Dennis the Menace?: An Analysis of Whether the Episcopal Church’s Dennis Canon Entitles the Church to an Exemption from Neutral Trust Law

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DENNIS THE MENANCE?: AN ANALYSIS OF WHETHER THE EPISCOPAL CHURCH’S DENNIS CANON ENTITLES THE CHURCH TO AN EXEMPTION FROM NEUTRAL TRUST LAW

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ABSTRACT

In 1979, the Episcopal Church amended its canons to include a provision whereby all dioceses and local churches agreed to hold their property in trust for the national church. The Dennis Canon, as it is known, was a response to a schism within the church and an attempt by the church to preserve real property owned by local churches. Many courts construing the effect of the Dennis Canon have found it applies even when common law trust principles would provide otherwise. However, the Supreme Court of South Carolina recently refused to give effect to it, stating it has “no legal effect.” This paper discusses whether United States Supreme Court's jurisprudence, specifically a hybrid rights analysis under Employment Division v. Smith, requires courts to give effect to the Dennis Canon and grant the Episcopal Church an exemption from neutral trust laws when necessary.
I. INTRODUCTION

Some call him worse than a beast.\(^1\) Hundreds have protested him as he simply attempts to do his job.\(^2\) Others call him “Bishop.” The firestorm ignited by the consecration of Bishop Gene Robinson in the Protestant Episcopal Church in the United States of America (ECUSA or the Church) has been undeniable and threatens to tear that Church apart. The Church has approximately 2.3 million members and is the United States branch of the worldwide Anglican Communion,\(^3\) which itself is the third largest church in the world, behind only the Catholic Church and the Eastern Orthodox Church.\(^4\) However, given these recent events and scruples dating back some thirty years, hundreds of millions of dollars of property is in jeopardy as conservative factions of the Church flee what they feel is its departure from the true teachings of the Bible.\(^5\) One court observing these events described “the creation of new and substantial religious entities . . . within their own structures and disciplines, the rapidity with which the ECUSA’s problems became that of the Anglican Communion, and the consequent impact—in some cases the extraordinary impact—on its provinces around the world.”\(^6\)

Cases concerning the ownership of church property are some of the oldest in the country: reported cases date back to at least the early nineteenth century,\(^7\) with the Supreme Court first

\(^3\) *Id.*
\(^7\) See discussion *infra* Part III.A.1.
ruling on the issue in 1871.⁸ Over the course of the next century, the Court slowly modified its approach, culminating with the seminal case Jones v. Wolf⁹ in 1979 and its endorsement of the “neutral principles of law” approach, which states that a court may apply neutral principles of law when adjudicating the issue of church property ownership.¹⁰ This paper analyzes the neutral principles approach under the lens of the Free Exercise Clause and freedom of association rights. It seeks to determine whether or not the Constitution requires state courts to exempt churches that enact express trust provisions in their constitutions and other documents from any neutral state trust law that otherwise would not give effect to those provisions.

Part II of this paper begins by examining the history of the ECUSA, from its humble beginnings in the Jamestown colony through its expansion into one of the largest churches in the country. This journey, however, has not been smooth, and the Church has faced strife and splits in the past that prompted it to enact the express trust provision in its canons more commonly known as the Dennis Canon. Part III discusses the winding path charted by the Court through its resolution of church property disputes, ending with the neutral principles of law approach announced in Jones. Part IV then analyzes the course of the Supreme Court’s Free Exercise Clause jurisprudence, from the high burden imposed on the state to justify its restrictions on free exercise to the complex and controversial hybrid rights approach. It discusses how the Dennis Canon triggers this hybrid rights analysis by implicating the Church’s freedom of association rights in addition to its rights under the Free Exercise Clause. Part V examines the split in state courts regarding the application of the Dennis Canon and discusses why this split raises constitutional concerns. Finally, Part VI advocates that those jurisdictions that would ordinarily

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¹⁰ Id. at 602-03.
give no effect to similar trust provisions must exempt Episcopal Churches from those laws under the First Amendment.

II. HISTORY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES FROM THE 1600s THROUGH THE PRESENT

As one might expect, the Church of England, a branch of the Anglican Church, was the first proper church to arrive in the American colonies with the founding of the Jamestown colony in 1607.11 With a history dating back to the time of the Apostles, by 1700 the Church of England was second only to the Congregational Church in terms of the number of parishes across colonial America.12 Its popularity, however, was not uniform in what would become the United States: the closer one was to Chesapeake Bay, the more Anglican churches one would find;13 with the exception of South Carolina, the farther away one was from the Bay, the less presence the church commanded.14 Although the Church of England remained second to the Congregational Church at the time of the American Revolution, it was the most wide-spread church geographically in the colonies when war broke out.15 Due in part to its heavy presence in Virginia, the Church of England had an impressive roster of Founding Fathers as members: Benjamin Franklin, George

11 DAVID L. HOLMES, A BRIEF HISTORY OF THE EPISCOPAL CHURCH 20 (1993). In fact, Pocahontas was the church’s most famous convert at the time. Id. Although the church officially took hold in Virginia, the first reported Anglican service in what is now the United States took place when Sir Francis Drake landed in San Francisco in 1579. CHRISTOPHER L. WEBBER, WELCOME TO THE EPISCOPAL CHURCH 5 (1999).
12 HOLMES, supra note 11, at 28.
13 Id. at 33. Much of the church’s popularity in the tidewater area was due to its establishment in Virginia. Id. at 20-21.
14 Id. at 33. In New England, the more Puritan residents tended to reject the tenets of Anglicanism, so it was slow to take there. Id. at 28. It was not until the College of William and Mary started graduating home-grown priests born in America and the passage of the English Toleration Act of 1689 that it started to gain popularity. Id. As for the Middle Colonies, such as Pennsylvania and ultimately what would become Delaware, Anglicans were overshadowed by the Quakers, who maintained a healthy majority. Id. at 30-32. As for the Southern colonies, it experienced mixed results in North Carolina and Georgia but took hold in the wealthy colony of South Carolina. Id. at 34-36.
15 Id. at 37-38.
Randolph, Patrick Henry, and more than half of the signers of the Declaration of Independence.\textsuperscript{16}

Following the Revolution, the newly created states disestablished the Church of England
in every colony where it was the official religion.\textsuperscript{17} Although the Church was still active
following the war, it certainly could not be called the “Church of England” any more. Puritans
in New England had nicknamed the Church “Episcopal,” a derivative of the Greek word
\textit{episkopos} for “overseer,” in reference to the Church’s governance by bishops.\textsuperscript{18} The Church
decided to adopt this name, as it was already well known.\textsuperscript{19} However, because the Catholic
Church also had bishops, in the 1780s the term “Protestant Episcopal” was used to differentiate it
from its Roman cousin.\textsuperscript{20} During the church’s first General Convention, a triennial meeting of
Church officials beginning in 1789, it adopted its official name: The Protestant Episcopal Church
in the United States of America.\textsuperscript{21}

Despite adopting a new name to distance itself from its former colonial master, the
Church was in serious decline following disestablishment.\textsuperscript{22} Its biggest problem was the
emergence of different factions within the Church after the war; those churches that took hold in
New England were accustomed to the governance of bishops, while, despite the Greek roots of
the church’s name, those in Virginia, for example, had been governed by the laity.\textsuperscript{23} The Church
thus faced its first major division and needed to find a common form of governance in order to

\textsuperscript{16} \textit{Id.} at 49. \\
\textsuperscript{17} \textit{Id.} at 50. \\
\textsuperscript{18} \textit{Id.} \\
\textsuperscript{19} \textit{Id.} \\
\textsuperscript{20} \textit{Id.} \\
\textsuperscript{21} \textit{Id.} at 51. It would retain this as the official name until 1967, at which point the word
“Protestant” became optional. \textit{Id}. \\
\textsuperscript{22} \textit{Id}. \\
\textsuperscript{23} \textsc{Webber}, \textit{supra} note 11, at 9. The laity, or lay people, are the non-ordained members of the
survive.\textsuperscript{24} Going into the General Convention of 1789, representatives proposed the following bi-cameral compromise: an upper House of Bishops that would have the right to review decisions with veto power but not to initiate discussions on issues, and a lower House of Deputies with equal numbers of clergy and laity to introduce measures.\textsuperscript{25} This compromise, memorialized in the Church’s first constitution, soon put it in a secure position to expand westward into the new territories acquired by the federal government.\textsuperscript{26}

As this expansion progressed and the Church gained more influence and power, it faced yet another identity crisis in the form of the Oxford Movement.\textsuperscript{27} The Oxford Movement called for a return to the Church’s catholic heritage and more emphasis on the ritual aspects of its liturgy.\textsuperscript{28} At its height, the House of Bishops\textsuperscript{29} investigated students at General Seminary in New York for “catholic” acts such as bowing and genuflecting (the bending of at least one knee to the ground); controversy raged when priests wore certain vestments such as chasubles,\textsuperscript{30} leading to a proposal that only minimal vestments were allowed; further proposals banned the use of crucifixes and candles on altars and making the sign of the cross except in the sacrament of baptism.\textsuperscript{31} The tide of opposition eventually receded as church leaders accepted these practices when the proposals to ban them failed to command a majority or the support of the

\textsuperscript{24} Webber, supra note 11, at 9.
\textsuperscript{25} See id.
\textsuperscript{26} Id. at 10-11.
\textsuperscript{27} Id. at 15.
\textsuperscript{28} Id.
\textsuperscript{29} The House of Bishops not only meets at the Church’s General Conventions in a legislative capacity, but it also serves in a judicial capacity as well. Episcopal Dictionary, http://www.holycross.net/index.cfm?section=1&page=52#P.
\textsuperscript{30} This is a type of vestment worn by clergy while celebrating Communion that is derived from an ancient Roman cloak. Id.
\textsuperscript{31} Webber, supra note 11, at 15-16.
General Convention. The ECUSA had managed to survive yet another division that
threatened to fracture the Church.

As time wore on and the Church continued to expand, it became obvious that the ECUSA
needed a more formal organizational structure, or in other words, to act “like a national
down.” Up until 1919 the Presiding Bishop was just a senior member of the House of
Bishops. During the General Convention held in that year, the Presiding Bishop was
denominated the executive of the national church in order to make the ECUSA reflect a typical
corporate model. As a result, “[b]y the beginning of the twentieth century, a church that many
thought was so identified with England that it could not survive the Revolution had become so
integral a part of American life that some began to think of it as the leading American church.”
This corporate form of governance is essentially the same form that the Church uses today. At
the lowest level of Church hierarchy sit the individual parishes, whose membership is comprised
of those who have been baptized in the Church or had their baptism recorded with the Church.
Church law leaves the governance of the individual parishes up to the states and dioceses, but
members of a given church generally hold annual elections to elect a vestry, which is a group of
members responsible for the finances and property from year to year. The Rector, who is the

32 Id. at 16.
33 Id. at 18.
34 Id. at 107.
35 Id. at 19. However, it was not until the election of the Most Reverend Henry Knox Sherrill as
Presiding Bishop in 1946 that the ECUSA had a full-time national leader. Id. at 20. Today, the
Presiding Bishop is the Most Reverend Katharine Jefferts Schori. Presiding Bishop,
36 WEBBER, supra note 11, at 20.
37 Id. at 101-02.
38 Id. at 102.
priest in charge of a parish, is responsible for the spiritual mission of the individual church.\textsuperscript{39} The Church’s rules give considerable autonomy to parishes, but that power is not absolute.\textsuperscript{40}

Every single parish in the ECUSA falls under the umbrella of a diocese, which is a regional governing body covering anywhere from twenty to two hundred parishes.\textsuperscript{41} Each parish is assessed an annual fee to help pay for the work of the diocese, which in turn provides resources and guidance for the parishes to complete their mission.\textsuperscript{42} Individual dioceses will hold annual conventions where they adopt a diocesan budget and program for the coming year.\textsuperscript{43} Each diocese is led by a bishop who is elected by all priests within the diocese and select lay members of parishes.\textsuperscript{44} A diocese, however, cannot consecrate a new bishop without complying with the rules set by the ECUSA.\textsuperscript{45} The ECUSA itself is organized somewhat like the federal government, with its two houses—the House of Bishops and the House of Deputies—adopting a budget for the national church and resolutions on matters concerning church members and making changes to the Prayer Book, Hymnal, and ecumenical relationships.\textsuperscript{46} Serving with these bodies is the executive, the Presiding Bishop.\textsuperscript{47} The highest level within the Church technically is the Anglican Communion, an international family of churches united in a common faith to which the ECUSA belongs.\textsuperscript{48} The Anglican Communion, however, does not have much authority over individual churches such as the ECUSA; it is really “an international church

\textsuperscript{39} \textit{Id.} at 103.
\textsuperscript{40} \textit{Id.} at 103.
\textsuperscript{41} \textit{Id.} at 104.
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} at 105.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.} at 106.
\textsuperscript{46} \textit{Id.} at 106-07.
\textsuperscript{47} \textit{Id.} at 107.
\textsuperscript{48} \textit{Id.} at 108.
without a governing body," although there has been some recent movement to create a more formal structure. 49

As secular society faced pressure for change during the civil rights era, the ECUSA faced its own calls for change at the same time with “pressure” to change the Book of Common Prayer 50 and ordain women as priests. 51 Although progress for women within the Church was slow, in the 1950s and 1960s, they gradually began serving on vestries, as delegates to various diocesan conventions, and even as deputies to General Conventions. 52 The House of Bishops first considered the actual ordination of women in 1966, and in 1968 that body requested the Lambeth Conference in 1968 to consider the issue. 53 It was not until 1976 that women were officially permitted to be ordained, and that development ushered in new controversy. 54 Detractors consequently left the church to join various splinter Anglican churches that were cropping up around the world. 55 Three years later, the General Convention of 1979 approved a slate of changes to the Book of Common Prayer that represented a massive liturgical change in

49 Id. at 110.
50 The Book of Common Prayer, also know colloquially as the “Prayer Book,” is the ECUSA’s required worship book and lays out the prayers, devotions, services, and psalms used. Episcopal Dictionary, http://www.holycross.net/index.cfm?section=1&page=52#P. The Prayer Book’s full name is The Book of Common Prayer and Administration of the Sacraments and Other Rights and Ceremonies of the Church Together with the Psalter or Psalms of David According to the Use of The Episcopal Church.
51 WEBBER, supra note 11, at 21.
53 ROBERT PRITCHARD, A HISTORY OF THE EPISCOPAL CHURCH 67 (2d ed. 1999) (1991). The Lambeth Conference is a decennial meeting of bishops and other participants in the Anglican Communion from around the world to decide church matters. See The Lambeth Conference Official Website – Home Page, http://www.lambethconference.org/index.cfm. At the 1968 Lambeth Conference, women were permitted to be admitted as deacons, but not into the priesthood or as bishops. PRITCHARD, supra, at 67.
54 BOOTY, supra note 52, at 69.
55 Id. at 69. These breakaway parishes and dioceses have been aligning themselves with very conservative bishops in Latin America and Africa. Laurie Goodstein, Episcopal Split as Conservatives Form New Group, N.Y. TIMES, Dec. 3, 2008. However, there has been a recent movement to form a new conservative branch of Anglicanism in the United States as well. Id.
the Church.\footnote{Booty, supra note 52, at 29.} Church members objected to the new Prayer Book on a number of grounds. Some believed the new language was colloquial and ineffective to transmit the solemnity of church sacraments.\footnote{Id. at 31.} Others thought it “reduced all worship to the level of three year olds.”\footnote{Id., supra note 52, at 31.} Some even said it did not go far enough in removing the modern reliance on liturgy.\footnote{Id.} As in ages past, those who objected to these changes to the Prayer Book left the ECUSA to join various splinter churches purporting to stay true to the faith.\footnote{Id.} Consequently, the years 1965-1980 were the worst for the Church since the Revolution in terms of new members being baptized.\footnote{Pritchard, supra note 53, at 249.}

In response to the fear that these schisms—or potential schisms depending on one’s vantage point—would lead to these dissident factions claiming Church property as their own, and to the evolving First Amendment standards from the Supreme Court, the General Convention of 1979 passed what is commonly known as the Dennis Canon.\footnote{Brenda Goodman, A Church is Divided, and Headed for Court, N.Y. Times, Dec. 5, 2007.} In full, the Dennis Canon provides,

All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.\footnote{Constitution & Canons Together with the Rules of Order for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as the Episcopal Church, Canon I.7.4 (2009).}
The next section of the Constitution and Canons provides that “[t]he several Dioceses may, at their election, further confirm the trust declared under the [Dennis Canon] by appropriate action, but no such action shall be necessary for the existence and validity of the trust.” Canon law also states that all property must be held in accordance with these rules. As one might expect, the canons of individual dioceses and the ECUSA require that all parishes agree to be bound and act in accordance with these rules. Additionally, adding a new canon, such as the Dennis Canon, requires the approval of both houses of the General Convention to ensure that all levels of the Church—the laity, priests, and bishops—agree to new canons.

The effect of the Dennis Canon is to expressly state that all local churches within the ECUSA hold their property in trust for the Church and for their respective dioceses. To the

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64 Id. at Canon I.7.5.
65 Id. at Canon I.7.3.
66 See, e.g., DioceSE OF New York, DioceSan Canons Canon 28 (2009) (requiring a group which seeks to organize as a congregation to send a letter to the Bishop stating, “[W]e do hereby promise conformity to the authority of the Diocese, and to the Constitution, Canons, Doctrine, Discipline and Worship of the Protestant Episcopal Church of the United States and in the DioceSe of New York”); DioceSe OF Olympia, Constitution & Canons Canon 8 § 1 (2009) (requiring a new parish to send a letter to the Bishop stating, “We do hereby promise and agree that said Parish shall always be held under the ecclesiastical authority of the Bishop of Olympia, and in conformity with the Constitution and Canons of the Episcopal Church in the United States of America and Constitution and Canons of the DioceSe of Olympia, the authority of which we do hereby recognize and bind ourselves to incorporate them into the Constitution of said Parish, and to whose doctrine, discipline, and worship we promise at all times, for ourselves and our successors, corporate obedience and conformity”); DioceSe OF South Carolina Canons Canon 3 § 1 (2009) (“Whenever any organized Mission shall desire to become an organized Parish, . . . it must show . . . its willingness to conform to the Constitution and Canons of the General Convention and the Constitution and Canons of the Convention of this DioceSe, which are then, or thereafter may be, enacted by the authority of the same . . . .”).
67 Constitution & Canons, supra note 63, at Canon I.15.4 (“Before being taken under the direction of the General Convention of this Church, such Congregation shall be required, in its Constitution, or Plan, or Articles of Organization, to recognize and accede to the Constitution, Canons, Doctrine, Discipline, and Worship of this Church, and to agree to submit to and obey such directions as may be, from time to time, received from the Bishop in charge and Council of Advice.”).
68 Id. at Canon V.1.1.
extent there already was not an implied trust existing in favor of the Church. All parishes agreed from this point forward that they would hold their property in trust. Therefore, if a local church were to separate itself from the ECUSA, the ECUSA would still be entitled to the physical property occupied by that individual parish.

Following the disputes after the decision to ordain women and change the Prayer Book, the ECUSA entered a period of relative calm. That peace ended, however, when the Church consecrated the openly gay Reverend Gene Robinson as Bishop of New Hampshire in 2003. Despite being described as charming and jovial even by some of his fiercest critics, Bishop Robinson’s consecration threatened to pull the Church apart. In fact, he was the only bishop of the 800 currently in the Anglican Communion who was not invited to the Lambeth Conference in 2008. Since Bishop Robinson’s consecration in 2003, several conservative dioceses have threatened to separate from the Church, and a few have already done so. This is in addition to the individual parishes that have left without diocesan approval, which numbered roughly fifty-five in the first four years following Bishop Robinson’s consecration. As these parishes and dioceses begin to secede from the Church, inevitable battles erupt over who owns the physical property occupied by the local church. Following the enactment of the Dennis Canon in 1979, much of the litigation has centered around the effect of that trust provision.

III. APPROACHES TO ADJUDICATING CHURCH PROPERTY DISPUTES

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69 At least one court has found that the Dennis Canon merely codified what had been implicit since the Church’s founding in 1789. Rector, Wardens and Vestrymen of Trinity-St. Michael’s Parish, Inc. v. Episcopal Church in Diocese of Conn., 620 A.2d 1280, 1292 (1993).
71 Bates, supra note 1.
72 Millard, supra note 2. Bishop Robinson attended the Lambeth Conference anyway, and some 200 people protested his attendance. Id.
74 Goodman, supra note 62.
Over the course of this nation’s history, courts have had countless opportunities to define and develop approaches to determine the ownership of church property. This section follows the course of that jurisprudence and outlines the different tests courts have created, from the earliest days of the country through the Supreme Court’s most recent decision on the matter in 1979. The two main approaches that currently exist are the deference approach and the neutral principles of law approach.

A. Deference Approach

1. Early State Decisions

The colonists who settled what would become the United States were of the mindset that a strong church was essential for the development of a stable government.\(^{75}\) Thus, with the exception of Maryland, every colony founded in all of the Western Hemisphere before the mid-seventeenth century had an established church.\(^{76}\) However, religious dissent soon started growing in the colonies as early as the late seventeenth century.\(^{77}\) With the restoration of the Church of England back in the motherland, Anglican leaders sought to expand the reach of the church abroad.\(^{78}\) Even before 1776, the revolutionary spirit was alive as other religious groups resisted the spread of empiric Anglicanism at the expense of their own beliefs,\(^{79}\) although this proved fairly unsuccessful.\(^{80}\) For a few years, these groups put aside their differences, and “[w]ith little more than faith in God and a determination to be ‘a free people,’ the colonists,


\(^{76}\) Id. at 13-14.

\(^{77}\) Id. at 30.

\(^{78}\) Id. at 30-31.

\(^{79}\) Id. at 31.

\(^{80}\) As discussed earlier, the Church of England became the second-largest church in the colonies in terms of its number of parishes and the most wide-spread church geographically as well. Holmes, supra note 11, at 37-38.
through the Second Continental Congress, declared war on England.\textsuperscript{81} Though united for this common purpose during the war, after the ratification of the Constitution and the Bill of Rights, religious diversity continued to grow within the new country.\textsuperscript{82}

When Congress passed the First Amendment to the Constitution, by its terms it was only applicable to the federal government and not to the states.\textsuperscript{83} Following the Revolution, court dockets were ripe with church property disputes as this prolific diversity continued to spread.\textsuperscript{84} This was particularly true in New England, where many Congregational churches rejected the doctrine of Trinitarianism\textsuperscript{85} and began embracing Unitarianism.\textsuperscript{86} Reported decisions discussing the principles of church property adjudication consequently began appearing as early as 1807. For example, in \textit{Avery v. Inhabitants of Tyringham},\textsuperscript{87} the Supreme Judicial Court of Massachusetts decided to adopt the rule that ordinary legal principles could not interfere with a religious organization.\textsuperscript{88} In that case, a local minister sued the parish that voted him out of office for the remainder of his salary still owing under his contract of employment.\textsuperscript{89} The defendants


\textsuperscript{83} See U.S. Const. amend. I (stating that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”) (emphasis added).


\textsuperscript{85} Trinitarianism is the belief in the Holy Trinity, which views “God in Three Persons”: The Father, Son, and Holy Spirit. \textit{Wayne Grudem, Systematic Theology: An Introduction to Biblical Doctrine} 226 (1994). Each identity is unique yet they are all part of God. \textit{Id.} at 231.

\textsuperscript{86} Ross, \textit{supra} note 84, at 267. Unitarianism rejects the notion of the Trinity and instead believes in a single, unitary God. \textit{See Patrick Navas, Divine Truth or Human Tradition?} 14-15 (2007). There are far more complex differences between those who believe in the Trinity and those who do not than are germane to this paper.

\textsuperscript{87} 3 Mass. 160 (1807).

\textsuperscript{88} \textit{Id.} at 170.

\textsuperscript{89} \textit{Id.} at 160-61.
argued that the minister’s contract had no set time for performance and, therefore, was terminable by the will of either party under ordinary contract principles. Furthermore, the defendant-inhabitants of the township argued that they had the right to choose their minister; if one were to stray from the beliefs of the congregation as a whole, the township’s right would necessarily become one to terminate his employment. In response, the minister-plaintiff argued that “[i]f such was to be the tenure of [the minister’s] office, the great solemnity used in inducting him into it would sink from a solemn religious rite to an idle and profane mummery.”

Although the contract was not one for life, the minister argued that this public policy supporting the office of a minister favored construing it as one. In the typical seriatim opinion style of that time, Justice Isaac Parker wrote that absent “neglect of duty, immoral conduct, or flagrant unsuitableness of character,” the contract was one for life. If the parishioners want to remove the minister, they must resort to creating an ecclesiastical council to do so.

This rule of ecclesiastical authority, however, did not last long. Just six years later, the same court found that a Unitarian majority faction that split from an Episcopal Church was entitled to the physical property of the church itself. Because the officers and wardens of the new church were successors to the rector and wardens of the old church, they retained the vested remainder in the property formerly held by the Episcopal parish. Therefore, Massachusetts very early on adopted and then rejected the principle of ecclesiastical authority only to adopt a form of “majority rule,” which states that whichever group is the majority of parishioners, be it

90 Id. at 161.
91 Id. at 161-62.
92 Id. at 163.
93 Id. at 164.
94 Id. at 170.
95 Id.
97 Id.
the dissenting faction or the one still loyal to the national church, will receive rights to the church property. Outside of New England, however, state courts never widely accepted the majority rule principle. Those courts instead examined trust documents to ascertain whether the donor of the property in question expressed an intent for the faction remaining faithful to the donor’s faith to retain title to it. If the court could not find any express intent, it would imply a donative intent based on the circumstances surrounding the creation of the trust. This policy of delving into theological disputes eventually proved troublesome for courts, and more guidance was necessary as to the limits of their power to resolve these cases. It was in this context that the Supreme Court of the United States first entered into the fray of church property disputes.

2. *Watson v. Jones*

In 1842, various members of the Louisville, Kentucky, community organized the Walnut Street Presbyterian Church under the authority of the Presbyterian Church in the United States. It was part of and subject to the jurisdiction of the Presbytery of Louisville and the Synod of Kentucky. In 1853, the church purchased a tract of land in Louisville and, pursuant to the

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98 *See also* Baker v. Fales, 16 Mass. 488, 522 (1820) (formally adopting the majority rule). *Baker* was authored by Chief Justice Isaac Parker, the justice who wrote the first opinion in *Avery* before his days as Chief.  
99 *Ross, supra* note 84, at 269.  
100 *Id.*  
101 *Id.*  
102 *Watson v. Jones, 80 U.S. 679, 683 (1871).*  
103 *Id.* In the preceding pages of the opinion, the Court discussed the various levels of organization within the Presbyterian Church. Each local church had a group of trustees, in whom legal title to the church is vested without any religious duties. *Id.* at 681. The trustees were elected by the congregation and subject the powers of the Session. *Id.* The Session was comprised of the pastor and ruling elders and charged with furthering the religious mission of the church. *Id.* It was the Session who had equitable power to manage the church’s property. *Id.* The next level of Presbyterian governance was the local Presbytery, which was comprised of all ministers and one ruling elder from each congregation within a local district. *Id.* at 681-82. Its duties and powers included inquiring into the state of the local churches, resolving disputes, controlling the individual ministers, and doing “whatever pertains to the spiritual welfare of the
form of governance within the church, conveyed it to the trustees of the Walnut Street church. Following the outbreak of the Civil War, the local church became divided over the issue of slavery; the majority of the Session was pro-slavery, while the majority of the congregation was anti-slavery. Without delving into the details of the ensuing dispute, which occupy some fifteen pages in the U.S. Reporter and are not particularly relevant to this discussion, the issue of which group owned the church property arrived at the Supreme Court. Justice Miller, writing for the Court, set the stage for the opinion when he announced that “[r]eligious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law.”

In the Court’s view, there were three classifications of ownership arrangements so far as church property was concerned. If the property was conveyed to the church by a will or deed expressly stating that the property is to be held in trust for a particular religion, it is a civil court’s duty to give effect to that trust so long as there is any group that remained loyal to that religion’s doctrines or beliefs. If no express trust exists on the deed and the local church is organized independently of other church bodies, the rights of each church simply are to “be determined by the ordinary principles which govern voluntary associations.” Finally, if no express trust

chances under their care.” Id. at 682. Next was the Synod, which essentially served as an appellate body from the Presbyteries. Id. Finally, the highest body in the church was the General Assembly, which in addition to serving as the appellate body for the Synods had the authority to decide all matters involving church discipline and disputes. Id.

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104 Id. at 683.
105 Id. at 684.
106 Id. at 684 & n.6.
107 Id. at 714.
108 Id. at 722-23.
109 Id. at 724.
110 Id. at 725.
exists on the deed and the church is organized in a hierarchical fashion with different levels of ecclesiastical authority ending with a “supreme judicatory,” which the Walnut Street Presbyterian Church was, courts 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.” Thus, the “deference” approach was born: courts must accept as final the decisions of the highest church bodies pertaining to questions of discipline, faith, or ecclesiastical rule, custom, or law. The Court emphasized that an ecclesiastical tribunal’s jurisdiction did not extend beyond these limited areas but then found that the Kentucky courts nevertheless overrode the proper decision of the General Assembly that the pro-slavery faction did not represent the true church and had no rights to the property. Although this rule was not a constitutional one when first announced by the Court, the Court later recognized its constitutional significance.

B. Neutral Principles of Law Approach

1. Cases Preceding Formal Adoption

For almost the next one hundred years, Watson’s deference approach remained the rule regarding church property disputes. In 1969, however, the Court gave its first signal of a shift

\[\text{\textit{Id.}}\text{ at 726-27.}\]
\[\text{\textit{Id.}}\text{ at 727.}\]
\[\text{\textit{Id.}}\text{ at 732-33.}\]
\[\text{\textit{Id.}}\text{ at 734.}\]
\[\text{\textit{Kerdoff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.}, 344 U.S. 94, 115-16 (1952).}\]
\[\text{\textit{Id.}}\text{ at 734.}\]

In 1952, the Court ruled that:

\[\text{\textit{Id.}}\text{ at 726-27.}\]
\[\text{\textit{Id.}}\text{ at 727.}\]
\[\text{\textit{Id.}}\text{ at 732-33.}\]
\[\text{\textit{Id.}}\text{ at 734.}\]
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\[\text{\textit{Kerdoff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.}, 344 U.S. 94, 115-16 (1952).}\]
\[\text{\textit{Id.}}\text{ at 734.}\]

In 1952, the Court ruled that:
away from it in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church.*

In *Hull*, two local Presbyterian churches in Savannah, Georgia, sought to break away from the national church, claiming that the national church had abandoned its basic tenets of faith. After a failed attempt at reconciliation, the national church began internal proceedings to take control of the local church’s property until members could elect new, non-dissident leadership. Instead of appealing this action to the higher church authorities, the local church filed an action in Georgia state court to enjoin the national church’s “trespass” on the disputed property. At trial, the court instructed the jury that if the general church had engaged in a “fundamental or substantial abandonment of the original tenets and doctrines” of the church, then civil law would terminate an implied trust that existed in favor of the national church. The jury found that such a departure from doctrine had in fact occurred, and the trial judge therefore ordered that the national church be enjoined from using the local church’s property. The Supreme Court of Georgia affirmed the decision, and the Supreme Court of the United States granted certiorari “to consider the First Amendment questions raised.”

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118 *Id.* at 441-42.
119 *Id.* at 443. See the discussion *supra* in note 103 for the organization and hierarchical structure of the Presbyterian Church.
120 *Id.*
121 *Id.* at 443-44.
122 *Id.*
123 *Id.*
The Court immediately noted that “[s]pecial problems arise . . . when these disputes implicate controversies over church doctrine and practice.” After citing its holding in Watson, the Court went on to suggest that it actually could review an ecclesiastical determination if it were arbitrarily made or done through fraud or collusion. But this is not always necessary, because not every resolution of a property dispute will involve a civil court in the adjudication of faith and doctrinal issues. For example,

there are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.

The trial court in Hull specifically instructed the jury that it was to determine whether the national church had departed from its core doctrines, and this involvement of a civil court in doctrinal interpretation clearly violated the commands of the First Amendment. The Court did not have to formally adopt the “neutral principles” approach at this time because regardless of the ultimate test, the Georgia courts went beyond the limited role the First Amendment permits them to play.

The next year, another church property case was before the Court: Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc. In a per curiam

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124 Id.
125 Id. at 447.
126 Id. at 449.
127 Id. at 449-50.
128 The Court remanded the case back to the Georgia courts for further proceedings. Id. at 452. On remand, the Supreme Court of Georgia awarded the property to the local church because the property was deeded to it, not the national church, and there was no basis for a trust in favor of the national church. Presbyterian Church in U.S. v. E. Heights Presbyterian Church, 167 S.E.2d 658, 659-60 (Ga. 1969). Interestingly, the court was sure to point out that the church constitution contained no trust provisions. Id. at 659.
decision, the Court dismissed the appeal for want a federal question because the Maryland Court of Appeals’s decision below did not delve into any religious doctrines.\textsuperscript{130} Justice Brennan—who authored the majority opinion in \textit{Hull}—filed a concurring opinion.\textsuperscript{131} In it, he declared that civil courts could undertake a variety of different approaches to church property disputes, each of which is constitutional so long as it involves no consideration of doctrinal matters.\textsuperscript{132} The first approach advocated by Justice Brennan was the deference approach announced in \textit{Watson}.\textsuperscript{133} Second, a court may use the “neutral principles of law” approach outlined in dicta in \textit{Hull}, where “civil courts can determine ownership [of church property] by studying deeds, reverter clauses, and general state corporation laws.”\textsuperscript{134} Justice Brennan again cautioned that this approach only is permissible if its use would not require the resolution of doctrinal issues.\textsuperscript{135} The third and final approach Justice Brennan discussed was the passage of special statutes by individual states that govern church property arrangements, once again as long as such statutes left the determination of church policy and doctrine to the churches.\textsuperscript{136} At this point, although the Court had mentioned the neutral principles of law approach multiple times, it had yet to garner a majority of the Court

\textsuperscript{130} Id. at 367-68.
\textsuperscript{131} Id. at 368 (Brennan, J., concurring).
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 369-70.
\textsuperscript{134} Id. at 370.
\textsuperscript{135} Id.
\textsuperscript{136} Id. In support of this proposition, Justice Brennan cited \textit{Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America}, 344 U.S. 94 (1952). In \textit{Kedroff}, church property was in dispute and title to it was in the name of the local church. \textit{Id.} at 95-96 & n.1. A state statute in existence at that time created an autonomous administrative district within the broader Russian Orthodox Church, a body created without the consent of the church. \textit{Id.} at 97-98. This body claimed the right to occupy the church’s cathedral. \textit{Id.} at 95-96. The Court found this specific statute unconstitutional, holding, “Ours is a government which by the ‘law of its being’ allows no statute, state or national, that prohibits the free exercise of religion.” \textit{Id.} at 120. However, it never ruled that statutes are categorically unconstitutional if they are directed at churches. This paper does not address the constitutionality of such statutes.
or the proper procedural posture for the Court to be in a position to adopt it. However, that would soon change.

2. *Jones v. Wolf* and the “Neutral Principles of Law” Approach to Property Disputes

   a. The Majority Opinion

Nine years after Justice Brennan authored his concurring opinion in *Sharpsburg*, the Court was faced squarely with the opportunity for the first time since *Watson* to redefine how lower courts should resolve church property disputes. *Jones* involved another church property dispute arising out of Georgia involving the Presbyterian Church.¹³⁷ Like other Presbyterian churches, the Vineville Presbyterian Church was hierarchical, governed by its Session, the local Presbytery, the regional Synod, and then the General Assembly.¹³⁸ In 1973, a majority of the church membership voted to separate from the national church and ousted the minority faction remaining faithful to the Presbyterian Church from the property.¹³⁹ After the Presbytery determined that this minority group was the “true congregation of Vineville Presbyterian Church,” these members brought a class action suit in state court, asking the court to declare that they have exclusive possession of the church property.¹⁴⁰ The trial court applied what it termed Georgia’s “neutral principles of law” approach and granted summary judgment in favor of the majority.¹⁴¹ The Supreme Court of Georgia affirmed.¹⁴² The Supreme Court of the United States granted certiorari to answer the question “whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve [church property disputes] on the

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¹³⁸ *Id.* at 597-98.
¹³⁹ *Id.* at 598.
¹⁴⁰ *Id.* at 598-99.
¹⁴¹ *Id.* at 599.
¹⁴² *Id.*
basis of ‘neutral principles of law,’ or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church.”143

Writing for the majority, Justice Blackmun was joined by Justice Brennan, Justice Marshall, then-Justice Rehnquist, and Justice Stevens. He first noted that Georgia created its current approach on remand from Hull.144 Back from the Supreme Court, the Georgia court in that case examined the deeds to the property, state trust statutes, and the Presbyterian Church’s Book of Order for any basis in law to impose a trust in favor of the general church.145 It was only after determining that these documents and sources did not give rise to a trust that the Georgia court on remand awarded property to the trustees of the new local church.146 The Jones court first reiterated that civil courts were able to resolve questions of church property ownership and that states have “an obvious and legitimate interest in the peaceful resolution of property disputes,” but it then cautioned that the First Amendment “severely circumscribes the role that civil courts may play in resolving” them.147 Thus, civil courts must always defer to the decisions of church organizations regarding issues of religious doctrine or polity.148 Outside of those situations, the Court adopted the following language from Justice Brennan’s concurrence in Sharpsburg: “a State may adopt any one of the various approaches for settling church property

143 Id. at 597.
144 Id. at 599-600.
145 Id. at 600 (citing Presbyterian Church in U.S. v. E. Heights Presbyterian Church, 167 S.E.2d 658 (Ga. 1969)).
146 Id. The Supreme Court of Georgia also applied the neutral principles approach in Carnes v. Smith, 222 S.E.2d 322 (Ga. 1976). In Carnes, while the deeds, corporate charters, and state statutes did not impose a trust in favor of the United Methodist Church, the general church’s Book of Discipline contained an express trust provision in favor of the it. Id. at 328. Therefore, the court awarded the property to the general United Methodist Church. Id.
147 Jones, 443 U.S. at 602 (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 445-49 (1969)).
148 Id.
disputes so long as it involves no consideration of doctrinal matters, whether the ritual or liturgy of worship or the tenets of faith.”149

Without having to overrule any of its prior precedent, the Court finally was able to hold that the neutral principles of law approach was a constitutionally sound method for resolving these disputes.150 The primary advantage of this approach, reasoned the Court, was that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.151

It also permits courts to best effect the intentions of the parties, who can use reversionary clauses and trust provisions to specify what should happen in the event of a dispute.152 “In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.”153 Although the approach requires courts to examine documents such as church constitutions for this trust language, in doing so a court is to “take special care to scrutinize the document in purely secular terms”; if this is not possible, then the court must defer to the determinations of the highest ecclesiastical authority.154 While this approach certainly will have some problems in application, the Court reasoned that its advantages will far outweigh any of these concerns.155 Before remanding the case, the Court was

150 Id.
151 Id. at 603.
152 Id.
153 Id. at 603-04.
154 Id. at 604.
155 Id.
sure to remind the lower courts that the neutral principles approach was a constitutional method, but not the constitutional method, to use in church property dispute cases.\footnote{156}

b. The Dissent and The Majority’s Response

Justice Powell, joined by Chief Justice Burger, Justice Stewart, and Justice White, began his dissent by opining that if these cases were truly about ownership of property, the answer would be simple: the trustees of the Vineville Presbyterian Church held title to the church property and therefore had rights to it.\footnote{157} Instead, the real question was which faction of the church—the dissident majority or the faithful minority—was entitled to the property.\footnote{158} When answering \textit{that} question, Justice Powell found that the new neutral principles of law approach impermissibly required courts to intrude into the forbidden area of church polity.\footnote{159}

His opinion divided the neutral principles approach into two stages: (1) the court must examine deeds, charters, church books of order or discipline, and state statutes to determine whether there was a trust in favor of general church; and (2) if there were no trust, the court must determine which faction resulting from the schism is the “local congregation.”\footnote{160}

Justice Powell argued that the first stage essentially operates as a “restrictive rule of evidence” in that the majority’s rule requires a court to examine church constitutions and books of order for trust language only if it were memorialized in the secular language of trust and property law.\footnote{161} Because these documents rarely are stated in secular terms, this rule would

\footnotesize{\textbf{156} The Court remanded the case because the Supreme Court of Georgia did not articulate the grounds upon which it found the property belonged to the majority faction. \textit{Id.} at 609-10.}

\footnotesize{\textbf{157} \textit{Id.} at 610 (Powell, J., dissenting).}

\footnotesize{\textbf{158} \textit{Id.}}

\footnotesize{\textbf{159} \textit{Id.} at 610-11.}

\footnotesize{\textbf{160} \textit{Id.} at 611.}

\footnotesize{\textbf{161} \textit{Id.} at 611-12. Justice Powell made an interesting point in a footnote about the “neutral principles” approach supposedly endorsed by the Court in \textit{Sharpsburg} when it dismissed the appeal. He believed that the Maryland court below was not as neutral as the majority claimed it}
actually deny lower courts the ability to examine the very evidence the Supreme Court said they should. It would therefore be possible for a court to undermine a church’s own organization and authority under the guise of neutral principles, a move that “is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice.”

The second stage, determining which faction of the local church controls the property at issue if there were no trust in favor of the general church, poses similar problems. Justice Powell himself believed that the long-established *Watson* rule would suffice and courts should defer to the decisions of the church. The majority instead permitted the courts to adopt a majority-rule presumption, rebuttable by evidence that the true congregation could be determined through some other evidence. The relevant evidence to rebut this presumption was the same as that used in the first stage: corporate charters, general church constitutions, and the like. However, Justice Powell felt that the majority’s decision would once again operate to restrict the evidence a court could hear in overcoming that presumption and would likely “exacerbate further the interference with free religious exercise.”

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was; rather, the state court examined the constitution of the general church, the local church charters, deeds, and state statutes for information about the basic polity of the Church of God, not restricting its inquiry to statements “expressed in the language of trust and property law.” *Id.* at 612 n.1. Despite examining many inherently religious documents and language, the Court still dismissed that appeal because there was no inquiry into religious doctrine. *Id.* Justice Powell believed that under the majority’s approach in *Jones*, such an inquiry would in fact be unconstitutional. *Id.* For that reason, he did not accept the majority’s statement that the same neutral principles approach appeared in *Sharpsburg*. *Id.*

*Id.* at 613-14. Indeed, Justice Powell felt that this is exactly what the Georgia court did in *Jones*. He stated that under the structure of the Presbyterian Church, the Presbytery had authority over the Vineville church. *Id.* at 613. However, because this was not expressed in purely secular terms, the lower court was barred under *Jones* from examining this evidence and actually imposed a congregational form of government upon the hierarchical church. *Id.*

*Id.* at 615.

*Id.*

*Id.*

*Id.* at 615-16 & n.3.
The dissent then quoted the following language from *Watson* in support of its belief that the majority’s rule would frustrate the free exercise rights of a church:

“The right to organize voluntary religious organizations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who united themselves to such a body do so with the implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts to have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.”\(^\text{167}\)

In that vein, the Constitution commands courts to defer to decisions made within the church itself as to the fate of property in the event of a schism.\(^\text{168}\) Doing so would avoid reviewing the decisions of church bodies and avoid “interfering indirectly with the religious governance of those who have formed the association and submitted themselves to its authority.”\(^\text{169}\)

Although the majority did not appear to specifically address the dissent’s evidentiary concern, it did specifically address the dissent’s argument that the neutral principles approach would violate the free exercise rights of those who have formed and submitted themselves to the religious institution. In fact, according to the majority, “[n]othing could be further from the truth”:

The neutral-principles approach cannot be said to “inhibit” the free-exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the

\(^{167}\) *Id.* at 617-18 (quoting Watson v. Jones, 80 U.S. 679, 728-29 (1871)).

\(^{168}\) *Id.* at 618.

\(^{169}\) *Id.*
church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parities, provided it is in some legally cognizable form.\(^{170}\)

In responding to the dissent in this manner, the majority indicated that its opinion will not undermine free exercise rights at all, and a general church will be free to take any of the steps outlined in *Jones* to ensure that church property remains with the general church. However, there remains a lingering question of what the term “legally cognizable form” truly means: does it require a church to comply with every state’s specific trust law or simply just to express the trust provision in some tangible form? Given the majority’s statement that its rule does not violate the Free Exercise Clause and subsequent Supreme Court jurisprudence regarding neutral and generally applicable laws, the answer to that question turns on whether or not either of those solutions violates the commands of the First Amendment.

Shortly after *Jones* was decided, Judge Arlin Adams on the United States Court of Appeals for the Third Circuit found that the meaning of these words was the main difference between the dissent and the majority.\(^{171}\) According to Judge Adams, the dissent really was concerned about nothing; even under the majority’s analysis, “associated churches need not explicitly refer to property to indicate the intention that the general church is to have unfettered authority over the local church in all matters, including control over property.”\(^{172}\) If a court can infer the nature of the relationship, then it must enforce the boundaries of it.\(^{173}\) Though he wrote these words before many of the relevant cases that would come in the future and change the

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\(^{170}\) *Id.* at 606.


\(^{172}\) *Id.*

\(^{173}\) *Id.*
landscape surrounding free exercise rights, Judge Adams’s language strongly hints that free exercise and freedom of association concerns drive the analysis of these disputes and Jones, at least as it should be applied, steers clear these problems.

IV. TENETS OF FREE EXERCISE AND CHURCH GOVERNANCE RIGHTS

A. The Free Exercise Clause From 1791 to Employment Division v. Smith

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”174 These sixteen words have produced some of the most complex and seemingly irreconcilable jurisprudence in this country. This section of the First Amendment contains two parts: the Establishment Clause and the Free Exercise Clause. The purpose of these two clauses is to “promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.”175 While these are two distinct clauses, a large amount of overlap and tension exists between them. Nevertheless, this paper will focus on the Free Exercise Clause and chart a course that should successfully sail between Scylla and Charybdis. By this point in time, a few free exercise concepts are well established. First, the Court has incorporated the Free Exercise Clause into the mandates of the Fourteenth Amendment, and therefore it applies to the states in addition to the federal government.176 Second, from a very early date the Court has been clear that a person cannot use his or her own religious practices and the Free Exercise Clause to circumvent criminal laws, as to allow such a practice would “permit every citizen to become a law unto

174 U.S. CONST. amend. I.
himself.” Third, the Free Exercise Clause contains one of the few, if not the only, absolute rights under the Constitution: the government cannot regulate religious beliefs in any way, shape, or form. Once a law begins to regulate religious practices, the Court’s jurisprudence is less clear, but the Court has stated that when examining practices, courts are prohibited from examining their centrality or importance to the believer.

When the Court first announced its rule that the protection of religious beliefs is absolute, it held that the power to regulate conduct must be exercised in such a way that it is in pursuit of a reasonable end and the burden it imposes is not undue. Forms of conduct deserving of this constitutional protection include assembling for worship, participating in various sacraments, proselytizing, fasting, and refusing to use certain forms of transportation. Fortunately, the rule was relatively clear when the Court first announced it: Sherbert v. Verner held that if the government’s actions impose a substantial burden on one’s actual religious practices, then they only will be permissible to the extent that the government has a compelling state interest and there is no other way it can achieve that interest. This is true even if the burden is indirect. For example, consider the facts from Sherbert: a woman was denied unemployment

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177 Reynolds v. United States, 98 U.S. 145, 166-67 (1879). While the Court seemed to diverge from this rule in subsequent years, it reaffirmed this general principle in Employment Division v. Smith. 494 U.S. 872, 882 (1990). Smith is the famous peyote case where the Court held that the use of peyote for religious purposes was not deserving of constitutional protection and the State of Oregon could deny the respondents unemployment benefits when they were fired for the criminal use of that drug. Id. at 890.

178 McDaniel v. Paty, 435 U.S. 618, 626 (1978); Cantwell, 310 U.S. at 304.

179 Smith, 494 U.S. at 886-87.

180 Cantwell, 310 U.S. at 304.

181 Smith, 494 U.S. at 877.


183 See id. at 406-09. The Court found that “[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.” Id. at 406.

184 Id. at 404.
compensation after she declined job opportunities that required her to work on Saturdays in violation of her religious beliefs.\(^\text{185}\) She was not subject to a direct burden because nothing directly forced her to act in contravention of her religious beliefs; rather, an indirect burden existed in the fact that the law required her to choose between her beliefs and receiving unemployment benefits.\(^\text{186}\)

More recently, the Court held in *Employment Division v. Smith*\(^\text{187}\) that a religious objector will receive an exemption from a neutral law of general applicability\(^\text{188}\) only if the law violated another “hybrid” constitutional right in addition to burdening free exercise.\(^\text{189}\) The Court reached this result after surveying Free Exercise Clause cases from the past and finding that in all cases where an objector received an exemption, another right was violated, such as freedom of speech, freedom of the press, and the rights of parents to educate their children.\(^\text{190}\) In no other circumstances has the Court granted an exemption from a neutral and generally applicable law on free exercise grounds.\(^\text{191}\) Although the Court has not had the opportunity explicitly to decide the issue, it also stated that “it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”\(^\text{192}\) While

\(^{185}\) Id. at 399-400.

\(^{186}\) Id. at 404.


\(^{188}\) Id. at 878-79. The Court later held that a law is not neutral if “the object of [it] is to infringe upon or restrict practices because of their religious motivation.” Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993). While the Court has not defined the exact contours of when a law is generally applicable, it noted that “[a]ll laws are selective to some extent” but also seemed to say that when the categories of selection involve areas protected by the First Amendment, it ceases to be generally applicable. Id. at 542-43.

\(^{189}\) Smith, 494 U.S. at 881.

\(^{190}\) Id. at 881 (citations omitted).

\(^{191}\) Id.

\(^{192}\) Id. (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (“An individual’s freedom to speak, to worship, and to petition the government for redress of grievances could not be
these issues directly implicate the Free Exercise Clause, the Establishment Clause is constantly lurking in the background when neutral and generally applicable laws are at issue:

The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.\textsuperscript{193}

The Court still had some loose ends to tie up, and left open the question of what standard a lower court would apply to a challenged law that is neutral and generally applicable, either with or without a hybrid right. The biggest loose end in \textit{Smith} was that the compelling interest test enunciated in \textit{Sherbert} was created in the context of a neutral and generally applicable law: unemployment benefits.\textsuperscript{194} The Court found, however, that \textit{Sherbert} has only been used to grant an exemption in that one context absent a hybrid right, a context which itself involves making an individualized determination of what benefits a person can receive.\textsuperscript{195} On that basis, the Court refused to apply it to the criminal sanction prohibiting “socially harmful conduct” at issue in \textit{Smith} where no need existed for a government body to undertake such an individual analysis.\textsuperscript{196} The compelling interest test therefore remains valid at least in the unemployment context and if vigorously protected from interference by the State [if] a correlative freedom to engage in a group effort towards those ends were not also guaranteed.”\textsuperscript{193})}


\textsuperscript{195} \textit{Smith}, 494 U.S. at 883.

\textsuperscript{196} \textit{Id.} at 884-85. The Court has also refused to apply the compelling interest test in cases where an individual is seeking to exact something from the government or dictate how the government should operate \textit{internally}. \textit{See} Lyng v Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 449-49 (1988); Bowen v. Roy, 476 U.S. 693, 707-08 (1986) (plurality); \textit{see also} Smith, 494 U.S. at 900 (O’Connor, J., concurring) (“In both \textit{Bowen v. Roy} and \textit{Lyng v. Northwest Indian Cemetery Protective Assn.}, for example, we expressly distinguished \textit{Sherbert} on the ground that the . . . ‘. . . . Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.’”) (citations omitted).
the contested state law is not neutral and generally applicable.\textsuperscript{197} However, the Court never explicitly announced what test it would apply outside of these specific areas. Some lower courts have determined that the rational basis test applies,\textsuperscript{198} while Justice O’Connor, in her concurrence in \textit{Smith}, believed that the Court’s rule implicitly validated all such laws.\textsuperscript{199}

When hybrid rights are implicated, the law is further obscured. Some lower courts have refused to recognize the existence of this claim,\textsuperscript{200} but a majority of the circuits appear to apply strict scrutiny to neutral and generally applicable laws when an objector raises a claim of hybrid rights.\textsuperscript{201} The courts that recognize this claim disagree as to what standard a plaintiff must meet in order to trigger a hybrid rights analysis, and therefore potential strict scrutiny for the free exercise claim.\textsuperscript{202} For example, must the plaintiff prove that the hybrid right claimed has been

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\textsuperscript{198} See, \textit{e.g.}, Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 292 (5th Cir. 2001); McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000); Miller v. Reed, 176 F.3d 1202, 1206 (9th Cir. 1999).
\textsuperscript{199} See \textit{Smith}, 494 U.S. at 893 (O’Connor, J., concurring) (“The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual’s religious beliefs, so long as that prohibition is generally applicable.”); \textit{see also} Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir. 2002); United States v. Indianapolis Baptist Temple, 224 F.3d 627, 629 (7th Cir. 2000); Hines v. S.C. Dep’t of Corr., 148 F.3d 353, 357-58 (4th Cir. 1998); United States v. Amer, 110 F.3d 873, 879 (2d Cir. 1997).
\textsuperscript{200} See Leeibaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003); McKay, 226 F.3d at 756.
\textsuperscript{201} See Merced v. Kasson, 577 F.3d 578, 587 n.12 (5th Cir. 2009); Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764-65 (7th Cir. 2003); \textit{Tenafly}, 309 F.3d at 165 n.26; \textit{Miller}, 176 F.3d at 1207; Swanson \textit{ex rel.} Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998). One scholar has suggested that state constitutions might provide a path to strict scrutiny, however that is beyond the scope of this paper. See \textit{generally} Angela C. Carmella, \textit{State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence}, 1993 B.Y.U. L. REV. 275 (1993).
\textsuperscript{202} See Benjamin I. Siminou, Note, \textit{Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court’s Approach to the Hybrid-Rights Exception in Douglas County v. Anaya}, 85 \textit{NEB. L. REV.} 311, 318-326 (2006). As this article points out, a person seeking to use the hybrid rights exception might not have to make a full showing that the correlative right has been
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independently and fully violated or must he or she simply show a “colorable” violation?\textsuperscript{203} This paper will discuss freedom of association as the ECUSA’s hybrid right when claiming an exemption from neutral trust law,\textsuperscript{204} and it will determine whether that right is independently violated when a state refuses to give effect to the Dennis Canon. This is not to pass judgment on the other standards, but merely to analyze whether such a claim by the ECUSA would be sufficient under the highest standard available. Regardless of which standard courts apply to initiate this analysis, they must always use this exception to Smith in such a way that it remains a true exception to the general rule that neutral laws of general applicability are not subject to strict scrutiny under free exercise principles.\textsuperscript{205}

Once a law triggers strict scrutiny, the state may constitutionally resist a demand for accommodation only if the law advances “interests of the highest order” and is narrowly tailored to serve those interests.\textsuperscript{206} Put differently, “no showing merely of a rational relationship to some colorable state interest would suffice; only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”\textsuperscript{207} This test is not to be “watered down” and must

\begin{footnotesize}
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\item At least one author has suggested that free speech rights are a better avenue than freedom of association to a hybrid rights analysis. Frederick Mark Gedicks, \textit{Towards a Defensible Free Exercise Doctrine}, 68 Geo. Wash. L. Rev. 925, 941-44 (2000). The basis for that argument is that neutral and generally applicable laws under Smith are the same as the “neutral principles of law” approach from Jones. \textit{Id.} at 943. Thus, a court applying Jones acts perfectly within the bounds of Smith. \textit{Id.} However, even these terms do have the same meaning that does not impose a barrier to using freedom of association to trigger hybrid rights. \textit{See} discussion infra Part VI.B.
\item Sherbert v. Verner, 374 U.S. 398, 406 (1963) (internal quotation omitted).
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“really mean[] what it says.”\(^{208}\) This is not, however, the end of the analysis. Even if the state can prove that it has a compelling interest, a court must consider if granting the religious objector an exemption would frustrate the government’s interest. If the state can grant an exemption without hindering its own interests, then the religious objector is entitled to the exemption even if the state’s interests are compelling.\(^{209}\) Because a church’s free exercise rights are closely guarded by the Constitution, the Court appears willing to protect them so long as doing so does not interfere with the state’s own compelling interest.

B. The Hybrid: Freedom of Association and the Right to Direct Internal Church Governance

“If it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment . . . .”\(^{210}\) While this freedom is not explicitly mentioned in the Constitution, the Court has found it to be implicit in the freedoms guaranteed by the First Amendment.\(^{211}\) Therefore, groups that engage in those expressive freedoms, such as the free exercise of religion, are protected individually in that right and in their right to associate in furtherance of it.\(^{212}\) Given the adjunctive nature of the freedom of association, it stands to reason that the freedom of association extends only as far as the corresponding First Amendment right does; if the activity itself is not protected, then there is no right to associate in furtherance of it.\(^{213}\)

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\(^{208}\) *Hialeah*, 508 U.S. at 546.


\(^{212}\) *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). There is another type of freedom of association known as the right to intimate association. It protects the right to engage in certain human relationships, and it finds its roots in the Fourteenth Amendment’s Due Process Clause as opposed to the First Amendment. *Montgomery v. Stefaniak*, 410 F.3d 933, 937 (7th Cir. 2005).

\(^{213}\) *See* *Salvation Army v. Dep’t of Cmty. Affairs of N.J.*, 919 F.2d 183, 199 (3d Cir. 1990).
“[I]nterference into the internal structure or affairs of an association” certainly violates the principles embodied in freedom of association.\textsuperscript{214} Although expressed prior to the recognition of this correlative freedom, the Court previously stated that the right to organize voluntary religious associations is “unquestioned.”\textsuperscript{215} A religious organization therefore is free to set up its own rules and procedures, and everyone who agrees to be a part of it is “bound to submit” to them.\textsuperscript{216} Even though the Court wrote those words before it incorporated the Free Exercise Clause as applicable against the states, it later found that they “radiate . . . a spirit of freedom for religious organizations” from state interference.\textsuperscript{217} Also found in another context, but perfectly germane to the associational rights of a religious institution, is the notion that “religious institutions have an interest in autonomy in ordering their internal affairs, so that they may be free to[ ] ’select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.’”\textsuperscript{218}

However, just as with almost any right guaranteed by the Constitution, freedom of association is not absolute. The Court has recognized two levels of infringement upon this right, each subject to a different standard by which the government must justify its conduct: where the burden is severe, it is subject to strict scrutiny; where the burden is less severe and the restriction is reasonable and nondiscriminatory, it will be justified by a state’s “important interests.”\textsuperscript{219} If subject to strict scrutiny, the law will be upheld only if it serves a compelling state interest, is

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\textsuperscript{214} Roberts, 468 U.S. at 623.
\textsuperscript{215} Watson v. Jones, 80 U.S. 679, 728-29 (1871).
\textsuperscript{216} Id. at 729.
\end{footnotesize}
unrelated to the suppression of ideas, and is narrowly tailored.\textsuperscript{220} In the context of a hybrid rights claim involving freedom of association, the burden claimed will necessarily be the same burden that the person or organization claims violates its free exercise rights; because freedom of association violations only occur when the state violates the underlying right, there is no independent violation for freedom of association. Additionally, just as the right to freely associate extends only as far as the underlying right, so too does the ability of the government to regulate the activity in question: if the government can permissibly regulate the specific acts an individual is engaging in, then freedom of association will not prevent the government from regulating a group engaging in them.\textsuperscript{221}

V. STATE COURT ANALYSES OF THE DENNIS CANON

Due to the past and present splits in the ECUSA, state courts have had ample opportunities to determine the ownership of Episcopal Church property. Since the enactment of the Dennis Canon in 1979, the Church has been remarkably successful in protecting its property: of all the reported decisions in state courts of appeal, it has lost only once. What follows is a discussion of those cases and the reasoning employed by those courts in finding for—and, in one case, against—the Church.

One of the first reported decisions to evaluate the terms of the Dennis Canon in light of the Court’s decision in \textit{Jones} was \textit{Rector, Wardens, and Vestrymen of Trinity-St. Michael’s Parish, Inc. v. Episcopal Church in the Diocese of Connecticut}.\textsuperscript{222} The Supreme Court of

\textsuperscript{221} See Salvation Army v. Dep’t of Cmty. Affairs of N.J., 919 F.2d 183, 199 (3d Cir. 1990).
\textsuperscript{222} 620 A.2d 1280 (Conn. 1993). There appear to be no reported decisions from the time \textit{Jones} was decided until \textit{Trinity-St. Michael’s} discussing the Dennis Canon. After that case, it was not until the 2000s that courts actively began hearing Episcopal Church property cases that implicated this canon. This could be due to the fact that following splits brought on by the General Convention of 1979, the Church was in a period of relative calm until the recent schism.
Connecticut reaffirmed its adherence to the neutral principles approach, also finding that Watson actually complements the approach in Jones, and required lower courts to enforce the terms of any express trust in a church’s documents or look for an implied trust if an express one does not exist. Following an exacting review of the history of the ECUSA, the local church involved, and the Dennis Canon, the Connecticut court not only concluded that the Dennis Canon imposed an express trust over the property but that it “codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of the ECUSA in 1789.”

In the following years, courts readily found that the Dennis Canon imposed a trust in favor of the ECUSA and the local dioceses. Many courts reached this result in spite of the fact that the property transfers in question took place before the ECUSA enacted the Dennis Canon, with one calling the mere existence of the Dennis Canon dispositive as to whether an

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In fact, the dispute that brought the split in Trinity-St. Michael’s dated back to the decisions made at the General Convention of 1979. Id. at 1291. One other case that is often cited is Bishop and Diocese of Colorado v. Mote, 716 P.2d 85 (Colo. 1986). That case, however, involved events occurring before the enactment of the Dennis Canon. Id. at 105. Nevertheless, the court still found an implied trust existing for the benefit of the national church. Id. at 108.

Trinity-St. Michael’s, 620 A.2d at 1284.

Id. at 1292.


223 Trinity-St.Michael’s, 620 A.2d at 1284.

224 Id. at 1292.


226 Episcopal Church Cases, 198 P.3d at 71-72; Harnish, 899 N.E.2d at 925; Trinity-St.Michael’s, 620 A.2d at 821; Divine, 797 N.E.2d at 919, 923; see also St. James the Less, 888 A.2d at 808-10 (doing so based on specific facts relating to the church); Daniel, 580 S.E.2d at 718 (not applying the neutral principles of law approach, but still finding that local church had acceded to Dennis Canon’s express trust after fifty years adherence to all of the Church’s canons without raising an objection).
express trust exists in favor of the Church.\textsuperscript{227} Outside of the Episcopal Church context, courts have been finding that similar express trust provisions are effective when they appear in church constitutions and other governing documents.\textsuperscript{228}

The most recent case to find for the ECUSA is the aptly-named \textit{In re Episcopal Church Cases}.\textsuperscript{229} Following a discussion of the specific facts of that case, and a discussion of the Supreme Court’s church property jurisprudence also outlined above, the California court created the following roadmap for civil courts to follow when presented with a property dispute:

State courts must not decide questions of religious doctrine; those are for the church to resolve. Accordingly, if resolution of a property dispute involves a point of doctrine, the court must defer to the position of the highest ecclesiastical authority that has decided the point. But to the extent the court can resolve a property dispute without reference to church doctrine, it should apply neutral principles of law. The court should consider sources such as the deeds to the property in the dispute, the local church’s articles of incorporation, the general church’s constitution, canons, and rules, and relevant statutes . . . .\textsuperscript{230}

The court noted that the local church held title to the property but it also agreed to be bound by the canons and constitutions of the national church.\textsuperscript{231} In fact, the question before the court was framed in those exact terms: “which prevails—the fact that [the local church] holds record title to the property, or the fact that it is bound by the constitution and canons of the Episcopal Church and the canons impress a trust in favor of the general church?”\textsuperscript{232} Because the local church

\textsuperscript{227} \textit{Harnish}, 899 N.E.2d at 925.
\textsuperscript{229} 198 P.3d 66 (Cal. 2009).
\textsuperscript{230} \textit{Id.} at 79.
\textsuperscript{231} \textit{Id.}
\textsuperscript{232} \textit{Id.}
agreed to be bound by the canons of the general church, those canons clearly stated that the local church held the property in trust for the general church, and this analysis presumably did not involve any question of church doctrine, the general church was entitled to the property. In fact, reasoned the court, the Free Exercise Clause commands such a result.

All of this case law notwithstanding, the Supreme Court of South Carolina reached the opposite result in *All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*. All Saints was the consolidation of two cases, one to determine if the local church had rights to the property and another to determine which group actually was the “local” church. The court detailed the history of the dispute going back to South Carolina’s establishment of the Church of England in 1706 and a trust deed for the property in question dating to 1745. The court first formally adopted the neutral principles approach to adjudicating property disputes in South Carolina and then sought to apply it to the facts at hand.

The first steps in the court’s analysis determined that the local church had title to the property at the time the ECUSA enacted the Dennis Canon. In 2000, the Diocese of South

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233 *See id.* at 81-82.
234 *Id.* at 82.
235 685 S.E.2d 163 (S.C. 2009).
236 *Id.* at 166-67. This two-step approach is exactly how Justice Powell described the process required by *Jones*. *Jones v. Wolf*, 443 U.S. 595, 610-11 (1979) (Powell, J., dissenting).
237 *All Saints*, 685 S.E.2d at 167.
238 *Id.* at 172. The South Carolina court stated that it had first adopted a neutral principles approach in *Pearson v. Church of God*, 478 S.E.2d 849 (S.C. 1996). Under *Pearson*, while a court cannot resolve doctrinal, disciplinary, custom, or administrative disputes within a church, it cannot avoid resolving disputes that arise under civil law. *Id.* at 854. Thus, if neutral civil law can completely resolve the dispute, the court must apply it. *Id.* *All Saints* set out to “reaffirm and more fully explain this rule.” *All Saints*, 685 S.E.2d at 172.
239 The last act concerning the property that occurred before the enactment of the Dennis Canon was the execution of a quit-claim deed in 1903 in favor of the local church. *All Saints*, 685 S.E.2d at 168. This served to solidify title in the name of the All Saints parish, which already
Carolina recorded a notice on the deed to the property that the parish held it in trust for the Diocese of South Carolina and the ECUSA pursuant to the Dennis Canon. What follows is the entirety of the court’s discussion of this notice and the effect of this canon:

Furthermore, we hold that neither the 2000 Notice nor the Dennis Canon has any legal effect on title to the All Saints congregation’s property. A trust “may be created by either declaration of trust or by transfer of property . . . .” It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another. The Diocese did not, at the time it recorded the 2000 Notice, have any interest in the congregation’s property. Therefore, the recordation of the 2000 Notice could not have created a trust over the property.

For the aforementioned reasons, we hold that title to the property at issue is held by All Saints Parish, Waccamaw, Inc., the Dennis Canons [sic] had no legal effect on the title to the congregation’s property, and the 2000 Notice should be removed from the Georgetown County records.

At no point in this discussion did the court cite to any other decisions determining the effect of the Dennis Canon on property ownership. Rather, in these two curt paragraphs the court held that the Dennis Canon simply had no legal effect. Despite the court’s assertion that civil courts must accept as final and binding the rules of church administration, for some reason this principle did not apply to the fact that the All Saints parish agreed to be bound by the Dennis Canon. The South Carolina court’s decision removed the Church’s autonomy and the local church’s decision to accede to the ECUSA’s rules and governance, all in the name of neutral principles of law. The majority of courts to examine the Dennis Canon concluded with little hesitation that it clearly had legal effect, sometimes even if the state’s trust law might hold had at least some rights vested in it through the Statute of Use’s execution of the 1745 trust in favor of the local church. Id. at 174.

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240 Id. at 168.
241 Id. at 174 (quoting Dreher v. Dreher, 634 S.E.2d 646, 648 (S.C. 2006)).
242 Id. at 172 (quoting Pearson, 478 S.E.2d at 849).
otherwise. South Carolina, on the other hand, had just as little trouble concluding that its laws would give no effect to this trust provision. In essence, this is exactly what Justice Powell feared *Jones* would lead to, which is a court imposing a congregational structure on a hierarchical church. The question that remains is whether the Constitution and *Jones* permit a court to reach such a conclusion or whether well-established First Amendment principles require courts to give legal effect to the Dennis Canon.

VI. A HYBRID FREE EXERCISE AND FREEDOM OF ASSOCIATION RIGHTS APPROACH TO ADJUDICATING CHURCH PROPERTY DISPUTES UNDER THE DENNIS CANON

One would have trouble claiming that run of the mill property and trust law is, without more, not neutral and generally applicable. While specific circumstances and special statutes may alter this analysis, common law trust principles do not categorize on religious terms nor do they have any object to inhibit religion. Assuming that courts such as the Supreme Court of South Carolina correctly apply their trust law, if this body of law does not give effect to the Dennis Canon, the Church may seek an exemption from these laws to ensure that it has the rights it sought to retain in the disputed property. To the extent that a failure to recognize the Dennis Canon amounts of a violation of the Church’s free exercise rights, *Smith* requires the Church to

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243 *See In re Episcopal Church Cases*, 198 P.3d 66, 86 (Cal. 2009) (Kennard, J., concurring in part and dissenting in part) (dissenting from the majority’s finding in favor of the national church on the ground that California trust law does not permit one who does not have title to property to declare that the owner holds it in trust).

244 *See Jones v. Wolf*, 443 U.S. 595, 613 (1979) (Powell, J., dissenting).

245 As previously discussed, a law is neutral when it does not facially discriminate against religion and does not have the object of infringing upon or restricting religious practices. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). It is generally applicable if there is no intent to target religious activities. *Id.* at 542-43. If it meets both of these criteria, it is within the purview of *Smith*. *Id.* at 531.
show that the same failure violates another constitutional right as well.\textsuperscript{246} As previously discussed, this paper will determine whether the hybrid right of freedom of association will provide the ECUSA with this relief. While the Court has not specifically decided a case based on this particular hybrid right, Justice Scalia’s opinion for the Court in \textit{Smith} specifically acknowledged it as a viable mechanism to trigger this analysis.\textsuperscript{247} A religious objector seeking an exemption from a neutral and generally applicable law by claiming a violation of a hybrid right places the onus back on the state to justify its law under the lens of strict scrutiny. Therefore, the remainder of this paper analyzes whether refusing to give legal effect to the Dennis Canon first infringes on the ECUSA’s free exercise rights and whether the state can show a compelling interest to prevent the ECUSA from receiving an exemption from this trust law. It will then analyze whether this hybrid rights claim exists by determining whether any free exercise violation leads to a violation of the Church’s freedom of association rights, and whether the state can justify this burden with a compelling interest.

A. Burden on the ECUSA’s Free Exercise Rights

Few burdens on the free exercise of religion are greater than taking away a church’s house of worship. In order for a church to do what it purports to do—namely, spread its message—the church must have a forum in which to do so. Additionally, churches become very associated with their property, so much so that many become identified and known solely by

\textsuperscript{246} \textit{See} Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990); \textit{see also} Merced v. Kasson, 577 F.3d 578, 587 n.12 (5th Cir. 2009); Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764-65 (7th Cir. 2003); Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165 n.26 (3d Cir. 2000); Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999); Swanson \textit{ex rel.} Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998).

\textsuperscript{247} \textit{Smith}, 494 U.S. at 881.
their buildings. If this was not true, then dissenting factions would never put up the fights that have led to the cases discussed in this paper; if having to build a new church imposed no obstacle to their mission, each group would simply build a new one instead of spending years embroiled in heated litigation. But, as history has shown, this simply is not the case.

There is an additional burden imposed in these situations: usurping the church’s power to direct what happens to its property. As courts have long acknowledged, a church has the exclusive right to dictate matters of church governance, and it also has the right to require its members to be bound by its rules and decisions. With respect to the ownership of property, the various ways churches can decide to organize their property are tied closely with the values each church seeks to instill and its polity. When a court interferes with the relationship between a church and its members, as it does whenever it rules on the efficacy of the requirements by which its members agreed to be bound, that is clearly a burden on that church’s free exercise rights. While individual parishes have a certain degree of autonomy under the ECUSA’s governance structure, it is incorrect to refer to the Church as “congregational.” Instead, the Church has a hierarchical government, one that operates in a fairly federalist manner: the national Church imposes rules and canons for the governance and operation of the Church.

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248 Two clear examples of this are Notre Dame in Paris and Westminster Abbey in London. Both of these churches are iconic even just for their buildings. Countless people around the world will recognize each of them simply when viewing their structures without any consideration of the religions that worship within their walls.


250 Fiona McCarthy, Note, Church Property and Institutional Free Exercise: The Constitutionality of Virginia Code Section 57-9, 95 VA. L. REV. 1841, 1857 (2009). The author contends, however, that the church autonomy cases were decided independent of Sherbert and Smith and represent a limited doctrine. Id. at 1858. She believes that there is some uncertainty over whether Smith and its progeny provide any relief to churches such as the ECUSA from neutral and generally applicable laws, although she did not further examine the issue as it did not apply to her topic. Id. at 1861. This paper determines whether in fact there would be any relief.
The dioceses are free to do same, essentially so long as their own rules do not conflict with those of the Church. Finally, each local church can operate in a fairly free manner, again only so long as it does not contradict the rules of the diocese or the ECUSA it agreed to follow. If a church disagrees with one of those rules, it must address its concerns with the Church and not with the courts.\footnote{See Diocese of Cent. N.Y. v. Rector, Church Wardens, Vestrymen of Church of Good Shepherd, No. 2008-0980, 2009 WL 69353, at *3 (N.Y. Sup. Ct. Jan. 8, 2009) ("Suffice it to say, if Good Shepherd has an objection to the validity of the Dennis Canon, the remedy is not with the courts, but rather with the General Convention of The Episcopal Church.").} Similarly, if it does not believe it should be bound by a certain rule, for whatever reason, that issue is for the Church to decide and is non-justiciable in civil courts. Here, the ECUSA, through the Dennis Canon, requires that all parishes hold their property in trust for the Church. Under the Church’s current organization, local autonomy does not permit a local church to act in contravention of the Dennis Canon. Failing to give effect to these canons upsets this hierarchical structure and permits local churches to freely decide the fate of their property for themselves, converting the Church’s organization into a congregational one.

It is well established that courts do not need to accept the deference approach from Watson and are free to apply the neutral principles of law approach from Jones.\footnote{Jones v. Wolf, 443 U.S. 595, 602 (1979).} However, Justice Powell’s dissent in Jones raised the concern that a truly neutral approach, as he viewed it, would violate this cardinal free exercise right, to which the majority responded, “Nothing could be further from the truth.”\footnote{Id. at 606.} In response to this specific objection based on free exercise rights, the majority specifically held that churches can place trust provisions in their constitutions and “civil courts will be bound to give effect” to them.\footnote{Id.} While the Court did require these trust
provisions to be in some “legally cognizable form,” these words necessarily do not mean each provision must meet the requirements of each state’s trust laws to avoid violating the Free Exercise Clause. Otherwise, civil courts routinely could ignore the rules and governance set by a hierarchical church. Such a result plainly does not square with the Court’s First Amendment jurisprudence. Rather, those words mean simply that the parties must memorialize these provisions in some form that a court can recognize, such as in writing. A court must then read these documents as they appear on their face, as engaging in an interpretation of them also would violate the court’s constitutional limitations. Therefore, if one party claims the Dennis Canon means something other than what it says, this involves an adjudication of church law and the court must defer to the ECUSA’s determination of what it means. Jones actually contemplated as much. However, Jones plainly did not permit state property and trust law to prevail over a provision like the Dennis Canon. Because the Dennis Canon appears in the written, agreed upon Constitutions and Canons of the ECUSA, a court must give effect to it so the Church can enjoy the rights and benefits inured by neutral trust law, the very principles of law Jones had in mind. When a court disregards the decisions made by the ECUSA and its members, it collapses the very form of ecclesiastical governance each party agreed to. When that happens, the court violates the rule from Jones and burdens the Church in contravention of free exercise principles.

\footnote{\textit{Id.}}

\footnote{See \textit{id.} at 604. The ECUSA’s canons also prevent a church from seeking extra-ecclesiastical interpretation of the canons. \textit{CONSTITUTION & CANONS, supra} note 63, at Canon IV.19.2.}

\footnote{See \textit{id.}}

\footnote{See Adams & Hanlon, \textit{supra} note 171, at 1337 (noting that if a court attempts to hide behind the “wall of separation” between church and state, and avoid examining a local church’s agreement with the national church, it runs afoul of the “equality of treatment that the first amendment requires”).}
The next step is to determine if the state has a compelling interest “of the highest order”
to justify these burdens. There is no doubt that the state has an interest in the orderly disposition
of property and operation of trusts. As a matter of fact, the rule from Jones was couched in
terms of the state’s “obvious and legitimate interest in the peaceful resolution of property
disputes.”\textsuperscript{259} However, the state’s interest ends there. The state does not have an interest in
restricting church governance or in the outcome of a particular property dispute.\textsuperscript{260} This
interest in orderly trust administration, therefore, is not of such a high order that the state can
override the Church’s own rules, and the state cannot justify this burdening of the ECUSA’s free
exercise rights. If the Supreme Court is willing to hold that providing unemployment benefits in
Sherbert\textsuperscript{261} and requiring secondary education in Wisconsin v. Yoder,\textsuperscript{262} both of which are
undoubtedly important societal interests, categorically are not compelling without meeting a high
evidentiary burden of proving that they are addressing a need that is befitting of the “highest
order” label, it seems doubtful that trust administration will clear that hurdle. Smith and earlier
Supreme Court cases such as Bowen v. Roy\textsuperscript{263} and Lyng v. Northwestern Indian Cemetery

\textsuperscript{259} Jones, 443 U.S. at 602.
\textsuperscript{260} See McCarthy, supra note 250, at 1885.
\textsuperscript{262} 406 U.S. 205, 228-29 (1972). Here, a group of Amish families claimed they were entitled to
an exemption from a state’s mandatory education laws on free exercise grounds. Id. at 207-08. In the end, the Court doubted that the state could prove its interest in compulsory education was
sufficiently compelling to overcome the burden it placed on the Amish’s free exercise rights. See id. at 234-35. The Court did believe, however, that it was unlikely that any religious sect
other than the Amish would have been able to make the showing required for an exemption from
mandatory schooling. Id. at 235-36. While that may be true, Yoder still stands for the
proposition that even the interests behind education are not wholly spared from free exercise
concerns.
\textsuperscript{263} 476 U.S. 693 (1986). Bowen involved an objection by Native American parents to a state’s
welfare program requirement that they provide social security numbers for members of their
household in order to receive benefits. Id. at 695. The Court was still four years away from
Smith’s neutral laws of general applicability, but it still found another path away from Sherbert
and strict scrutiny when it held that an objector cannot require the government to conduct its
Protective Association\textsuperscript{264} certainly represented the Court taking steps back from the strictures of Sherbert and Yoder, but they also represented the Court finding situations in which it wanted a less-burdensome alternative to the compelling interest test. Those decisions do not stand for the proposition that the analysis in Sherbert and other similar cases is flawed in any way; if anything they were emblematic of the Court acknowledging that Smith, Bowen, and Lyng would all have failed the compelling interest test, and the Court needed other alternatives if the government were to prevail, none of which are applicable here.\textsuperscript{265}

Further, even if the state’s interest were compelling, granting the Church an exemption would not inhibit or frustrate that interest. This exemption would apply in a limited set of circumstances to a very particular issue rather than rewriting an entire body of trust law. Surely, granting this exemption to the ECUSA could have a broader application to other churches as well. However, one must look at just what this exemption is accomplishing. It is requiring a church that has specifically assented to a trust provision to be bound by it. This cannot be said to interfere with the orderly and peaceful passing of property. If anything, it forces a court to recognize that local churches in the ECUSA have agreed, through their acquiescence to the Dennis Canon, to hold their property in trust for the Church. To the extent that this intent might not be cognizable under ordinary principles, the fact that it is flows from a religious organization requires special treatment under Smith.

\textsuperscript{264} 485 U.S. 439 (1988). In Lyng, another group of Native Americans sought relief from the government’s plan to build a road that would transverse some of their sacred sites. \textit{Id.} at 443. Building off of Bowen, the Court reiterated that where an objector seeks to change the way the government functions internally, such as when it uses land that belongs to it, those actions are not subject to strict scrutiny. \textit{Id.} at 452-53.

\textsuperscript{265} Primarily, Bowen and Lyng involved an exemption from the very manner in which the government operates internally. \textit{See} Lyng, 485 U.S. at 452-53; Bowen, 476 U.S. at 699-700. Plainly, an objection from the ECUSA in these cases does not involve the same sort of claim.
The last prong of the compelling interest test—whether the law is narrowly tailored—is beyond the scope of this paper. It would be a vain attempt to try and analyze whether the trust laws of the fifty states are individually narrowly tailored to meet each state’s interest. It may very well be that they are narrowly tailored, as trust law has had years over which courts have developed and refined it. However, given the conclusion that the state’s interest is not compelling enough to overcome the burden of the church’s free exercise rights, such analysis would be superfluous in the end.

B. Burden on the ECUSA’s Freedom of Association Rights

In order to take advantage of the compelling interest test to procure an exemption to a neutral and generally applicable law, *Smith* requires that there be a violation of some other constitutional right as well. As discussed, the hybrid right at issue in these cases is freedom of association. A church’s freedom of association rights include the right to determine what rules its members assent to and its internal governance procedures and structure. The ECUSA was fully exercising this freedom when it required all member churches to agree to be bound by the constitution and canons that form its core. Consequently, the individual parishes agreed to be bound by the Dennis Canon, and each therefore holds its property in trust for the national church. *Watson* specifically affirmed this result in its language that “[a]ll who united themselves to such a body do so with the implied consent to this government, and are bound to submit to it.”\textsuperscript{266} Intrusion into these internal affairs by abrogating the intent of the parties to protect sacred church property is as sure a severe violation of freedom of association as dictating who can serve as a priest in a particular church because both involve the court substituting its own judgment as to

\textsuperscript{266} *Watson v. Jones*, 80 U.S. 679, 729 (1871).
matters of internal governance over that of those who actually govern and consent to be governed.

It has been suggested that due to the interplay between Smith and Jones, using an analogy to freedom of speech as opposed to free exercise to arrive at freedom of association might be a more effective trigger for hybrid rights. The logic is that the “neutral principles” from Jones and the “neutral laws” from Smith have the same meaning, and so long as a court can find a secular justification—which almost always will be the case—Jones will permit a court to delve into church doctrine. Therefore, analyzing freedom of association rights extending from free speech is likely to afford greater protection to a church. However, Smith was decided after Jones, and if the courts are correct that “neutral principles of law” has the same definition as “neutral laws of general applicability,” Smith and its progeny therefore modify and provide an exception to the general rule announced in Jones. As viable as the free speech analogy may be, it is not necessary. To the extent that Jones does permit a court to meddle in internal church disputes so long as it purports to apply neutral principles of law, the Free Exercise Clause and freedom of association challenges arising under Smith would bar the court from using those rules of law if their application infringes upon those cardinal rights. This does not, however, imply that a church will always be entitled to an exemption from any neutral and generally applicable laws. While strict scrutiny for both free exercise and freedom of association does impose a high burden on the state, this is not an impossible burden. For example, while courts tend to recognize a “ministerial exception” that permits a church to hire in contravention of

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267 Gedicks, supra note 204, at 943-44 (2000).
268 Id. at 943.
269 Id. at 944.
discrimination laws, such as a refusal to hire women as priests, a state surely would have a compelling interest that would allow for the prosecution of abuse and harassment charges, cases where actual harm results to employees and members, in the face of a hybrid rights challenge.

With this showing of a severe violation of the ECUSA’s freedom of association rights, the state’s actions once again are examined under the lens of strict scrutiny. Given that the burden on freedom of association is the same as with free exercise and the standard that the government must meet essentially is the same, what originally were two separate analyses appears to collapse into one, potentially eliminating the “hybrid” nature of it. This would seem to intrude upon the principle that hybrid rights is truly an exception, and a court should not allow this exception to swallow the general rule. However, when Justice Scalia authored the Court’s opinion in Smith, he certainly was well aware of the adjunctive nature of freedom of association when he stated that it could trigger the hybrid rights analysis. Nevertheless, he took the opportunity to verify that freedom of association would certainly be in the gamut of rights that could prompt a hybrid rights case. Given that a violation of freedom of association is

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270 See, e.g., Alcazar v. Corp. of Catholic Archbishop of Seattle, 598 F.3d 669, 671-72 (9th Cir. 2010).

271 The technical strict scrutiny test for a severe burden on freedom of association does require the state to also prove that the law is unrelated to the suppression of ideas in addition to showing a compelling interest and that the law is narrowly tailored. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000). This paper makes no claim that trust law is related to the suppression ideas. Therefore, the remaining analysis under strict scrutiny is identical to the analysis under the Free Exercise Clause.


274 The Third Circuit did address the issue of hybrid rights through freedom of association soon after the Court decided Smith. Salvation Army v. Dep’t of Cmty. Affairs, 919 F.3d 183 (3d Cir. 1990). The court there acknowledged that freedom of association extends only as far as the underlying First Amendment right from which it is derived. Id. at 199. However, the court was convinced that free exercise could not be violated by a neutral and generally applicable law and therefore found that freedom of association was not implicated. Id. at 199-200. However, the Third Circuit did seem willing to find that freedom of association could be implicated as a hybrid
inextricably linked with free exercise and it must be justified by the same compelling interest standard in a hybrid rights situation, the conclusion that the state cannot meet its burden on the Church’s free exercise claim compels the correlative conclusion that it cannot meet that burden with freedom of association as well.

In fact, all of this may have been exactly what the Supreme Court of California did in *Episcopal Church Cases*. The dissent argued that California trust law simply did not allow someone without title to the property to state that it is held in trust, just like the South Carolina court did. However, that was of no consequence to the majority. They squarely held that “[r]espect for the First Amendment free exercise rights of a person to enter into a religious association of their choice . . . requires civil courts to give effect to the provisions and agreements of that religious association.” The court’s opinion does not explicitly mention *Smith* or specifically address all of the rights enumerated above, but it is clear that those concepts were at play when the court decided it was constitutionally bound to give effect to the Dennis Canon.

VII. CONCLUSION

There are multiple cases now pending before the courts regarding the validity of the Dennis Canon and the fate of property within the ECUSA. In Georgia, for example, the Superior Court of Chatham County stated this issue very succinctly: “How can [the local church] dispute the existence and efficacy of the Dennis Canon when [it] publicly acknowledged [its] adherence right in the right circumstances, such as when free exercise rights actually are implicated. *Id.* at 200 n.9.

275 *In re Episcopal Church Cases*, 198 P.3d 66, 86 (2009) (Kennard, J., concurring and dissenting). Justice Kennard dissented with respect to trust law but concurred in that a California religious corporations statute would resolve the dispute in favor of the national church. *Id.* at 85-86.

276 *Episcopal Church Cases*, 198 P.3d at 82 (majority opinion).
to all canons of the National Church after the Dennis Canon was enacted? Concluding that
the local church and the ECUSA were not “strangers in the night,” the court had little trouble
finding that the Dennis Canon imposed a trust over the local church’s property. On April 13,
2010, the Supreme Court of Virginia heard arguments in another case where state law permitted
the local church to keep its buildings, worth an estimated $30-40 million. In a moment of
sincerity and reflection on the gravity of the case before it, the trial court in that case thought one
would

blink at reality to characterize the ongoing division within the Diocese, [P]ECUSA, and the Anglican Communion as anything but a division of the first
magnitude, especially given the involvement of numerous churches in states
across the country, the participation of hundreds of church leaders, both lay and
pastoral, who have found themselves ‘taking sides’ against their brethren, . . . and,
perhaps most importantly, the creation of a level of distress among many church
members so profound and wrenching as to lead them to cast votes in an attempt to
disaffiliate from a church which has been their home and heritage throughout their
lives, and often back for generations.

Despite the nature of the dispute, the court felt compelled to find for the local church due to a
specific state statute.

As these cases, and especially the Virginia court’s language quoted above, illustrate, this
is a highly charged, emotional issue. But when a court finds for the local, dissenting churches, it

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277 Bishop of Episcopal Diocese of Ga., Inc. v. Christ Church Episcopal, No. CV07-2039-KA, at
278 Id. at *20-21.
279 O’Dell, supra note 5. The trial court’s order was based on the application of a Virginia
statute that roughly provides that in the event of a division in a church, the property passes to the
majority faction. In re Multi-Circuit Episcopal Church Property Litig., No. CL 2007-0248724,
For an excellent discussion of the constitutionality of this particular statute, see McCarthy, supra
note 250.
280 Episcopal Church Property Litig., 2008 WL 7390539, at *48. The application of the Dennis
Canon is one of the grounds the ECUSA is appealing on. Amy Seed, Episcopal Church to
Challenge Property Rights Ruling by Virginia Circuit Court, WASH. EXAMINER, Apr. 8, 2010.
281 Episcopal Church Property Litig., 2008 WL 7390539, at *48.
is ignoring the reason why these issues are so intense: each faction believes that its identity, its ability to exist, is dependent on retaining ownership to its property. This is the exact reason why the ECUSA enacted the Dennis Canon in 1979. While courts have examined the impact of the Dennis Canon and overwhelmingly found in favor of the ECUSA, none of these courts examined the interplay between the neutral principles of law approach from *Jones* and the hybrid rights exception from *Smith*. As this paper has demonstrated, in the jurisdictions that have lawfully adopted the neutral principles of law approach, a church property analysis does not end with that rule. Rather, the Supreme Court’s subsequent decision in *Smith* casts a new shadow over those rights and adds two more layers to a property dispute: the Free Exercise Clause and freedom of association. While a court is certainly free to apply neutral principles of law in the very manner the prescribed by the Court, in those situations where its application would force a court to ignore and act in contravention of a church’s internal rules and governance, the state must justify its neutral and generally applicable trust law under strict scrutiny. When only property law is concerned, this is a burden the state will not be able to meet.