William & Mary Business Law Review

Volume 9 | Issue 3 Article 6

The Schofield/Gunner Decisions and Episcopal Church Property-Splitting Litigation: Considering Proposed Improvements to the Litigation Process and the Neutral Principles of Law Doctrine, Ten Years on

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THE *SCHOFIELD/GUNNER* DECISIONS AND EPISCOPAL CHURCH PROPERTY-SPLITTING LITIGATION: CONSIDERING PROPOSED IMPROVEMENTS TO THE LITIGATION PROCESS AND THE NEUTRAL PRINCIPLES OF LAW DOCTRINE, TEN YEARS ON

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ABSTRACT

In recent years, the Episcopal Church in the United States has seen a spate of parishes leaving the Church. Many of these departing parishes have attempted to take property with them as they leave and continue to operate independently or realign themselves with a different denomination. The Episcopal Church maintains that this property is held by the parishes on behalf of the national Church, and has generally been successful in obtaining a return of the property through legal action. In deciding these suits, state courts have skirted carefully around the contours of ecclesiastical questions; many state courts, following the Supreme Court, have adopted a Jones v. Wolf *neutral principles of law approach for determining church property questions. Some commentators, after examining the application of the neutral principles approach in the Episcopal Church property-splitting context, have argued that the results reached by the courts are unjust, and have made their own suggestions for how to improve the adjudication process to obtain different results. This Note examines some of these suggestions in the context of the lawsuits surrounding the Diocese of San Joaquin, California, which span over a decade. The suggestions considered here find no place in the San Joaquin litigation, and are simply not applicable in many situations. Even if they*

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were applicable, the suggestions would not improve the neutral principles approach, would create incongruities with other areas of law, would muddle court analysis, and would not create more just results in church property-splitting litigation.

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INTRODUCTION

In 2006, parishes in the Diocese of San Joaquin (California) were some of the first to split off from the Episcopal Church in the wake of alleged theological changes, preparing the way for a vast array of litigation and resulting scholarship.[1] When the Diocese's bishop reassigned the Diocesan property to himself for the use of the breakaway parishes, the Episcopal Church sued to recover the property.[2] Nearly ten years later, in July 2016, after a spate of embittered, nationwide litigation, the California Supreme Court declined to take the San Joaquin case, leaving the Appellate Court's April 2016 decision in favor of the Episcopal Church intact.[3]

Part I of this Note presents a history of the Episcopal Church, setting a historical context for schism and identifying the assets typically in question during a suit, as well as attempting to provide a more robust historical and cultural basis for the conflicts, a topic which has been somewhat ignored in prior legal scholarship. Part II looks at the development of judicial involvement in church property-splitting in the United States, following the progression of the common law from the initial deferential approach to the modern "neutral principles of law" doctrine, beginning with some of the earliest church property-splitting decisions and continuing through to the Diocese of San Joaquin lawsuits. Part III highlights a selection of scholarship, which is aimed at making suggestions to improve the church property-splitting process in an attempt to make the results more just. It then examines whether any of these suggestions were incorporated in the judicial decisions resulting from the San Joaquin property controversy, which is both one of the first, and, at this point, one of the last

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[1] Laurie Goodstein & Carolyn Marshall, *Episcopal Diocese Votes to Secede from Church*, N.Y. TIMES (Dec. 3, 2006), http://www.nytimes.com/2006/12/03/us/03episcopal.html.

[2] Pat McCaughan, *San Joaquin Diocese, Episcopal Church file suit to regain property*, EPISCOPAL CHURCH (Apr. 25, 2008), https://www.episcopalchurch.org/library/article/san-joaquin-diocese-episcopal-church-file-suit-regain-property [https://perma.cc/U9HD-4TBB].

[3] ENS Staff, *California Supreme Court upholds ruling in San Joaquin property case*, EPISCOPAL NEWS SERVICE (July 14, 2016), https://www.episcopalnewsservice.org/2016/07/14/california-supreme-court-upholds-ruling-in-san-joaquin-property-case/ [https://perma.cc/B4PG-8G7X].

Episcopal Church property-splitting lawsuits resulting from the conflicts of the mid-2000s. Finally, for each suggestion examined, it will ask one of two questions: if the suggestion was included in some way in the court's decision, how did it affect, or not affect, the outcome of the suit?; or, if the suggestion was not included in the court's decision, would its inclusion likely have had an effect on the outcome?

I. THE EPISCOPAL CHURCH

The Episcopal Church is a Christian religious organization established in the United States in 1784.[4] It is a member of the

[4] Diocese of Oregon, *History of the American Church*, EPISCOPAL CHURCH (1999), http://www.episcopalchurch.org/page/history-american-church [https://perma.cc/VD2U-PMCA]. The Episcopal Church is also known as the Protestant Episcopal Church in the United States of America (PECUSA or ECUSA). IAN S. MARKHAM & C.K. ROBERTSON, EPISCOPAL QUESTIONS, EPISCOPAL ANSWERS 84–85 (2014) ("In the early twentieth century, the official name of the corporate organization became 'The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America' ... although the corporate name remains for official purposes, the Church ... [uses] as its self-designation 'The Episcopal Church' or TEC ...."). What would become The Episcopal Church began as a mission of the Diocese of London in the Church of England. DAVID HEIN & GARDINER H. SHATTUCK, JR., THE EPISCOPALIANS 35–36 (Praeger Publishers, Denominations in America No. 11, 2004) ("Anglicanism in the colonies was forced to operate as a largely disunited collection of parishes under the distant supervision of the bishop of London."). A priest from the Church of England, the Reverend Robert Hunt, accompanied the Virginia Company of London's expedition to North America in 1607 as the expedition's chaplain. SAMUEL WILBERFORCE, A HISTORY OF THE PROTESTANT EPISCOPAL CHURCH IN AMERICA 25 (1844). This expedition founded the Jamestown settlement in the Colony of Virginia (later Jamestown, Virginia); the first Church of England sacramental service was celebrated there soon after, with Rev. Hunt "administering the holy eucharist [sic] to the united company upon the 14th of May, 1607, the day after their first landing." *Id.* at 22. The Diocese of London, with the support of English voluntary organizations such as the Society for the Propagation of the Gospel in Foreign Parts (SPG) and the Society for Promoting Christian Knowledge (SPCK) continued to send clergyman and monetary support to the church in the North American colonies until the outbreak of the Revolutionary War in 1775. HEIN & SHATTUCK, *supra,* at 17, 22, 35–41; Diocese of Oregon, *supra* (discussing American clergy maintaining ties with the SPG during the American Revolutionary War). The Church of England, both historically and presently, is synonymously referred to as the "Anglican Church," "Anglican" meaning "of England," from the Latin *Anglii* (English: Angles), the name given to the Germanic inhabitants of Britain. *Church History*, ANGLICAN, http://anglican.org/church/ChurchHistory.html [https://perma.cc/L8W9-WYUF];

worldwide Anglican Communion, an organization composed of a number of national churches around the world under the leadership of the Archbishop of Canterbury.[5] The Episcopal Church is headed by a Presiding Bishop, but, unlike, for example, the Roman Catholic Church, which has a very top-down leadership structure, the individual parishes that make up the Episcopal Church hold much of the primary power for self-determination in practice.[6]

The Editors of Encyclopædia Britannica, *Angle*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Angle-people [https://perma.cc/RVC5-C42N]. Due to its historical association with the Church of England, and its present-day participation in the Anglican Communion, the terms "Episcopal" and "Anglican" are sometimes used interchangeably to refer to the Episcopal Church. *See* THOMAS A. RUSSELL, COMPARATIVE CHRISTIANITY: A STUDENT'S GUIDE TO A RELIGION AND ITS DIVERSE TRADITION 185 (2010); *see, e.g.*, Schofield v. Superior Court, 118 Cal. Rptr. 3d 160, 162 (Cal. Ct. App. 2010) (showing the court referring to the Episcopal Church as a "regional Anglican church[ ].").

[5] Diocese of San Joaquin v. Gunner, 202 Cal. Rptr. 3d 51, 54 (Cal. Ct. App. 2016) (citing Schofield v. Superior Court, 118 Cal. Rptr. 3d 160 (Cal. Ct. App. 2010)). The Archbishop of Canterbury, in addition to being head of the Anglican Communion, is also the Primate of the Church of England. *Id.*; *see also* R. Gregory Hyden, *Welcome to the Episcopal Church, Now Please Leave: An Analysis of the Supreme Court's Approved Methods of Settling Church Property Disputes in the Context of the Episcopal Church and How Courts Erroneously Ignore the Role of the Anglican Communion*, 44 WILLAMETTE L. REV. 541, 562–68 (2008) (discussing the function of the Anglican Communion and its potential application to property disputes).

[6] *Governance of the Episcopal Church*, HOUSE OF DEPUTIES OF THE EPISCOPAL CHURCH, http://houseofdeputies.org/governance-episcopal-church/ [https://perma.cc/46K5-PBLQ] ("All major decisions affecting the life of the Episcopal Church are made jointly by lay people, clergy and bishops. Parishes elect a vestry to govern the affairs of the parish ...."). As the canons of the Episcopal Church give property rights to the national church rather than individual dioceses or parishes, the organization of the Episcopal Church has been the key point in contention in property-splitting lawsuits. *In re* Episcopal Church Cases, 198 P.3d 66, 75 (Cal. 2009) (quoting Watson v. Jones, 80 U.S. 679 (1871)) (in lawsuits "involv[ing] a hierarchical structure, i.e., 'a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government' ... 'we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments.'"). The Roman Catholic Church in the United States has not experienced recent schisms of the same extent as those of the Episcopal Church, but in property disputes where the neutral principles of law approach is used, the more hierarchically focused polity of the Roman Catholic Church has been a militating factor. *See, e.g.*, Blaudziunas v. Egan, 961 N.E.2d 1107,

This might, at first glance, appear to be a confederal form of government, in which the dioceses, as an association of governments, delegate certain powers to a central organization (the General Convention).[7] However, the appearance of decentralization is deceptive:

> [The decentralization] does not make the church structurally confederal. There is no essential division of power between the General Convention and the dioceses. In fact, there is no limit at all upon the Convention's governing powers, unless it be the ancient canons and the necessity for conformity with the Catholic Faith; but these are interpreted finally by the General Convention alone. Thus, the government is unitary.[8]

Each individual parish is run by a vestry, which is a board composed of a number of laypeople elected by the parish; the members of the vestry elect a rector, who must be an ordained priest.[9] The Episcopal Church spreads across seventeen countries, but the bulk of its membership is located in the United States.[10] For administrative purposes, the geographic regions of the Episcopal Church are broken down into units called dioceses; a bishop is appointed to run the affairs of each diocese.[11] The Episcopal Church currently contains 109 dioceses.[12] Each diocesan bishop, in turn,

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1108 (N.Y. 2011) ("No act or proceeding of the [trustees of the parish] shall be valid without the sanction of the Archbishop.").

[7] DAVID L. HOLMES, A BRIEF HISTORY OF THE EPISCOPAL CHURCH 55 (1993).

[8] *Id.* at 55 (quoting James A. Dator, The Government of the Protestant Episcopal Church in the United States of America: Confederal, Federal, or Unitary? 245 (1959) (unpublished Ph.D. dissertation, American University)).

[9] *Gunner*, 202 Cal. Rptr. 3d at 55.

[10] *About Us*, EPISCOPAL CHURCH, http://www.episcopalchurch.org/page/about-us [https://perma.cc/RX6K-6CJR] (listing number of countries with non-domestic dioceses); *Baptized Members by Province and Diocese 2005–2015*, EPISCOPAL CHURCH (2016), http://www.episcopalchurch.org/files/documents/baptized_members_by_province_and_diocese_2005-2015.pdf [https://perma.cc/XQU7-WGJ5] (listing 1,779,335 members in domestic dioceses versus 137,847 members in non-domestic dioceses in 2015).

[11] *In re* Episcopal Church Cases, 198 P.3d 66, 71 (Cal. 2009). The diocesan bishop typically serves two roles, as a diocese is both "the sphere of jurisdiction of a bishop" and "the district under the pastoral care of a bishop." *Diocese*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/53084?redirectedFrom=diocese#eid [https://perma.cc/4NJ5-8874].

[12] *About Us*, EPISCOPAL CHURCH, http://www.episcopalchurch.org/page/about-us [https://perma.cc/RX6K-6CJR].

participates in and reports to the decision-making body of the Episcopal Church, the General Convention.[13] These three levels make up the "three-tiered" hierarchy of the Church: (from bottom to top) parish, diocese, General Convention.[14] Because of this allocation of power, there is necessarily a tension between the top-down leadership of the bishops in the General Convention and the bottom-up control of the individual parishes.[15] The General Convention passes and periodically updates the Constitution and Canons, the binding rules governing the functions of the Episcopal Church.[16] When a diocese or parish applies to join the Episcopal Church, it agrees to adopt a constitution and canons which match those of the Episcopal Church.[17]

Schism is nothing new in the Episcopal Church. The Church of England, from which the Episcopal Church emerged after the American Revolution, was a product of the English Reformation.[18] In 1534, England, spearheaded by Henry VIII, declared that the churches in England, largely Roman Catholic and under the control of the Pope in Rome, now belonged to the English crown and owed loyalty solely to the king.[19] In the intervening 500 years, the Anglican Church has seen a continuous stream of separation, notably including the separation of the Methodist Church[20] and (arguably)

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[13] *Gunner*, 202 Cal. Rptr. 3d at 55.

[14] New v. Kroeger, 84 Cal. Rptr. 3d 464, 469–70 (Cal. Ct. App. 2008).

[15] *See supra* text accompanying notes 6–14 (discussing these two forms of leadership).

[16] *Gunner*, 202 Cal. Rptr. 3d at 55 (citing Huber v. Jackson, 96 Cal. Rptr. 3d 356 (Cal. Ct. App. 2009)); *Constitution & Canons: Together with the Rules of Order, 2015*, EPISCOPAL CHURCH (2016), http://www.episcopalchurch.org/files/documents/2015_candc.pdf [https://perma.cc/8BBF-8QD4].

[17] *Gunner*, 202 Cal. Rptr. 3d at 55.

[18] HOLMES, *supra* note 7, at 172–73.

[19] Act of Supremacy 1534, Public Act, 26 Hen. VIII, c. 1 (Eng. and Wales) ("the King's Majesty justly and rightfully is & oweth to be the supreme head of the Church of England ... and shall have ... all ... jurisdictions, privileges, authorities, immunities, profits, and commodities."); Statute in Restraint of Appeals 1532, 24 Hen. VIII, c. 12 (Eng. and Wales) (making the King the final legal authority on matters within national borders and refusing domestic citizens the ability to appeal to the Pope or hierarchy of the Church in Rome, on both religious and non-religious matters).

[20] HEIN & SHATTUCK, *supra* note 4, at 27 ("the Methodists separated from Anglicanism in 1784 ....").

the Baptist Church,[21] the second and first largest protestant denominations in America, respectively.[22] The Episcopal Church, in particular, had also seen its share of separations prior to the twenty-first-century turbulence. The Reformed Episcopal Church split off from the Episcopal Church in the late nineteenth century due to perceived ecclesiological changes in the Episcopal Church.[23] Several groups broke off in the twentieth century, including, *inter alia*, the American Episcopal Church in 1968 and the Anglican Catholic Church in 1977.[24]

The last half of the 1990s and the first decade of the twenty-first century proved a breaking point for the largest separation in the history of the Episcopal Church.[25] In 2003, the Diocese of New Hampshire elected Gene Robinson to serve as their

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[21] *See, e.g.*, WILLIAM H. BRACKNEY, BAPTISTS IN NORTH AMERICA: AN HISTORICAL PERSPECTIVE 22 (2006) (arguing that the most persuasive view of the historical origins of the Baptist movement is one that describes the Baptist movement, apropos of the Anabaptists, as arising from English Separatism of the sixteenth and seventeenth centuries).

[22] *Fifteen Largest Protestant Denominations*, PEW RESEARCH CENTER (May 7, 2015), http://www.pewforum.org/2015/05/12/chapter-1-the-changing-religious-composition-of-the-u-s/pr_15-05-12_rls_chapter1-03/ [https://perma.cc/L4ZH-6ZEY]. In 2014, the Baptist Church (composed of, inter alia, the Southern Baptist Convention, the American Baptist Churches USA, and the National Baptist Convention) had 8.2 percent of the US population, the United Methodist Church had 3.6 percent, and the Episcopal Church had 0.9 percent. *Id.*

[23] HOLMES, *supra* note 7, at 172–73. The original break-off party left the Episcopal Church largely over concerns of the "Romanizing" influence of the Oxford Movement in England. *Id.* at 173–74. *See* MIRANDA KATHERINE HASSETT, ANGLICAN COMMUNION IN CRISIS: HOW EPISCOPAL DISSIDENTS AND THEIR AFRICAN ALLIES ARE RESHAPING ANGLICANISM 30 (2007) ("The nineteenth century brought tensions between waves of evangelicalism within the church, inspired by revivals around the country, and a movement of liturgically oriented, traditionalist Episcopalians that influenced the church strongly in the direction of Anglo-Catholicism. From that time on, the Episcopal Church has been dominated by ... an 'Anglo-Catholic hegemony.'").

[24] MARTYN PERCY, POWER AND THE CHURCH: ECCLESIOLOGY IN AN AGE OF TRANSITION 167–68 (1998); *see also* HOLMES, *supra* note 7, at 173.

[25] The departure of the Episcopal Diocese of South Carolina alone took 22,953 members out of the Episcopal Church. *About Us*, THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA, http://www.dioceseofsc.org/about/ [https://perma.cc/GA5V-YJXZ]. The split off of the Reformed Episcopal Church in the nineteenth century, in contrast, had only 1,500 communicants six months after its separation. ANNIE DARLING PRICE, A HISTORY OF THE

bishop.[26] Robinson was the first openly gay, non-celibate priest to be elected as a bishop in the Anglican tradition.[27] Historically, the Episcopal Church, along with almost all Christian churches, had declared non-celibate homosexuals to be living sinfully,[28] but recent revisions of Episcopal church canons reversed this stance and allowed parishes first to bless gay unions,[29] then later to perform weddings for gay couples.[30] Some Episcopalians saw this as the final straw in a church which, they argued, had been rapidly becoming more socially, politically, and theologically liberal.[31] This led many dissenting members to break off their affiliation with the Episcopal Church, beginning with individual parishes voting to leave the Church.[32] The 7,000-member Diocese of San

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[26] STEPHEN BATES, A CHURCH AT WAR: ANGLICANS AND HOMOSEXUALITY 6 (2004).

[27] Rebecca Leung, *Gay Bishop 'Being Honest'*, CBS NEWS (Mar. 4, 2004), http://www.cbsnews.com/news/gay-bishop-being-honest-04-03-2004/ [https://perma.cc/D2CX-6ZFE].

[28] *See generally* ROBERT E. HOOD, SOCIAL TEACHINGS IN THE EPISCOPAL CHURCH 144–59 (1990) (discussing the historical development of views on sexuality within the Episcopal Church).

[29] Alison Leigh Cowan, *A Moratorium on Weddings*, N.Y. TIMES (Jan. 14, 2005), http://www.nytimes.com/2005/01/14/nyregion/a-moratorium-on-weddings.html.

[30] George Conger, *The Episcopal Church approves religious weddings for gay couples after controversial debates,* WASH. POST (July 1, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/01/why-the-episcopal-church-is-still-debating-gay-marriage/?utm_term=.5fa242080c63 [https://perma.cc/7QGT-VWC8].

[31] *See* Diocese of San Joaquin v. Gunner, 202 Cal. Rptr. 3d 51, 56 (Cal. Ct. App. 2016); *see also* HASSETT, *supra* note 23, at 1 ("A growing socially conservative and religiously evangelical orientation among the leaders and members of [some Episcopal churches], along with moves to the left by the larger Episcopal Church, created a divide that eventually proved irreconcilable."). This included issues such as biblical inerrancy and the epistemic foundation of faith, the ordination of women as priests, the appointment of female priests as bishops, the acceptability of non-celibate homosexual relationships, ecumenical and interfaith relations, and Church affiliation with particular political or economic positions. *See, e.g.*, *id.* at 96–98 (discussing reactions to Episcopal calls for unconditional third-world debt relief).

[32] Laurie Goodstein & Carolyn Marshall, *Episcopal Diocese Votes to Secede From Church*, N.Y. TIMES (Dec. 3, 2006), http://www.nytimes.com/2006/12/03/us/03episcopal.html.

Joaquin, California, was the first diocese to break off from the Episcopal Church in the wake of Robinson's election.[33] Under the leadership of Bishop John-David Schofield, the diocese voted "overwhelmingly" to secede from the Episcopal Church.[34] Over the next few years, many other dioceses and parishes chose to follow a path similar to the one taken by San Joaquin.[35] Upon leaving the Episcopal Church, many of the parishes and dioceses, including the Diocese of San Joaquin, took title and possession of the church property with them, setting the stage for the ensuing litigation.[36]

While some of the formerly Episcopal churches chose to remain independent,[37] many chose to join the Anglican Church of North America, an organization formed in 2009 to maintain the Episcopal style of worship while rejecting the alleged theological and social changes that had led to the split.[38] The Anglican Church

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[33] *Id.*

[34] *Id.*

[35] Laurie Goodstein, *Episcopal Split as Conservatives Form New Group*, N.Y. TIMES (Dec. 3, 2008), http://www.nytimes.com/2008/12/04/us/04episcopal.html.

[36] *Gunner*, 202 Cal. Rptr. 3d at 58 ("[former Diocese of San Joaquin Bishop] Schofield began retitling the 27 parcels of real property in dispute by granting them to The Anglican Bishop of San Joaquin, a Corporation Sole."); *see also* Barbara Bradley Hagerty, *A Church Divided: Ruling Ends Va.'s Episcopal Battle*, NPR: ALL THINGS CONSIDERED (Apr. 10, 2012), http://www.npr.org/2012/04/10/150351713/a-church-divided-ruling-ends-va-s-episcopal-battle (discussing the real property kept by several breakaway Virginia parishes).

[37] *Report from the Task Force for Provincial Affiliation: Provincial Affiliation with the Anglican Church in North America*, THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA, https://web.archive.org/web/20160912090217/http://www.diosc.com/sys/about-us/affiliation/729-report-from-the-task-force-for-provincial-affiliation [https://perma.cc/YT3E-W4QC] [hereinafter *Provincial Affiliation*] (discussing the diocese's reason for remaining independent of ACNA).

[38] The Anglican Church of North America is itself a collection of organizations, including the Reformed Episcopal Church. *Ecumenical Relationships*, THE REFORMED EPISCOPAL CHURCH, http://www.recus.org/ecumenical.html [https://perma.cc/3KPD-JLL9] ("The Reformed Episcopal Church is a subjurisdiction of the Anglican Church of North America."). Despite recognition by some individual Anglican churches, it has not been recognized by, and is not considered a member of, the Anglican Communion. Jennifer Berry Hawes, *Archbishop says ACNA not part of the Anglican Communion*, THE POST & COURIER (Oct. 8, 2014), https://www.postandcourier.com/features/faith_and_values/archbishop-says-acna-not-part-of-the-anglican-communion/article_a954ad22-4f70-51ab-8ed0-87273a9435c4.html [https://perma.cc/N3RJ-9V8A].

of North America has subsequently associated itself with members of the Southern Cone, which is composed largely of South American Anglican churches, and the Global Anglican Future Conference, which is composed largely of African Anglican churches.[39] This has created an international divide in the Anglican Communion, falling mostly along lines of Western countries on one side and developing countries on the other, with Africa and South America (along with the Americans who have left the Episcopal Church) aligning themselves against the "liberal" policies of the churches in England, Europe, the United States, and Canada.[40]

These splits are not trivial in magnitude. Some commentators have claimed that winning the lawsuits and regaining property are empty victories for the Episcopal Church; its right may be vindicated by the court, but it is left with little but empty buildings and rows of unused pews, slowly gathering dust.[41] This is to forget, however, that the assets held by many parishes are comprised significantly (if not mostly) of the value of the real estate owned by the parish or diocese, which can be a significant sum.[42]

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[39] Pat Ashworth, *Southern Cone offers haven to disaffected US dioceses*, CHURCH TIMES (Nov. 14, 2007), https://www.churchtimes.co.uk/articles/2007/16-november/news/uk/southern-cone-offers-haven-to-disaffected-us-dioceses [https://perma.cc/UYA8-2MPU]; Global Movement, GAFCON, https://www.gafcon.org/about/global-movement [https://perma.cc/Y7SX-DVYU] (listing member countries that include: Nigeria, Uganda, Kenya, Tanzania, and Congo).

[40] *See generally* HASSETT, *supra* note 23, at 2–4.

[41] *See, e.g.*, *Why is the Episcopal Church near collapse?*, BELIEFNET NEWS, http://www.beliefnet.com/columnists/news/2012/07/why-is-the-episcopal-church-near-collapse.php [https://perma.cc/2KX3-YUPB] ("the denomination is the proud owner of scores of empty buildings nationwide—and liable for their upkeep in a depressed real estate market where empty church buildings are less than prime property.")

[42] In 2011, Trinity Wall Street, reputed to be the wealthiest parish in the country, estimated that it held over $2 billion in assets, including 14 acres of Manhattan real estate and a 26-story skyscraper. Michelle Mazzarella, *Plans Approved for Trinity Church's Community Center and Office Tower,* CITY REALTY (Oct. 17, 2017), https://www.cityrealty.com/nyc/market-insight/features/future-nyc/plans-approved-trinity-church039s-community-center-office-tower/14063 [https://perma.cc/UH6X-3MCQ]; Sharon Otterman, *Trinity Church Split on How to Manage $2 Billion Legacy of a Queen*, N.Y. TIMES (Apr. 24, 2013), http://www.nytimes.com/2013/04/25/nyregion/trinity-church-in-manhattan-is-split-on-how-to-spend-its-wealth.html; *The Rector, Church-Wardens, and Vestrymen of Trinity*

At a time when the Episcopal Church has seen revenue growth fail to outpace inflation, the availability of historical physical assets could make a dramatic difference in the ability of parishes to consolidate and remain financially solvent in the future.[43]

II. HISTORY OF CHURCH PROPERTY-SPLITTING CASES IN THE UNITED STATES

A. Watson v. Jones *and the Development of Initial and Subsequent Deferential Approaches*

The Supreme Court first ruled on a church property dispute in 1871.[44] The members of Third, or Walnut Street, Presbyterian Church in Louisville, Kentucky, disagreed over the church's stance on slavery after the Civil War, amongst other issues.[45] An election of elders by the pro-slavery faction was contested by the anti-slavery faction.[46] In the subsequent fallout, each faction claimed ownership and control of the church property.[47] The

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Church, in the city of New York and Subsidiaries, Consolidated Financial Report, December 31, 2012 and 2011, TRINITY WALL STREET (Apr. 26, 2013), https://www.trinitywallstreet.org/sites/default/files/Trinity-Wall-Street-2012_0.pdf [https://perma.cc/36HX-LE6P] (listing Trinity Wall Street's financial and real assets for the years 2011 and 2012). The Diocese of San Joaquin has been reported to hold "tens of millions of dollars" in physical assets, mostly composed of real estate. Pablo Lopez, *Fresno appeals court says Episcopal church properties must be returned*, FRESNO BEE (Apr. 6, 2016), http://www.fresnobee.com/news/local/article70375317.html [https://perma.cc /MD5B-B44U].

[43] Between 2005 and 2015, total domestic income increased from $2,199,993,228 to $2,280,563,637, an increase of 3.66 percent. *Fast Facts 2005*, EPISCOPAL CHURCH (2006), https://www.episcopalchurch.org/files/Episcopal_FAST_FACTS_2005.pdf [https://perma.cc/T2RQ-BYLR]; *Fast Facts 2015*, EPISCOPAL CHURCH (2016), http://www.episcopalchurch.org/files/domestic_fast_facts_2015__0.pdf [https://perma.cc/BVP8-XUHV]. During the same period, United States domestic inflation increased by a total of 23.44 percent, not seasonally adjusted. *10-Year Breakeven Inflation Rate* (T10YIE), ECONOMIC RESEARCH, FEDERAL RESERVE OF ST. LOUIS, https://fred.stlouisfed.org/series/T10YIE#0 [https://perma.cc/RP8T-GDJQ].

[44] Watson v. Jones, 80 U.S. 679 (1871).

[45] Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1847–48 (1998).

[46] *Id.* at 1848–50.

[47] *Id.* at 1848.

anti-slavery faction sued in federal court to recover title to the church property.[48] The Supreme Court, after extensive consideration of the constitutionality of ruling on such a case, advocated a deferential approach.[49] The Supreme Court recognized that many church property disputes will be ultimately theological in nature, and that American courts are barred on First Amendment grounds from deciding such issues.[50] Accordingly, the Supreme Court chose to defer to the church in question and allow internal church tribunals or decision-making apparatus to answer questions concerning church property.[51]

In 1976, the Supreme Court heard *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, which concerned the removal of a bishop from his position.[52] In

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[48] *Id.*

[49] *Watson*, 80 U.S. at 733–35.

[50] Greenawalt, *supra* note 45, at 1844–45.

[51] *Watson*, 80 U.S. at 733–35; *see* Hyden, *supra* note 5, at 546–48, 571 (discussing methods of application of the Watson decision).

[52] Serb. E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976). There were several other ecclesiastical cases between *Watson* and *Milivojevich*, but each applied the deferential approach as set out in *Watson*, albeit with some clarifications and further discussion. *See* Bouldin v. Alexander, 82 U.S. 131, 137, 139 (1872) (applying a deferential standard to a dispute over the alleged removal of elected trustees of a church); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94 (1952) (applying a deferential standard, eighty years after the original promulgation, to a dispute over the rightful holder of the office of Archbishop in which one party had been appointed by the Supreme Church Authority of the Russ. Orthodox Church in Moscow, Russia, and the other had been appointed by a convention of prelates from a number of Russian Orthodox churches in America). After these less influential clarifications, the Court developed a set of "comprehensive constitutional restrictions on civil involvement in church property disputes." Greenawalt, *supra* note 45, at 1855. The first of the cases to begin this clarification was the 1969 decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, in which a number of Presbyterian churches in Georgia withdrew from the national Presbyterian Church in the United States for doctrinal and ecclesiological reasons and wished to keep possession of the local church property. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 441–44 (1969); *see* Greenawalt, *supra* note 45, at 1855–57. The Court's decision argues that a neutral principles approach might resolve church property disputes, but doing so would risk "resolving underlying controversies over religious doctrine," something which is likely to arise in any dispute over church

Milivojevich, the hierarchical Serbian Eastern Orthodox Church was headquartered (at the time of the suit) in Belgrade, Yugoslavia.[53] In 1939, Milivojevich was created Bishop of the American-Canadian diocese of the Serbian Orthodox Church, based in Illinois.[54] The Serbian Orthodox Church, after a series conflicts with Bishop Milivojevich, removed him as Bishop and defrocked him in 1963.[55] At the same time, the Serbian Orthodox Church split Milivojevich's former diocese into three dioceses and appointed new leadership.[56] Milivojevich argued his removal and defrocking, and the division of his former diocese, were arbitrary and in contradiction to the Church's internal canons and regulations, both procedurally and substantively.[57] These decisions were made by the Church's internal judiciary in Yugoslavia, and had been pronounced accordingly.[58] The *Milivojevich* Court ostensibly applied the former deferential standard, but with a noticeable difference.[59] While still adhering to the deferential approach in theory, the Supreme Court created an opening for court interpretation in religious matters, saying that courts could not decide a religious issue *only* when the issue or conflict could not be resolved "without extensive inquiry by civil courts into religious law and polity ...."[60] The Supreme Court did not affirmatively specify that courts could (or should) decide church disputes, but the language employed significantly entailed that the Court was opening the door to a future judicial role in religious property disputes.[61]

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separation related to alleged violations of doctrine. *Mary Elizabeth Blue Hull*, 393 U.S. at 449.

[53] *Milivojevich*, 426 U.S. at 699 ("The Serbian Orthodox Church, one of the 14 autocephalous, hierarchical churches which came into existence following the schism of the universal Christian church in 1054, is an episcopal church whose seat is the Patriarchate in Belgrade, Yugoslavia.").

[54] *Id.* at 701–02.

[55] *Id.* at 704–07.

[56] *Id.* at 703.

[57] *Id.* at 706.

[58] *Id.* at 704–06.

[59] *See generally id.* at 708–26.

[60] *Id.* at 709.

[61] *Id.*; Kathleen E. Reeder, *Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits*, 40 COLUM. J.L. & SOC. PROBS. 125, 142–43 (2006).

B. Jones v. Wolf *and the Application of "Neutral Principles of Law"*

After nearly one hundred years of applying the deferential approach from *Watson v. Jones*, the Supreme Court moved from *Watson* to the modern "neutral principles of law" approach in *Jones v. Wolf*.[62] In 1979, a majority of the Vineville Presbyterian Church in Macon, Georgia broke off from the Augusta-Macon Presbytery of the national Presbyterian Church of the United States.[63] In doing so, the separating majority kept possession of the church property and associated with another denomination.[64] The dissenting minority, remaining under the Presbyterian Church of the United States, sued to regain possession of the property.[65] The Supreme Court decided that the appropriate method for courts to resolve ecclesiastical property disputes was to apply a "neutral principles of law" evaluation.[66] Going beyond the speculative ruling in *Milivojevich*, the Supreme Court determined that courts could examine "certain religious documents," such as church canons or constitutions, and decide the case on the basis of these documents so long as doing so would not require the court to "resolve a religious controversy."[67] If deciding the case would require the Court to rule upon ecclesiastical questions, this would infringe upon the separation of church and state, and the Court would be obligated to return in the case to *Watson*-style deference.[68]

1. In re Episcopal Church Cases

In the Episcopal Church, the state of California is split into six separate dioceses: (from north to south) Northern California, California, San Joaquin, El Camino Real, Los Angeles, and San Diego.[69]

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[62] Jones v. Wolf, 443 U.S. 595 (1979).

[63] *Id* at 595.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id.* at 604.

[68] *Id*.

[69] General Convention Office, *Provinces of the Episcopal Church*, EPISCOPAL HEALTH MINISTRIES (1998), http://www.episcopalhealthministries.org/files/file

In 2006, when the first Episcopal Church property-splitting case reached California courts, the Episcopal dioceses in California had a total of 158,200 members.[70] The California Supreme Court's first encounter with the twenty-first-century Episcopal Church property-splitting cases took place in 2009 with *In re Episcopal Church Cases*.[71] This decision arose out of a conflict within St. James Parish in the Diocese of Los Angeles.[72] In 2004, the vestry of St. James Parish voted to break from the Episcopal Church, taking the parish's real property with them, to the exclusion of the Diocese.[73] The Diocese responded by appointing a new rector and asking the parish to surrender the church property; upon the parish's refusal, the Diocese filed suit to regain possession of the property.[74] While this was the first recent Episcopal Church property-splitting case heard by the California Supreme Court, the Supreme Court had heard several property-splitting cases involving other denominations in the past.[75] These cases, leading up to

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/province-map.jpg [https://perma.cc/MT8S-6SBQ] (showing a geographic breakdown of the dioceses of the Episcopal Church).

[70] *Baptized Members by Province and Diocese 2005–2015*, *supra* note 10.

[71] *In re* Episcopal Church Cases, 198 P.3d 66 (Cal. 2009).

[72] *In re* Episcopal Church Cases, 61 Cal. Rptr. 3d 845, 850 (Cal. Ct. App. 2007).

[73] *Id.* A majority of the members of the parish voted for disaffiliation, but a minority of members opposed the move. *Id.* Upon the vote to leave, the parish amended its articles of incorporation, adopted upon joining the Episcopal Church in 1949, to remove all references to the national Episcopal Church, including a 1958 diocesan canon stating that parish property would revert to the Diocese on the dissolution of the parish. *Id.* at 850–51.

[74] *Id.* The dissenting minority of the parish joined the Diocese in the suit. *Id.* at 850.

[75] *Id.* at 854–57. These cases included *Baker v. Ducker*, *Wheelock v. First Presbyterian Church of Los Angeles*, and *Horsman v. Allen*. *Id. Baker*, an 1889 case, involved the First Reformed Church of Stockton, California, which incorporated as part of the Reformed Church, with the incorporation documents specifically making reference to Calvinist theology. Some years later, the congregation had shifted to a largely Lutheran theological structure, and accordingly changed the church's incorporation to reflect this, renaming it the German Lutheran Zion Society. The remaining members of the Reformed tradition sued to recover the property. Baker v. Ducker, 79 Cal. 365 (1889). *Wheelock*, an 1897 case, involved a dispute with the First Presbyterian Church of Los Angeles. Upon receiving a sum of money, two parties within the church disputed the way in which it should be used. The minority party appealed to the national

the decision in *Horsman*, developed the deferential approach and ended up closely mirroring the result from *Watson*.[76] In subsequent cases, the California Appellate Courts began to move towards the neutral principles approach; tracking, with some delay, the changes in the U.S. Supreme Court and leaving behind the former California Supreme Court rulings which established the deferential approach in the state.[77] The seminal change came with *In re Episcopal Church Cases,* in which the California Supreme Court explicitly affirmed the use of the *Jones* "neutral principles of law" evaluation.[78] This came after an extended period during which California courts, mostly at the appellate level—though occasionally including the Supreme Court—had begun to lean towards a more interventionist approach to church property dispute litigation.[79] In *In re Episcopal Church Cases*, the California Supreme Court agreed with the Appellate Court's ruling, but felt that the Appellate Court had placed too much emphasis on prior California rulings to the exclusion of the more recent U.S. Supreme Court updates.[80] Accordingly, the California Supreme Court decided to formally introduce the neutral principles approach, stating that "to the extent the court can resolve a property dispute without reference to church doctrine, it should apply neutral principles of law."[81] In doing so,

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Presbyterian Church's tribunal, which ruled partially in favor of the minority party and ordered the church to split into two congregations. The majority party, which had control of the money, refused to pay. Wheelock v. First Presbyterian Church of Los Angeles, 119 Cal. 477 (1897). *Horsman*, a 1900 case, involved a Church of the United Brethren in Christ in Tulare County. Two parties emerged in the church, the "radicals" and the "liberals." The national church split along these lines, and the local branches followed. The "radicals" in Tulare County sued to recover land held by the "liberals." Horsman v. Allen, 129 Cal. 131 (1900).

[76] *In re* Episcopal Church Cases, 61 Cal. Rptr. 3d 845, 854–56 (Cal. Ct. App. 2007).

[77] *Id.* at 866–68.

[78] *In re* Episcopal Church Cases, 198 P.3d 66, 73–74 (Cal. 2009).

[79] *See*, *e.g.*, Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church, 39 Cal. 2d 121, 131 (1952) (noting that "[t]he general rule that courts will not interfere in religious societies with reference to their ecclesiastical practices stems from the separation of the church and state, but has always been qualified by the rule that civil and property rights would be adjudicated.").

[80] *In re Episcopal Church Cases*, 198 P.3d at 81.

[81] *Id.* at 79.

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 ...."[82] Applied to St. James Parish, the court found that the parish's early choice to submit to the constitution and canons of the Episcopal Church was dispositive.[83] The Episcopal Church had altered its canons, largely in response to *Jones v. Wolf*, to "[make] clear that a local parish owns local church property in trust for the greater church and may use that property only so long as the local church remains part of the greater church."[84] St. James Parish had voluntarily chosen to submit to these rules, and thus the parish property rightfully belonged to the national church.[85]

C. Schofield v. Superior Court *and* Diocese of San Joaquin v. Gunner

The story of the Diocese of San Joaquin is similar to that of many breakaway Episcopal dioceses and parishes across the country. In an interview, the newly appointed Bishop of the Anglican Diocese of San Joaquin (composed of former members of the Episcopal Church Diocese), Dr. Eric Vawter Menees, recounted the internal disputes that led up to the diocesan retreat from the Episcopal Church.[86] Dr. Menees described the ordination of Gene Robinson as the catalyst of the secessionist movement in the Diocese.[87] He cited a high level of support in the diocese for leaving the Episcopal Church, claiming that over ninety-five percent of the members of the Diocese supported the decision to depart.[88] In a statement given at the Diocese's 2007 convention, after which the Diocese voted to leave the Episcopal Church, then-Bishop John-David Schofield recounted watching the Episcopal Church "lose its way" for more

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[82] *Id.* at 70.

[83] *Id.* at 82.

[84] *Id.*

[85] *Id.* at 86.

[86] Scott Carpenter, *Legal battle hinges on California's High Court*, UNION DEMOCRAT (July 6, 2016), http://www.uniondemocrat.com/localnews/4485344-151/legal-battle-hinges-on-californias-high-court [https://perma.cc/J5X2-6T25].

[87] *Id.*

[88] *Id.*

than twenty years, "dismissing the word of God" and making "unilateral decisions about theology, sexuality, and ordination" which cut it off from the rest of the Anglican Communion.[89] Encouraged by the example set by the string of parishes and dioceses breaking off across the country, he urged the members of the Diocese to vote for secession.[90] On December 7, 2007, forty of the forty-seven parishes in the Diocese voted to leave the Episcopal Church.[91] Preparing a plan to leave as early as 2005, the Diocese had slowly begun to amend its canons away from those of the national Episcopal Church, "in an attempt to protect its property" from future seizure by the national church.[92] On January 22, 2008, Schofield amended the articles of incorporation for the Diocese, renaming it "The Anglican Bishop of San Joaquin (A Corporation Sole)."[93] Soon after, the Episcopal Church removed Bishop Schofield from his office and elected Jerry Lamb as a provisional bishop of the minority of parishes which did not secede.[94] With diocesan approval, Lamb quickly proceeded to amend the Diocese's articles of incorporation again, revoking Schofield's earlier changes.[95] In response, Schofield began retitling the real property occupied by the secessionist parishes to The Anglican Bishop of San Joaquin (A Corporation Sole), and from there, granting the property to the Anglican Diocese Holding Corporation; created by Schofield specifically as an attempt to protect the property from seizure.[96] The holding corporation explicitly listed itself as the Holding Corporation for the Diocese of San Joaquin, "a diocese ... of the Anglican Province of the Southern Cone," another (mostly South American) portion of the Anglican Communion.[97]

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[89] Diocese of San Joaquin v. Gunner, 202 Cal. Rptr. 3d 51, 56 (Cal. Ct. App. 2016) (quoting John-David Schofield, *Address to the Convention*, Diocese of San Joaquin (Dec. 7, 2007)).

[90] *Id.*

[91] *Id.* at 57.

[92] *Id.* at 56.

[93] *Id.* at 57.

[94] *Id.* at 54.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 57.

In April 2008, Lamb requested on behalf of the Episcopal Diocese that Schofield return all real and personal property taken by the secessionist parishes.[98] After Schofield refused to do so, the Episcopal Church and the Diocese joined in suing to recover the property.[99] After a number of amended complaints, the trial court granted summary judgment to the Diocese.[100] The trial court determined that the secessionist party's actions (including the amendments to the Diocese's governing documents) were "ultra vires and impermissible under the constitution and canons of the national church."[101] Schofield responded by filing a writ of mandamus.[102] The appellate court determined that summary judgment was improper: any questions that required the court to determine whether Schofield or Lamb was properly the bishop of the Diocese were fundamentally religious in nature, and, thus, the court was blocked from adjudication on First Amendment grounds.[103] Aside from this, however, civil jurisdiction was "properly invoked to resolve issues concerning property transfers" made by Schofield while he was unquestionably the bishop.[104] With this in mind, the appellate court granted the writ and remanded the suit, instructing the trial court to determine any property disputes using neutral principles of law in line with *Jones* and the recently decided *Episcopal Church Cases*.[105]

On remand, the trial court refused a second motion for summary judgment by the Diocese.[106] Soon after, however, John-David Schofield died before the case could be tried on remand; his personal representative, Kevin Gunner, took Schofield's place in the suit.[107]

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[98] *Id.*

[99] *Id.*

[100] Diocese of San Joaquin v. Schofield, No. 08 CECG 01425, 2009 WL 9442332, at *1 (Cal. Super. Ct. July 21, 2009).

[101] Schofield v. Superior Court, 118 Cal. Rptr. 3d 160, 165 (Cal. Ct. App. 2010).

[102] *Id.* at 161.

[103] *Id.* at 165.

[104] *Id.* at 166.

[105] *Id.* at 166–67.

[106] Diocese of San Joaquin v. Schofield, No. 08CECG01425, 2013 WL 7331710, at *1 (Cal. Super. Ct. Mar. 7, 2013).

[107] Diocese of San Joaquin v. Gunner, 202 Cal. Rptr. 3d 51, 59 (Cal. Ct. App. 2016).

After a full adjudication, the trial court ruled in favor of the Diocese and the national church in an unreported 2013 opinion.[108] Displeased with the results, Gunner appealed the decision, arguing, inter alia, that the trial court failed to use the neutral principles of law approach and "erred in deferring to the Episcopal Church's experts."[109] The California Court of Appeals for the Fifth District agreed: the trial court, erroneously interpreting the appellate court's past opinion, did not apply neutral principles of law.[110] Additionally, the trial court improperly decided to defer to the Episcopal Church as a hierarchical organization, thus accepting the Church's stance that a diocese may not unilaterally leave the Episcopal Church.[111] This decision requires "extensive inquiry into church polity" and is thus beyond the court's secular jurisdiction.[112] Even if deference and the ecclesiastical determination were appropriate, deciding whether or not a diocese may unilaterally leave the Church does not resolve the property dispute in question.[113] This left the appellate court to apply neutral principles of law on its own. The court dealt first with the Diocese's real property, and second with the Diocese's personal property.[114]

As noted, the property of the Diocese was held in a corporation sole, and one purpose of using such an entity is to "ensure

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[108] *Id.*

[109] *Id.* at 60. Gunner also argued that the Episcopal Church should be collaterally estopped from arguing that the trial court properly decided the case because of an Episcopal Church property-splitting suit in Illinois. Diocese of Quincy v. Episcopal Church, 14 N.E.3d 1245 (Ill. App. Ct. 2014); *see Gunner*, 202 Cal. Rptr. 3d at 60. *Quincy* was decided soon after the remanded *Schofield* trial court ruling, and involved another secessionist Diocese leaving with church property. *See generally Quincy*, 14 N.E.3d at 1245. There, however, the trial court ruled in favor of the breakaway group and the appellate court affirmed. *Id.* Despite the different result, the *Gunner* court determined that due to differences in Illinois law, the method of incorporation of the Illinois diocese, and the methods in which the Diocese of Quincy held title to its property, the case did not present the "identical issue" required for collateral estoppel. *Gunner*, 202 Cal. Rptr. 3d at 60–61.

[110] *Gunner*, 202 Cal. Rptr. 3d at 61–62.

[111] *Id.* at 63.

[112] *Id.* (quoting Diocese of Quincy v. Episcopal Church, 14 N.E.3d 1245, 1257 (Ill. App. Ct. 2014)).

[113] *Id.* at 63.

[114] *Id.* at 66–67.

the continuation of ownership of property dedicated to the benefit of a religious organization that may be held in the name of its titular head."[115] There is a clear distinction between the corporation itself and the current officeholder; the officeholder deals with the assets only on behalf of the religious organization.[116] So, while Schofield remained chief officer of the corporation sole, he did not have authority to make his amendment to the articles of incorporation because the religious organization governed by the corporation (here, the Diocese) had not authorized the amendment.[117] Additionally, the canons of the Diocese stipulated the name of the corporation sole. To effectively change the name, Schofield needed to have the diocesan convention vote first to approve a change to the canons and constitution, and after that change, vote to amend the title of the corporation sole.[118] Schofield's first set of deed grants were invalid because Schofield's attempt to rename the corporation sole failed; accordingly, when he granted the deeds to the "Anglican Bishop of San Joaquin," no organization of this name actually existed.[119] Schofield's later transfer of the deeds from the new corporation sole to the Anglican Diocese Holding Company was also null because the ability to transfer to the Holding Company was contingent upon the transfer to the corporation sole being successful.[120] After this point, all transfers made by Schofield were invalid because he had been removed from his position as bishop, and with that his position as incumbent of the corporation sole.[121]

The personal property involved in the dispute was the money held in the Diocese's investment accounts at Merrill Lynch.[122] Schofield created a new account with Merrill Lynch in the name of his holding company, and instructed Merrill Lynch to transfer the diocesan investment accounts to his new account.[123] These transfers came after Schofield had been removed from his position,

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[115] *Id.* at 65.

[116] *Id.* at 65.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 66–67.

[120] *Id.* at 67.

[121] *Id.*

[122] *Id.*

[123] *Id.*

and, thus, he lacked the authority to make these transfers.[124] Having gone through the neutral principles of law analysis, the court determined that all property—both real and personal—remained with the Diocese and the Episcopal Church, and accordingly affirmed the trial court's judgment.[125]

III. IMPROVING NEUTRAL PRINCIPLES

The agonizing division amongst the Anglican Communion continues, but as of the writing of this Note, the spree of property litigation—and to some extent the attempts of large property-holding groups to leave the Episcopal Church—seems to have died down.[126] Accordingly, it seems an appropriate time to reflect back upon some of the early suggestions concerning ways to improve the Episcopal Church property-splitting litigation, and to examine the extent to which these suggestions were, or were not, considered during the subsequent litigation.

A. Scholarship and Suggestions

Many years before the current Episcopal Church property-splitting controversies began, scholarly articles began weighing in with suggested improvements and changes to the *Jones v. Wolf* neutral principles of law approach.[127] Numerous commentators who believed this approach to be problematic offered solutions, or if not solutions, at least alleged improvements to the current law and process surrounding church property litigation. Some focused on leaving behind the framework of the neutral principles approach and either prescribing an alternative system, or removing the decision from the courts entirely.[128] Alternatively, others argued

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[124] *Id.*

[125] *Id.*

[126] *Compare* search results for "Anglican Communion Property Litigation" between January 1, 2017 and January 1, 2018, GOOGLE [https://perma.cc/AP6A-Z64E], *with* "Anglican Communion Property Litigation" between January 1, 2015 and January 1, 2016, GOOGLE [https://perma.cc/M3GC-SCVT].

[127] *See, e.g.*, Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335 (1986).

[128] *See, e.g.*, Greenawalt, *supra* note 45, at 1843 (1998); Calvin Massey, *Church Schisms, Church Property, and Civil Authority*, 84 ST. JOHN'S L. REV. 23 (2010).

for keeping the neutral principles approach, but making changes to reach a more equitable system.[129] The number and variety of the suggestions make it unreasonable to discuss even a substantial portion of them in a paper of this length. Accordingly, this analysis selects a number of the suggestions which would potentially be applicable within the current neutral principles doctrine. These suggestions mainly concern adding additional factors or considerations to the adjudication process with a hope of, it would seem, removing some of the alleged institutional bias inherent in the neutral principles doctrine. The discussion will focus on the suggestions of two specific papers: *Whose Church Is It, Anyway?* by Kathleen Reeder[130] and *Welcome to the Episcopal Church, Now Please Leave* by R. Gregory Hyden.[131]

1. Reeder

Reeder's paper is the earlier of the two, and Hyden draws from it in his work.[132] Reeder argues that the neutral principles approach to Episcopal Church property-splitting leads to a "foregone conclusion" in which the national Church and diocese retain ownership of the diocesan property.[133] This, Reeder believes, is unjust, because the parishes "often lose the very properties they have purchased, improved, and maintained."[134] Accordingly, she offers five "salient factors" which, she argues, courts should consider in adjudicating Episcopal Church property disputes.[135] The five factors are: 1) assessments to the diocese; 2) the purchase and maintenance of property; 3) expectations of parishioner-donors; 4) change in membership between approval of the canons and present-day disputes; and 5) the lack of bargaining power for new churches.[136]

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[129] *See, e.g.*, William G. Ross, *The Need for an Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 ST. LOUIS L.J. 263 (1987).

[130] Reeder, *supra* note 61.

[131] Hyden, *supra* note 5.

[132] *Id.* at 542 n.8.

[133] Reeder, *supra* note 61, at 157.

[134] *Id.* at 158.

[135] *Id.*

[136] *Id.*

2. Hyden

Hyden argues that "courts either do not understand or simply ignore the role the wider Anglican Communion plays in Episcopal polity."[137] To Hyden, this is, in fact, the "greatest shortcoming" of the Episcopal Church property-splitting lawsuits.[138] Hyden makes general suggestions for improving the litigation process, but sums up recommendations by saying that within the Anglican context, the flexibility of his recommendations should allow courts to "determine the living structure between the parish and the Episcopal Church within the Anglican Communion."[139] The only one of Hyden's "principles" which explicitly brings in a consideration of the Anglican Communion is the second principle.[140] This principle suggests that courts adopt the "Living Relationship Test" from the Ohio Appellate Court, which "looks beyond ordinary indicia of property ownerships expressed in deeds, articles of incorporation and like documents, and examines the rituals and practices of the church in dispute to determine the governmental relationship or polity prevailing."[141] This would allow courts to consider a parish's refusal to pay annual assessments to the national church, their refusal to accept their bishop's authority, and other actions which show their "desire to not remain loyal to the diocese."[142] This would also allow courts to "give weight to the fact" that some secessionist Episcopal parishes realigned themselves with other parts of the Anglican Communion.[143] Because of this realignment, Hyden argues that the property in contest "is not being withdrawn from the international church."[144]

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[137] Hyden, *supra* note 5, at 563.

[138] *Id.*

[139] *Id.* at 572.

[140] *Id.* at 571–72.

[141] *Id.* at 570–71 (quoting S. Ohio State Exec. Offices of Church of God v. Fairborn Church of God, 573 N.E.2d 172, 182–83 (Ohio Ct. App. 1989)).

[142] *Id.* at 571.

[143] *Id.*

[144] *Id.*

B. Utilization and Non-Utilization of Suggestions in the Gunner/Schofield *Controversy*

1. Reeder

In *Gunner*, the appellate court was required to redo the entire neutral principles of law application that the trial court failed to perform,[145] so if Reeder's factors would come into play, the court's application should be visible here. However, the first problems with Reeder's suggestions appear in their very applicability to *Gunner* and other similar property-splitting suits. Reeder assumes that courts will "rely heavily on the ... implied trust doctrine."[146] Thus, Reeder's factors are tailored to a court examining the presence or absence of an implied trust.[147] But in *Gunner,* the court expressly rejects this approach.[148] "Implying a trust almost inevitably puts the civil courts squarely in the midst of ecclesiastical controversies," forcing courts "to determine which faction continued to adhere to the 'true' faith."[149] Doing so would put courts expressly into prohibited ecclesiastical territory.[150] Since no implied trust is at issue in the case, it is therefore unsurprising that the *Gunner* court does not consider any of Reeder's factors.[151]

2. Hyden

In the *Gunner* opinion, and the opinions leading up to it, there is no mention of the Anglican Communion.[152] This, of course, comports with Hyden's statement that courts often "simply ignore" the role of the Anglican Communion.[153] The court in *Gunner*

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[145] Diocese of San Joaquin v. Gunner, 202 Cal. Rptr. 3d 51, 62 (Cal. Ct. App. 2016).

[146] Reeder, *supra* note 61, at 157.

[147] *Id.* at 157–58.

[148] *Gunner*, 202 Cal. Rptr. 3d at 64.

[149] *Id*.

[150] *Id*.

[151] *See generally* Diocese of San Joaquin v. Gunner, 202 Cal. Rptr. 3d 51 (Cal. Ct. App. 2016).

[152] *See id.*; Schofield v. Superior Court, 118 Cal. Rptr. 3d 160 (Cal. Ct. App. 2010); Jones v. Wolf, 443 U.S. 595 (1979); Watson v. Jones, 80 U.S. 679 (1871).

[153] Hyden, *supra* note 5, at 563.

(following the California Supreme Court) also did not employ the Living Relationship Test that Hyden advocates.[154] Unlike Reeder's suggestions, Hyden's suggestion would at least be applicable in *Gunner* if the court had chosen to use it because the breakaway parishes of the Diocese of San Joaquin realigned with a group composed of members of the Anglican Communion.[155]

C. Theoretical Efficacy of the Suggested Improvements

1. Reeder

The factors that Reeder suggests vary in hypothetical difficulty of application. The first four are parish- or diocese-specific—assessments to the diocese, the purchase and maintenance of property, expectations of parishioner-donors, and change in membership between approval of the canons and present-day disputes—while the last, the lack of bargaining power for new churches, is a generalization presumably based on the age of the parish.[156]

The expectations of parishioner-donors is perhaps the most difficult to apply. As Reeder notes, only the intentions of presently living donors who are currently active participants in the parish are readily measurable.[157] Considering that some parishes in the United States have been in existence for over 350 years, the current donors have likely made only a fraction of the donations that have contributed to the parish's assets over time.[158] Also, as seen in *Gunner*, many of the Episcopal Church parishes in the central and western parts of the United States started as missions, in which existing dioceses and parishes would provide funds to start parishes in newly settled areas.[159] Looking at the intent of donors in such a situation would be particularly difficult. Additionally, funding for many of the parishes in the original English colonies in North America came from the Church of England and voluntary societies run by English citizens, such as the SPCK and the

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[154] *Compare Gunner*, 202 Cal. Rptr. 3d, *with* Hyden, *supra* note 5, at 570–71.

[155] *Gunner*, 202 Cal. Rptr. 3d at 57.

[156] Reeder, *supra* note 61, at 158–59.

[157] *Id.* at 163–64.

[158] HEIN & SHATTUCK, *supra* note 4, at 16.

[159] *Gunner*, 202 Cal. Rptr. 3d at 55.

SPG.[160] This complicated history of donations,[161] presumably not well-documented, would make any analysis of donor intent extremely messy; based on availability bias,[162] it seems likely that such an analysis would skew heavily in favor of recent donors. Every court considering such a factor would have to make a choice regarding whom to include in its expectations analysis. Hyden raises very similar concerns about Reeder's suggestion to look at the intent of donors.[163] Reeder is entirely unconcerned about such bias: the "interests of temporally distant owners are not the primary concern."[164] This is, of course, a value judgment. However, even if historical donors are set aside, a hypothetical should illustrate that this exclusion does not solve the problems inherent in the suggestion.

Suppose a parish has 100 members. Among these parishioners, there is one major donor who has given several million dollars to the parish, while the other 99 members have each given less than $100 per year. If this was the status quo at the time of the property-splitting adjudication, how would a court evaluate the expectations of these parishioner-donors? Reeder, for some reason, thinks that this choice should be "fairly straightforward," but fails to provide even an inkling of how this process should work.[165] Should each parishioner get one vote? This would ignore that the vast majority of donated money came from one person. Should votes be allocated by amount donated? This seems undemocratic, and figuring out just how much each parishioner donated could be difficult, especially in parishes with lifelong members who have donated over the course of seventy years, or more. What if the single major donor had a well-known preference, but had died or left the parish prior to adjudication? Even without this extreme distribution in donations, problems still remain. Should members who do not donate get a vote? Should donors who are not members get a vote? Should people who have been members of the parish for many years get more votes than members who

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160 HEIN & SHATTUCK, *supra* note 4, at 16, 22, 35–41.

161 *See id.* at 38.

162 *See* Reeder, *supra* note 61, at 163.

163 Hyden, *supra* note 5, at 564–65.

164 Reeder, *supra* note 61, at 163.

165 *See* Reeder, *supra* note 61, at 163.

joined less than a week before litigation? Do children get votes? Do clergy get to vote? And once vote allocation has been decided, what would the standard be for determining expectations? Should a majority control the decision? A supermajority? A unanimous vote? Deciding any one of these questions could have a dramatic impact on the court's analysis, and could swing the expectations wildly in one way or another. But Reeder provides no indication of how this should work.

Reeder's next factor is assessments to dioceses.[166] Her argument is roughly that the "voluntary" nature of assessments to dioceses, if examined by courts, would show that parishes have autonomy on a day-to-day basis, and, thus, courts should be willing to give the parishes control over property after succession.[167] It is unclear why this day-to-day autonomy would have any impact on a hypothetical court's decision, and Reeder does not provide any explanation. It is well known that the Episcopal Church tends to delegate the majority of its power to the parish level.[168] This delegation, however, does nothing to change the fundamental polity and power structure of the Episcopal Church.[169] Nor does it do anything to change the contractual relationships which govern the operation of the parishes and dioceses.[170] Reeder would have courts focus on this nebulous concept of autonomy,[171] presumably to the exclusion of explicit, easily ascertainable contractual relationships.

Reeder's next factor asks courts to look at the name under which property is held, and the source of funding which allowed for the creation of the buildings.[172] Reeder believes that "[i]t would be manifestly unjust if the diocese held legal ownership of

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[166] Reeder, *supra* note 61, at 159.

[167] *See id.* at 160 (noting that the funds generated from assessments are voluntary commitments).

[168] *See Governance of the Episcopal Church, supra* note 6 (describing the governance structure of the Episcopal Church).

[169] *See* Reeder, *supra* note 61, at 160.

[170] *See Governance of the Episcopal Church, supra* note 6 (describing the governance structure of the Episcopal Church).

[171] Reeder, *supra* note 61, at 161 ("Courts could give this day-to-day autonomy more weight in the resolution of church property matters.").

[172] *Id.*

real property that the parish wholly financed."[173] Reeder cites a restaurant franchise example in an explanatory footnote for this factor.[174] Again, this would favor a nebulous concept of intent over the actual contractual relationship which the diocese and parishes agreed to. The franchise argument, while interesting, is not a particularly viable parallel. Notably, the franchise in question presumably did not agree to a contract which placed ownership of its property in implied trust with the franchisor, as courts have often found to be the case in the Episcopal Church's Dennis Canon.[175] Reeder also bases her argument on an assumption that parishes generally fund the creation of their own buildings without outside monetary support.[176] This may be accurate in some cases, but as noted above, the presence of foreign donations, grants from the national Church, and current or past mission-status of many parishes directly contradicts this assumption in many cases.[177] The California Supreme Court, commenting on the exact concern that Reeder raises, concludes that "[a]lthough the deeds to the property have long been in the name of the local church, that church agreed from the beginning of its existence to be part of the greater church and to be bound by its governing documents."[178]

Reeder's final two factors are Change in Membership between Approval of Canons and Present-Day Disputes and Lack of Bargaining Power for Missions.[179] Both factors essentially involve a claim that the present membership of the parish in question may not have freely consented to the canons of the Episcopal Church. In the former, this lack of consent is based on potential changes in membership, so that the current members did not vote for the diocese adopting the canons.[180] In the latter, the lack of consent is based on the idea that new parishes have no real choice

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[173] *Id.* (asserting that Episcopal churches frequently purchased real property and structures without assistance from the diocese).

[174] *Id.* at 161 n.173.

[175] *Id.* at 126–27.

[176] *Id.* at 162.

[177] *In re* Episcopal Church Cases, 198 P.3d 66, 70 (Cal. 2009).

[178] *Id.*

[179] Reeder, *supra* note 61, at 158–59.

[180] *See id.* at 164–65.

in joining the Episcopal Church, have no ability to join a diocese other than the one in which they are geographically located, and have no legal expertise to understand the property indications of the contract into which they are entering.[181] These two factors suffer from the fewest flaws because, unlike the other factors, they provide reasons why a court should deviate from a contractual basis, rather than merely tossing the contract out in favor of other factors without explanation. Nonetheless, these factors are not without difficulties. It is true that members who joined a parish after the parish voted to join the Episcopal Church and adopt its canons did not themselves vote on these decisions. Reeder argues that this lack of personal voting should be interpreted—or at least can be interpreted—as a lack of consent to the canons in question.[182] This lack of consent would apparently render the canons unenforceable.[183] That seems unusual; this is, after all, a *voluntary* organization, and one with a number of available substitutes.[184] Because the canons were already in place, these new members, had they wished to investigate the matter, could have fairly easily determined the rules which governed the parish's relationship to its diocese and to the Episcopal Church.[185] The fact that the individual parish is associated with the larger Episcopal Church should be fairly obvious, even if one looks no further than the similarities in styling akin to a trademark.[186] Because this is not a difficult connection to make, it would be odd to entirely excuse compliance with a contract on the basis that some members of an organization failed to inquire into the rules governing the organization.[187] This also comes back to issues involved with some

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[181] *See id.* at 166–67.

[182] *Id.* at 164–65.

[183] *See id.*

[184] *Id.* at 165.

[185] *See* Diocese of San Joaquin v. Gunner, 202 Cal. Rptr. 3d 51, 55 (Cal. Ct. App. 2016).

[186] *See id.*

[187] *See id.* (discussing the governing structure of the Episcopal church); Denise Ping Lee, *The Business Judgment Rule: Should It Protect Nonprofit Directors?*, 104 COLUM. L. REV. 925, 930 (2003) (discussing how state statutes tend to give non-profits "complete freedom in establishing criteria for membership and in determining what rights ... the members are to have."); *id.* at 947

of Reeder's other factors: why would a court be concerned with the lack of voting by particular members of the parish?[188] The parish is a separate entity from its members, and the canons of the Church control the relationship not between the members of a parish and the diocese, but between the parish as a separate entity and the diocese.[189] If this is the case, inquiry into member voting preferences would be fruitless.

The bargaining power argument strikes a very different note. While not actually describing the adoption of diocesan rules as unconscionable, Reeder begins discussion of this factor with the idea of unconscionability.[190] Under contract law, unconscionability is an extreme standard, embodied in words such as a contract which "no man ... not under delusion would make" and "which no fair and honest man would accept."[191] Clearly, parishes in the not-too-distant past voluntarily, and with full knowledge, voted to adopt these canons.[192] If Reeder actually intends to call such agreements unconscionable, this is an extraordinary leap. Even if Reeder does not intend a full labelling of unconscionability, her argument still assumes a sort of duress which forces new parishes into agreement with the canons of the Episcopal Church.[193] She describes the Episcopal Church as being "[i]n some sense ... a monopoly supplier."[194] This is a curious claim. The Episcopal Church does not claim to be the only Christian organization

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(discussing the quasi-contractual relationship between donors and non-profit directors).

[188] *See* Reeder, *supra* note 61, at 165.

[189] *See id.* at 130 (discussing the relationship between the parish and diocese); *id.* at 154 (stating that individual churches do not automatically assent to new canons. Canons are enacted and amended by a concurrent vote of the House of Deputies, comprised of clergy and laity, and the House of Bishops, comprised of bishops of all dioceses.).

[190] *Id.* at 166.

[191] Hume v. U.S., 132 U.S. 406, 410 (1889).

[192] Reeder, *supra* note 61, at 164–65 ("[A] parish membership's consent at a given point in time to abide by the rule of the canons should not be read as a blanket agreement to the canons for all time, especially as the membership of the church changes.").

[193] *Id.* at 165 ("Dead hands cannot maintain an infinite grip, especially in a voluntary organization such as a church.").

[194] *Id.* at 166.

with valid orders, demonstrated by its relation to other Anglican churches and its ecumenical efforts.[195] Additionally, there are a variety of denominations, both Anglican and non-Anglican, which structure their worship and daily life in a manner similar to that of the Episcopal Church.[196] Had they wished to, the new parishes which Reeder is concerned about could have joined the exact same organizations that the departing parishes of San Joaquin joined.[197] Reeder even tacitly acknowledges this point in the same paragraph where she ascribes the monopoly, saying in her footnote that some "U.S. parishes have left the Episcopalian Church in the U.S. and have joined ... [the Anglican] church in Nigeria ... [and] in Rwanda, Uganda, and various provinces in Latin America."[198] On grounds of both unconscionability and presumed monopoly power, Reeder's argument for bargaining power is weak at best.

There is perhaps also a corporate law analogy to be made in opposition to Reeder's factors as a whole, though it is admittedly imprecise. Many non-profit organizations have come to be organized as corporations under various state laws.[199] Though different from corporations used by other non-profits, the corporation sole used by the Diocese of San Joaquin bears some similarity.[200] When donors contribute to a non-profit corporation, they are owed certain duties, as in for-profit corporate law, though these standards are somewhat relaxed.[201] Beyond enforcing these duties, donors are not able to choose what happens to their funds.[202] The officers of the non-profit organization control the decision making.[203] If, despite the delegation of power, the Episcopal Church has a unitary

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[195] HOLMES, *supra* note 7, at 125 (discussing the Episcopal Church's participation in interdenominational societies).

[196] *Id.*; *Ecumenical Relationships*, *supra* note 38 (discussing the Reformed Episcopal Church); *Provincial Affiliation*, *supra* note 37 (discussing consideration of joining the ACNA).

[197] *See* Reeder, *supra* note 61, at 166 n.186.

[198] *Id.*

[199] *See* Lee, *supra* note 187, at 930.

[200] *See* Diocese of San Joaquin v. Gunner, 202 Cal. Rptr. 3d 51, 67 (Cal. Ct. App. 2016).

[201] *See* Lee, *supra* note 187, at 925.

[202] *See id.* at 949.

[203] *Id.* at 958 n.190 (discussing non-profit control).

polity, the concentration of power surely bears some resemblance to the corporate structure.[204] The individual dioceses are asked to vote to approve changes to the governing documents of the diocese, as are corporate shareholders.[205] No matter how much a group of shareholders in the non-profit corporation wants to leave, the shareholders agreed to the corporate bylaws when they contributed funds, knowing that they would be unable to regain their donations.[206] The continuance or discontinuance of donations, the expectations of the donors, and the changes in the pool of donors contributing to the organization would have absolutely no effect on the shareholders' ability to take control of their own funds over the objection of the corporation.[207]

When Reeder describes what the courts currently consider in Church property-splitting suits, the list of documents and facts that she lays out mimics the list of documents that would be considered in litigation over a non-profit corporation, *mutatis mutandis*: "church canons, the articles of incorporation, and perhaps a few other secular documents such as property deeds."[208] Presumably, Reeder does not envision her factors applying to non-church property disputes. If donors and members of a non-profit corporation—say, the ACLU—decided that the ACLU no longer represented their views, and thus chose to go to their local ACLU office, load up a truck with the office's furniture, computers, and other property—which were, of course, paid for with these member-donors' funds—and cart them away, it is difficult to imagine a court pondering the "expectations" of the member-donors when deciding whether or not to return the furniture to the ACLU. As noted before, this is an admittedly imprecise metaphor. It demonstrates, however, that if Reeder's factors are to be considered plausible, there must be a relevant legal difference between a non-profit corporation and the Episcopal Church's polity. Reeder relies upon

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[204] Reeder, *supra* note 61, at 155 (arguing that the Episcopal Church should act more like a corporation than a democratic government).

[205] Lee, *supra* note 187, at 930 (discussing that non-profits are made up of members who have voting power akin to shareholders); *Governance of the Episcopal Church, supra* note 6 (discussing how diocesan conventions vote on major policy decisions of the diocese).

[206] *See* Lee, *supra* note 187, at 946 n.127, 949.

[207] *See id.* at 946–47.

[208] Reeder, *supra* note 61, at 158.

the *appearance* of the Church's polity to the exclusion of the actual polity.[209] Just as a corporate board of directors can delegate power to local branches without losing any of its controlling power over those branches, the General Assembly of the Episcopal Church has tended to delegate power to the parishes and dioceses, but has firmly and unquestionably maintained power as a unitary polity.[210] Correcting this errant assumption about the Church, and maintaining the assumption that Reeder's factors would be largely misguided if applied to other non-profit corporations, it is difficult to imagine a relevant legal difference that would justify the application of these rules to ecclesiastical property but not to other property held by a non-profit.

2. Hyden

Reading Hyden's argument, it appears—though it is not explicitly stated—that he believes introducing considerations of the Anglican Communion into court proceedings will yield results in favor of the secessionist dioceses and parishes.[211] In recent years, the Anglican Communion has become known for its tumultuous volatility, and some more pessimistic news sources continue to constantly herald its demise.[212] Hyden portrays the Anglican Communion as a hierarchical structure, and he characterizes it as a structure that has authority over the Episcopal Church.[213] To support the claim that the Anglican Communion operates with authority, Hyden cites documents created by bodies within the Anglican Communion.[214] Apparently, these documents are intended

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[209] *Id*.

[210] *See* HOLMES, *supra* note 7, at 55 (quoting James A. Dator, The Government of the Protestant Episcopal Church in the United States of America: Confederal, Federal, or Unitary? 245 (1959) (unpublished Ph.D. dissertation, American University)).

[211] Hyden, *supra* note 5, at 572.

[212] *See, e.g.*, Andrew Brown, *The Anglican Schism Over Sexuality Marks the End of the Global Church*, GUARDIAN (Jan. 8, 2016), https://www.theguardian.com/commentisfree/2016/jan/08/anglican-schism-sexuality-end-global-church-conservative-african-leaders-canterbury [https://perma.cc/BM92-SGDB] (alleging that the 2016 Primates Meeting, which did not end the Communion's schism, would be the "funeral" of the Anglican Communion).

[213] Hyden, *supra* note 5, at 565–66.

[214] *Id.* at 567–68.

to show authority, but it is not entirely clear why this is the case. Hyden quotes a document, just before those citations, which states decisions from a body of the Anglican Communion "do not have canonical force," but merely have "moral authority."[215] In other words, they have no authority. Nothing in the cited passages acts to counter this assertion. Hyden quotes a report from a body of the Anglican Communion which contains "recommendations" which "ask" the Episcopal Church to respond,[216] and another report in which the body "request[s]" and "urge[s]" the Episcopal Church to act in a certain way.[217] For an organization that supposedly holds power over a subordinate Episcopal Church, this is surprisingly non-authoritative language. The system of organization is certainly hierarchical, as Hyden establishes,[218] but attempting to ascribe "authority" to it is misplaced. In fact, one does not have to go any further than the menu of the Anglican Communion website to find that the only authority that the Anglican Communion as a body maintains is the authority to make "recommendations" which are intended to "guide[ ]" the actions of the members of the Communion.[219]

Another aspect of potential authority could be the authority to remove a member church from the Anglican Communion, which is certainly true, but beyond this the Anglican Church has no ability to influence the ongoing activities of a member such as the Episcopal Church.[220] Not all churches that present themselves as Anglican are members of the Anglican Communion, so membership is arguably not an integral part of the identity of any particular church. And, as noted above, the potential fracture of the Communion has been considered imminent by some commentators for at least the past decade,[221] and this threat will likely continue

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[215] *Id.* at 566 (quoting LAMBETH COMMISSION ON COMMUNION, THE WINDSOR REPORT 2004 app. 1 at 61 (2004), http://www.anglicancommunion.org/media/68225/windsor2004full.pdf [https://perma.cc/HJ5L-9MSL].

[216] *Id.* at 566–67.

[217] *Id.* at 567–68.

[218] *Id.* at 565–66.

[219] *Structures*, ANGLICAN COMMUNION OFFICE (2017), http://www.anglicancommunion.org/structures.aspx [https://perma.cc/29N6-5GXX].

[220] *Id.*

[221] Reeder, *supra* note 61, at 126.

into the future as members of the Communion continue to struggle with many of the issues from which the controversy has arisen.[222] Thus, one of the foundational claims of Hyden's argument seems to be a mischaracterization.

Setting aside this doubt, however, it is unclear whether or not a court's consideration of the role of the Anglican Communion would actually change the outcome of a property-splitting suit. The Living Relationship Test that Hyden proposes courts adopt requires courts to set aside the standard documents seen in neutral principles analysis, such as "deeds, articles of incorporation and like documents," and instead decide the suit based on an examination of "the rituals and practices of the churches in dispute to determine the governmental relationship or polity prevailing."[223] With this approach, there is the danger—as seen in the discussion of Reeder[224]—that the court would mistake the grant of authority by the General Assembly of the Episcopal Church for a confederal polity.[225] Hyden, though, envisions two specific facts from a parish's rituals and practices to be included in adjudication: first, a parish's expression that it does not desire to remain loyal to its diocese, as manifested in the parish's refusal to pay annual assessments to the diocese or national church and/or its refusal to accept the diocesan bishop's authority; and second, if the parish leaves the Episcopal Church but realigns "with another Anglican Church," which means that it "remains within the Anglican Communion" and thus does not have its property "withdrawn from the international church."[226] The first consideration raises similar concerns to those seen in Reeder, in that it involves asking why a court should set aside an established contractual relationship in favor of a loosely defined and newly developed preference.[227] The second is a more interesting suggestion, but the actual application of this principle is difficult to envision. Suppose that a court deciding a property-splitting suit acknowledges that a parish has realigned with a different member of the Anglican

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[222] Brown, *supra* note 212.

[223] Hyden, *supra* note 5, at 570–71.

[224] *See* Reeder, *supra* note 61, at 159.

[225] *Id*.

[226] Hyden, *supra* note 5, at 571.

[227] *See supra* text accompanying notes 166–71.

Communion after its succession from the Episcopal Church. What does it do next? This certainly is not a trivial fact, but how exactly is a court supposed to "give weight" to this affiliation? Prior to realignment, the parish likely had very little, if any, contact with other members of the Anglican Communion, and the parish most likely gave very little attention at all to the loosely affiliated international group of churches which meets only periodically. Presumably, the weight given to the realignment is supposed to go in favor of the parish's ownership of church property, but why? And, if this realignment goes in favor of the parish's ownership, is a parish which leaves the Episcopal Church but chooses to realign with an Anglican Church that is not a member of the Anglican Communion more deserving of having its property taken away? What if a parish continues to call itself Anglican but does not realign with any group? What if a parish realigns with a different denomination, perhaps becoming an Anglican Rite Roman Catholic Church? Would a parish that continued in an Anglican style be favorable to one which, say, opted for a Lutheran affiliation? Introducing the role of the Anglican Communion into adjudication provides no clear answers, nor a clearly appropriate amount of probative value, and seemingly opens the door to a variety of questions related to denominational alignment which courts are likely not prepared to deal with.

The suggestions made by Reeder and Hyden both contribute to the discussion about church property-splitting cases,[228] but, as demonstrated, straying from a mere evaluation of documents would place a court in position in which it has to decide a number of crucial questions.[229] These questions, as suggested above,[230] are fraught with difficulty when it comes to actual application. For most, it is unclear how any court could possibly make a systematic decision on a particular question that would maintain applicability across cases. If this is not possible, the suggested improvements place courts in the situation of having to make potentially arbitrary distinctions and denotations and having to assign probative

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[228] *See* Hyden, *supra* note 5, at 568–72; Reeder, *supra* note 61, at 167–68.

[229] *See* Hyden, *supra* note 5, at 570; Reeder, *supra* note 61, at 171.

[230] *See supra* text accompanying notes 157–71; *see also* discussion *supra* following note 227.

value more or less at whim.[231] In contrast, the neutral principles approach requires very little of this: it concerns tangible pieces of documentary evidence and asks courts to perform analysis on topics with which they have a high degree of familiarity.[232] When such a possibility remains open to courts, it is hard to see why a court would choose either set of suggested improvements.

CONCLUSION

Leading up to much of the contentious Episcopal Church property-splitting litigation, a number of scholars proposed ways in which they believed that the doctrine of neutral principles of law could be improved.[233] These proposals largely hinged on asking courts to take more factors into consideration when deciding the lawsuits.[234] The hope, it would seem, was that the introduction of additional factors and considerations would provide a more just result for the schismatic parties, even if this came at the cost of muddling the decisions and potentially creating conflicting rulings on similar facts.[235] *Gunner*, as—for the moment—one of the last Episcopal Church property-splitting suits and therefore the decision with the most commentary and case law available, provides a convenient demarcation to examine whether any of the proposed additions were actually taken into account. While some of the topics of these suggestions were introduced into the court decisions, their introduction was largely fleeting and did not seem to strongly influence the court's decision-making process.[236] This, therefore, brings another question to the front: considering the minimal impact of the factors that were included, if these proposals had all been applied in *Gunner*, would they have made any difference to the outcome? As noted above, the introduction of extraneous factors would, if nothing else, remove the institutionally driven clarity that exists in the current neutral principles approach.

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[231] *See, e.g.,* Kyle D. Gobel, Note, Holiman v. Dovers*: An Argument for a More In-depth Analysis of Religious Disputes*, 43 IND. L. REV. 1287, 1288, 1288–89 n.13 (2010) (noting inconsistent decisions by Arkansas courts in religious disputes).

[232] Jones v. Wolf, 443 U.S. 595, 603 (1979).

[233] *See supra* note 127 and accompanying text.

[234] *See supra* notes 128–29 and accompanying text.

[235] *See, e.g.*, Ross, *supra* note 129, at 311, 316.

[236] *See supra* Section III.B.

However, this uncertainty aside, there is not a compelling reason to think that the proposals would have had a consistent dispositive impact. The additional considerations, while perhaps providing some support for the Schofield party, do not propose anything compelling. There is no consistent way to determine intentions considering the history of the diocese, and while an organizational realignment to another party in the Anglican Communion did take place, there is no provided reason why this realignment should preempt one national church's canon law in favor of another, especially with the decentralized nature of the Anglican Communion. As long as the neutral principles of law approach is applied in its current manner, the results are likely to remain consistent with those of the past, even if courts were to fully take into account the entire range of proposed factors.