property ownership matters."<sup>113</sup> As one interested party in the diocesan dispute commented, "More is at stake than cash and property, because some congregants may care more about staying with their parish church than its affiliation; whichever side wins the property war may also gain members."<sup>114</sup> The interpretation of the neutral principles of law approach should take the individual members' viewpoints into consideration before uniformly deferring to the decision of the highest ecclesiastical body on property matters. This is particularly true in light of the fact that the ECUSA may not be the highest ecclesiastical body in the matter.

The courts and the ECUSA should devise a solution so that winning the "property war" does not mean losing the assets of the church and its core mission. Applying neutral principles alone has not produced consistent, equitable and final resolutions to the many schisms within the church. The ECUSA, the state courts, and the federal courts should cooperatively develop guidelines that provide for property dispensation upon the occurrence of these foreseeable doctrinal disputes.

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<sup>113</sup> See Reeder, *supra* note 43, at 137.

<sup>114</sup> See Ellis, *supra* note 111, at A6.

