

Spring 2013

## Churches Built on Sinking Sand: How Courts Decide Who Keeps Church Property following a Schism

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### Recommended Citation

Daniel Coffman, *Churches Built on Sinking Sand: How Courts Decide Who Keeps Church Property following a Schism*, 78 MO. L. REV. (2013)

Available at: <https://scholarship.law.missouri.edu/mlr/vol78/iss2/10>

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## NOTE

# Churches Built on Sinking Sand: How Courts Decide Who Keeps Church Property Following a Schism

*Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575 (Mo. Ct. App. 2012), *transfer denied*.

DANIEL COFFMAN\*

### I. INTRODUCTION

With a marked decrease in regular church attendance and the flowering of non-denominational churches across the United States,<sup>1</sup> traditional hierarchical church organizations are losing members in droves.<sup>2</sup> Such losses are exacerbated when denominations make controversial doctrinal changes, such as the ordination of women and homosexual clergy.<sup>3</sup> Local members can disagree so strongly with the decisions made by their national church that they choose to disaffiliate, oftentimes in favor of a denomination that more closely resembles their values and beliefs.<sup>4</sup> This has led to a flurry of litigation across the country in which the denomination seeks to retain all of the disaffiliating church's property, normally pursuant to a clause in the denomi-

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1. See Russell D. Moore, *Where Have All the Presbyterians Gone?*, WALL ST. J., Feb. 4, 2011, <http://online.wsj.com/article/SB10001424052748703437304576120690548462776.html>; Mark Tooley, *Another Mainline Implosion*, NAT'L REV. ONLINE (May 11, 2011), <http://www.nationalreview.com/corner/267017/another-mainline-implosion-mark-tooley> (estimating that the Presbyterian Church (U.S.A.) [PCUSA] lost approximately 60,000 members in 2011).

2. "The Presbyterian News Service estimates that approximately 100 congregations have left the [PCUSA] in the last five years." Laurie Goodstein, *Presbyterians Approve Ordination of Gay People*, N.Y. TIMES, May 10, 2011, <http://www.nytimes.com/2011/05/11/us/11presbyterian.html>; see also Tooley, *supra* note 1.

3. See Goodstein, *supra* note 2.

4. *PCUSA Report Critical of EPC, New Wineskins*, THE LAYMAN ONLINE (Apr. 22, 2010), <http://www.layman.org/newsaf96/>.

nation's constitution that purports to create a trust relationship between the national and local church.<sup>5</sup>

The recent case of *Heartland Presbytery v. Gashland Presbyterian* presented the question of whether a denomination could, relying solely on the property-trust clause in the denomination's constitution, could create a trust relationship in which the local congregation held all church property in trust for the denomination.<sup>6</sup> In this matter of first impression for Missouri, the Missouri Court of Appeals, Western District, applied what courts have called the "neutral principles of law" approach, which instructs courts to resolve church property disputes using "objective, well-established concepts of trust and property law."<sup>7</sup> The court found that a national church's property-trust clause, on its own, did not establish such a relationship.<sup>8</sup> With this ruling, the Western District established a framework of strict compliance for other Missouri courts to follow.

This Note will examine whether the "strict title" application of the neutral principles taken by *Gashland* is a more preferable approach than the interpretation and application of the neutral principles in other jurisdictions. This Note will discuss whether *Gashland* squares with the Supreme Court of the United States' prior decisions involving church property disputes and whether *Gashland*'s strict title approach is most true to the principles set forth in the leading case on the issue, *Jones v. Wolf*.<sup>9</sup> This Note will first review the facts and holding of *Gashland*.<sup>10</sup> It will then chronicle the history of church property jurisprudence in Missouri and the Supreme Court of the United States.<sup>11</sup> Next, this Note will outline the reasoning of the *Gashland* court.<sup>12</sup> Finally, this Note will analyze the dicta in *Jones* that has led to the deep split in how to apply the neutral principles of law approach to church property disputes. Specifically, this Note will advocate for the application of the neutral principles approach outlined in *Gashland* on the basis that it represents the most accurate reading of *Jones* and because its application is most in line with the Supreme Court of the United States' First Amendment jurisprudence.<sup>13</sup>

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5. AM. ANGLICAN COUNCIL, THE EPISCOPAL CHURCH: OVERBEARING AND UNJUST EPISCOPAL ACTS 22-26, <http://www.americananglican.org/assets/Resources/TEC-Canonical-Abuses.pdf>.

6. See *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575 (Mo. App. W.D. 2012), *transfer denied*; see also MO. REV. STAT. §§ 456.4, 407.2 (2000).

7. *Gashland*, 364 S.W.3d at 581 (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)).

8. *Id.* at 591-93.

9. 443 U.S. 595.

10. See *infra* Part II.

11. See *infra* Parts III.A, B.

12. See *infra* Part IV.

13. See *infra* Part V.

## II. FACTS AND HOLDING

Gashland Presbyterian Church (Gashland) was incorporated in August of 1948 and subsequently deeded a piece of real property by the Presbytery of Kansas City.<sup>14</sup> “The grantee [was] identified in the Corporation Warranty Deed as ‘Gashland Community Church, Gashland, Missouri.’”<sup>15</sup> The deed stated that the property was granted “to Gashland in exchange for ‘one dollar and other good and valuable considerations [sic].’”<sup>16</sup> The deed did not reserve any “beneficial, reversionary, or remainder interest to any other person or entity.”<sup>17</sup>

The Presbyterian Church in the United States of America (PCUSA) identifies itself as an “unincorporated association of ‘[r]eformed Christian believers.’”<sup>18</sup> PCUSA is comprised of individual churches, such as Gashland, that are governed by the churches’ pastors and elders, also known as sessions.<sup>19</sup> “Multiple sessions are governed by a district governing body known as a presbytery, which is in turn governed by a regional body, the synod. Synods are governed by the General Assembly, the highest governing body within PCUSA.”<sup>20</sup> Before its departure from PCUSA, Gashland fell within the purview of Heartland Presbytery.<sup>21</sup>

On September 30, 2007, Gashland notified Heartland Presbytery of its plans to disaffiliate from PCUSA, taking its property with it.<sup>22</sup> Receiving no response, on January 14, 2008, Gashland notified Heartland that it had “unilaterally disaffiliated” from PCUSA and Heartland in favor of the Evangelical Presbyterian Church.<sup>23</sup> In response to these letters, Heartland notified Gashland that a hearing would be held in April 2008 regarding its request for dismissal with property.<sup>24</sup> Three days prior to the scheduled hearing, Gashland

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14. Heartland Presbytery v. Gashland Presbyterian Church, 364 S.W.3d 575, 577-78 (Mo. Ct. App. 2012), *transfer denied*. Gashland “was originally affiliated with the Presbyterian Church in the United States of America . . . . In 1958, the Presbyterian Church in the United States of America merged with the United Presbyterian Church of North America to form the United Presbyterian Church in the United States of America (“UPCUSA”), which in turn merged with the Presbyterian Church in the United States in 1983 to form the PCUSA.” *Id.*

15. *Id.* at 578.

16. *Id.*

17. Brief for Respondent Gashland Presbyterian Church at 4, *Gashland*, 364 S.W.3d 575 (No. WD 73064), 2011 WL 1035603 [hereinafter Brief for Gashland].

18. *Gashland*, 364 S.W.3d at 578.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

notified Heartland that it would not participate in the hearing.<sup>25</sup> The hearing was nonetheless held on April 10, 2008, without Gashland's participation.<sup>26</sup> After a series of subsequent attempts to engage Gashland, Heartland initiated litigation to enforce PCUSA's purported rights to Gashland's property.<sup>27</sup>

Heartland claimed that, under the "property-trust clause" in PCUSA's Book of Order, Gashland held all church property in trust for the national church.<sup>28</sup> The "property-trust clause" (located in Section G 8.0201 of the Book of Order) stated:

All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).<sup>29</sup>

Thus, Heartland argued that disaffiliation with the national church would result in Gashland's forfeiture of all church property in favor of PCUSA.<sup>30</sup>

Heartland alleged that Gashland's membership in PCUSA, along with its original Articles of Agreement from 1948 and amended By Laws adopted in 1987, showed that Gashland agreed to be bound by PCUSA's Constitution.<sup>31</sup> Alternatively, Heartland also asserted that PCUSA's Book of Order, standing alone, established a trust and that Missouri trust laws were not applicable to the dispute.<sup>32</sup>

In contrast to Heartland's multitude of trust claims, Gashland asserted that under the neutral principles approach, the court must look solely to Missouri trust law in determining whether Gashland held its church property in trust for PCUSA.<sup>33</sup> Gashland argued that it did not acquiesce in PCUSA's unilateral imposition of a trust and that PCUSA's Book of Order, standing alone, failed to create an express trust under Missouri Law.<sup>34</sup>

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25. *Id.*

26. *Id.* at 578-79.

27. *Id.* at 579.

28. *Id.* at 583-84.

29. *Id.* at 578.

30. *See id.* The Book of Order is considered part of the PCUSA's Constitution. *Id.* at 578.

31. *Id.* at 583-85, 587-88.

32. *See id.* at 588, 591-92.

33. Brief for Gashland, *supra* note 17, at 10-15.

34. *Id.* at 15-16.

The Clay County circuit court dismissed Heartland's petition with prejudice citing Heartland's failure to state a cause of action.<sup>35</sup> The circuit court, citing *Presbytery of Elijah Parish Lovejoy v. Jaeggi*,<sup>36</sup> explained that in deciding church property disputes, "Missouri courts are prohibited from deferring to religious hierarchy, but must instead use 'neutral principles' of law in determining the property rights of congregations."<sup>37</sup>

Adopting the "strict title" neutral principles approach, the circuit court emphasized that a court will only enforce a trust if it is "embodied in a legally cognizable form."<sup>38</sup> Under Missouri law, a trust is only legally cognizable if the owner of the property declares that he holds the property as a trustee.<sup>39</sup> The court further established that in order for a trust to be created, the settlor must have the capacity to create a trust, "indicate[] an intention to create the trust," and declare as much in a signed writing (for the purposes of creating a trust in land).<sup>40</sup> The court concluded that the trust provision in PCUSA's Book of Order did not constitute a trust because it was not made by the owner of the property, Gashland, and, "to the extent the trust [was] alleged to cover Gashland's real property," the Denomination's Book of Order was signed on the behalf of, but not by, Gashland.<sup>41</sup> The court also rejected Heartland's second contention that the "[d]enomination's governing documents, including its trust and local-church control provisions," represented a binding contract on Gashland.<sup>42</sup> Missouri law, the court held, looks "to the governing documents of local organizations to determine if they have agreed to be bound by the provisions of an umbrella organization's governing documents."<sup>43</sup>

The Missouri Court of Appeals, Western District affirmed the circuit court's dismissal on substantially similar grounds.<sup>44</sup> The appellate court first affirmed the use of the "'neutral principles' approach as the sole method" in which to resolve church property disputes in Missouri.<sup>45</sup> The court then held that a denomination cannot unilaterally create an express trust in local church property by means of a property-trust clause in the denomination's constitution.<sup>46</sup>

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35. *Heartland Presbytery v. Gashland Presbyterian Church*, No. 09CY-CV12424, 2010 WL 5015536 (Clay Cnty. Cir. Ct. Sept. 13, 2010).

36. 682 S.W.2d 465 (Mo. 1984) (en banc); see *infra* Part III.C.

37. *Heartland Presbytery*, 2010 WL 5015536, ¶ 5.

38. *Id.* ¶ 4 (quoting *Jones v. Wolf*, 443 U.S. 595, 606 (1979)).

39. *Id.* ¶ 5; see MO. REV. STAT. § 456.4-401(2) (2000).

40. *Heartland Presbytery*, 2010 WL 5015536, ¶ 5; see MO. REV. STAT. § 456.4-402.

41. *Heartland Presbytery*, 2010 WL 50155366, ¶¶ 5-6.

42. *Id.* ¶ 13.

43. *Id.*

44. *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 595 (Mo. App. W.D. 2012), *transfer denied*.

45. *Id.* at 581.

46. *Id.* at 583.

## III. LEGAL BACKGROUND

To understand the deep divide in how state courts have chosen to resolve church property disputes, it is important to understand the vast legal history of court involvement in church property disputes. Much of the jurisprudence surrounding the resolution of church property cases has been a delicate balancing act. On one side, courts show a desire to resolve church property disputes so as not to close the doors of the court to churches that are equally under the protection of the law.<sup>47</sup> On the other, courts have been wary of interfering with the ability of local churches to submit to the authority of a denomination and all of its dictates, fearing suppression of free exercise.<sup>48</sup> A brief history shows how early Supreme Court of the United States' decisions grappled with balancing these two conflicting desires. The Court in *Jones v. Wolf* sought to settle these questions by advocating use of a neutral principles approach that purported to protect the property rights of individual churches as well as respect free exercise of religion.<sup>49</sup> However, as the latter sections of this Part demonstrate, lower courts have taken drastically different views on *Jones*' meaning of neutral principles and how they are to be applied.<sup>50</sup>

*A. Supreme Court Jurisprudence Regarding Church Property Disputes*

The 1871 Supreme Court of the United States' decision in *Watson v. Jones* marks the genesis of modern church property disputes.<sup>51</sup> The dispute in *Watson* was over the split of a Presbyterian church into pro-slavery and abolitionist factions, with the latter representing the majority within the congregation and the former controlling the church governing body (called a "session").<sup>52</sup> In *Watson*, the Court established three rules that have remained at the center of all church property disputes.<sup>53</sup>

First, the Court held that because churches' rights of property and contract are "equally under the protection of the law, and the actions of their members subject to its restraints," civil courts are required to resolve church property disputes.<sup>54</sup> The Court went on to state that religious organizations,

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47. See *Watson v. Jones*, 80 U.S. 679, 681 (1871).

48. See *Jones v. Wolf*, 443 U.S. 595, 610 (Powell, J., dissenting).

49. *Id.* at 606 (majority opinion).

50. See *infra* Part III.B.

51. *Watson*, 80 U.S. 679.

52. *Id.* at 684.

53. Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 522 (1990).

54. *Watson*, 80 U.S. at 714. The deferential approach established in *Watson* only applied to churches that were deemed hierarchical. Gerstenblith, *supra* note 53, at 523. A different framework was established when the church was congregational. *Id.*

like any other voluntary association, are afforded equal protection of the law insofar as they have a right to property and freedom to contract.<sup>55</sup>

Second, the Court rejected the “departure from doctrine” approach used in English common law to resolve internal religious disputes.<sup>56</sup> This doctrine required the court to determine which of the divisions in a church property dispute constituted the “true” congregation by “remain[ing] most loyal to the precepts followed at the time the property was donated.”<sup>57</sup> The Court reasoned that civil courts lacked the competence necessary to resolve disputes based on judicial determinations on matters of religious doctrine.<sup>58</sup> The Court did not rely on the First Amendment, which had yet to be applied to the states,<sup>59</sup> but based its decision on First Amendment principles purportedly found in the federal common law.<sup>60</sup> Apart from the Court’s competency concerns, the Court seemed to suggest that the departure from doctrine approach would not comport with Jefferson’s fabled “wall of separation” between church and state.<sup>61</sup>

Finally, in place of the “departure from doctrine” approach, *Watson* adopted a “deferential” or “polity” approach to resolving church property disputes.<sup>62</sup> This approach instructed civil courts to defer to the decision of the highest adjudicatory authority within a hierarchical church in matters “of discipline, or of faith, or ecclesiastical rule, custom, or law.”<sup>63</sup> The *Watson* court reasoned that this hands-off approach was, in light of the free exercise and establishment clauses, best suited to maintain the division between church and state.<sup>64</sup> In a further attempt to keep civil courts out of intra-church disputes, the *Watson* court took the position that all members of hierarchical churches “implicitly submit themselves to the decisionmaking authority of the church in ecclesiastical and property matters.”<sup>65</sup> *Watson* established a decades-long run in which hierarchical church decisions were exempt from judicial review.<sup>66</sup>

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55. *Watson*, 80 U.S. at 714.

56. Gerstenblith, *supra* note 53, at 522.

57. *Id.*

58. *Watson*, 80 U.S. at 729 (suggesting an appeal to civil courts would result in an “appeal from the more learned tribunal in the law which should decide the case, to one which is less so.”); Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1293 (1980).

59. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (discussing establishment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (discussing free exercise).

60. Adams & Hanlon, *supra* note 58, at 1292.

61. *See* *Watson*, 80 U.S. at 727; Adams & Hanlon, *supra* note 58, at 1293.

62. Gerstenblith, *supra* note 53, at 523.

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

64. *Id.*

65. Adams & Hanlon, *supra* note 58, at 1294; *see* *Watson*, 80 U.S. at 726-28.

66. Gerstenblith, *supra* note 53, at 524.



Nearly a century passed before the Court revisited the principles addressed in *Watson*.<sup>67</sup> In 1969, *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* once again presented the issue of how best to resolve a dispute between local churches and their governing national church.<sup>68</sup> This time, however, the Court explicitly relied on the First Amendment in reaching its decision.<sup>69</sup> In *Blue Hull*, the Court began by affirming *Watson*'s holding that the common law departure-from-doctrine approach was impermissible, this time grounding the holding in the First Amendment prohibition on religious establishments.<sup>70</sup> The primary purpose of the establishment clause was to "prevent the development of structural relationships between religious organizations and government which are vulnerable to abuse."<sup>71</sup> The Court found that the departure-from-doctrine approach would require courts "to determine matters at the very core of a religion."<sup>72</sup> Requiring courts to make such determinations would almost certainly create the sort of structural relationship the establishment clause was meant to avert.<sup>73</sup> The Court also affirmed civil court jurisdiction over church property disputes, holding that "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property."<sup>74</sup> But the Court departed from *Watson* in one significant way.<sup>75</sup> The Court introduced and endorsed, in dicta, the use of neutral principles of law so as to avoid "'establishing' churches to which property is awarded."<sup>76</sup> Instead, the Court indicated that subjecting churches to the same standards as other voluntary associations in matters of contract, property, and trust law would be entirely consistent with the First Amendment.<sup>77</sup>

*Blue Hull*, however, did not squarely reject the rule of compulsory deference to the church hierarchy endorsed in *Watson*, leading to widespread confusion in lower federal and state courts.<sup>78</sup> Justice William J. Brennan attempted to address this confusion in his concurrence in *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*,

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67. *Id.*

68. 393 U.S. 440, 441 (1969).

69. *Id.* at 444-45.

70. *Id.* at 450.

71. Gerstenblith, *supra* note 53, at 519.

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

73. *See* Gerstenblith, *supra* note 53, at 520.

74. *Blue Hull*, 393 U.S. at 449.

75. *See id.*

76. *Id.*

77. *See id.*; Adams & Hanlon, *supra* note 58, at 1295.

78. Adams & Hanlon, *supra* note 58, at 1295-96.

which would become the basis for the “neutral principles” doctrine the Court would later endorse in the leading case of *Jones*.<sup>79</sup>

Brennan’s concurrence laid out what has been called the “nondeterminationist” approach.<sup>80</sup> Joined by Justices Douglas and Marshall, the opinion suggested that civil courts had the choice of following the deferential approach endorsed by *Watson*, the neutral principles approach mentioned in *Blue Hull*, or a third approach, by passing statutes “governing church property arrangements in a manner that precludes state interference in doctrine.”<sup>81</sup> The only hard and fast rule would be the continued prohibition on civil court intrusion on ecclesiastical policy or doctrinal issues.<sup>82</sup>

After nearly a century of silence on the issue, the decade long flurry of Supreme Court decisions regarding the role of civil courts in resolving religious disputes culminated in the 1979 decision in *Jones v. Wolf*.<sup>83</sup> In *Jones*, the Court faced the question of “whether civil courts, consistent with the First Amendment . . . may resolve [a church property] dispute on the basis of ‘neutral principles of law’ or whether they *must* defer to the resolution of an authoritative tribunal of the hierarchical church.”<sup>84</sup> The Court held that the First Amendment does not require deferring to the highest authoritative tribunal of a hierarchical church.<sup>85</sup> To the contrary, the Court openly endorsed use of the neutral principles of law approach as a way of avoiding excessive entanglement in ecclesiastical affairs.<sup>86</sup>

In support of the neutral principles approach, the Court noted three distinct advantages of the method.<sup>87</sup> First, it possessed the advantage of being entirely “secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity.”<sup>88</sup> Second, that it “relie[d] exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges.”<sup>89</sup> The Court noted that this reliance on traditional property and trust law would “free civil courts completely from entanglement” in matters of religious doctrine.<sup>90</sup> Finally, the Court noted that proper application of the neutral principles approach would accurately “reflect the

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79. *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368-70 (1970) (Brennan, J., concurring); *see also Jones v. Wolf*, 443 U.S. 595, 602-04 (1979).

80. *See, e.g., Gerstenblith, supra note 53, at 526.*

81. *Sharpsburg*, 396 U.S. at 368-70.

82. *Id.* at 370.

83. 443 U.S. 595

84. *Id.* at 597 (emphasis added).

85. *Id.* at 602.

86. *Id.* at 603.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

intentions of the parties.”<sup>91</sup> The Court suggested that “[t]hrough appropriate reversionary clauses and trust provisions” a church could plan for a particular contingency, thereby “ensur[ing] that a dispute over the ownership of church property will be resolved in accord with the desires of the members.”<sup>92</sup>

In response to the dissent’s assertion that a rule of compulsory deference is required “to protect the free exercise rights of those who have formed the association and submitted themselves to its authority,” the majority contemplated a myriad of ways in which the parties could reflect their intent to be bound by the national church.<sup>93</sup> The split between courts can be traced to this one particularly vexing paragraph of dicta in *Jones*. It states:

The neutral-principles approach cannot be said to “inhibit” the free exercise of religion. . . . 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 church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.<sup>94</sup>

While endorsing the use of neutral principles of law that are embodied in “some legally cognizable form,” Justice Blackmun also suggested that if a church were to modify its constitution to “recite an express trust in favor of the denominational church,” that civil courts would be mandated to give it such effect.<sup>95</sup>

These ambiguous statements have been the focus of the two alternative interpretations of the “neutral principles” that have led to such a deep divide in lower courts. As the following two sections show, some courts have interpreted this dicta as *requiring* courts to enforce language in a denomination’s governing documents that asserts a trust absent traditional requirements of state trust and property law.<sup>96</sup> Others have emphasized *Jones*’ rejection of the idea that courts are required to “defer to the resolution of an authoritative tribunal of the hierarchical church,” or to denominational “laws and regula-

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91. *Id.*

92. *Id.* at 603-04.

93. *Id.* at 605-06 (internal quotation marks omitted).

94. *Id.* at 606.

95. *Id.*

96. *See infra* note 100 and accompanying text.

tions.”<sup>97</sup> Instead, these courts have mandated that trusts are only enforceable if “embodied in some legally cognizable form” under that state’s law.<sup>98</sup>

### B. Lower Court Decisions in the Wake of *Jones v. Wolf*

The Supreme Court of the United States’ ambiguity as to how to apply neutral principles of law – especially in situations in which the denomination has purported to create an express trust in its constitution – has created a nation-wide split among lower courts. Presently, five state supreme courts and the Eighth Circuit, applying Missouri law, have held that the neutral principles approach requires courts to apply the state’s property and trust law just as it would with any other voluntary association (referred to as “strict” neutral principles jurisdictions).<sup>99</sup> Conversely, three state supreme courts have interpreted the neutral principles to require enforcing trust language in a denomination’s constitutional documents without inquiring as to whether a trust was created under the generally applicable state trust and property law (referred to as “hybrid” neutral principles jurisdictions).<sup>100</sup>

#### 1. “Strict” Neutral Principles Jurisdictions

Courts following the “strict” neutral principles approach generally follow a two-step analysis in determining who holds title to the church property.<sup>101</sup> First, the court examines the deed to the property to establish who holds title and “whether there are any reverter clauses, express trusts, conditions, or restrictions attached to the property.”<sup>102</sup> If the title is vested in the local church and no restrictions are present in the title, the court proceeds to

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97. *Jones*, 443 U.S. at 597, 609.

98. *Id.* at 606; see *infra* note 101 and accompanying text.

99. See *Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 525-26 (8th Cir. 1995); *St. Paul Church, Inc. v. Bd. of Trs. of the Alaska Missionary Conference of the United Methodist Church, Inc.*, 145 P.3d 541, 553 (Alaska 2006); *Ark. Presbytery of the Cumberland Presbyterian Church v. Hudson*, 40 S.W.3d 301, 306-07 (Ark. 2001); *Berthiaume v. McCormack*, 891 A.2d 539, 547 (N.H. 2006); *In re Church of St. James the Less*, 888 A.2d 795, 805-06 (Pa. 2005); *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 685 S.E.2d 163, 172 (S.C. 2009).

100. See *In re Episcopal Church Cases*, 198 P.3d 66, 69 (Cal. 2009); *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237, 253-54 (Ga. 2011), *cert. dismissed*, 132 S. Ct. 2439 (2012); *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 458 (Ga. 2011), *cert. denied*, 132 S. Ct. 2772 (2012); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); *The Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d 302 (Conn. 2011), *cert. denied*, 132 S. Ct. 2773 (2012).

101. Gerstenblith, *supra* note 53, at 543-44.

102. *Id.* at 544.

the second step, determining if the national church controls the local church (the grantee).<sup>103</sup> If, as in *Gashland*, the grantee is a corporation, the court looks to the articles of incorporation and by-laws to determine whether the local church conveyed a beneficial interest to the denomination.<sup>104</sup> Absent evidence of an intent to convey an interest in the property, the property remains with the local church.<sup>105</sup> The *Gashland* decision is a typical example of how this interpretation is applied.<sup>106</sup>

## 2. “Hybrid” Neutral Principles Jurisdictions

A “hybrid” neutral principles analysis generally occurs when title is clearly vested in the local church, meaning that the local church is the only entity listed on the deed.<sup>107</sup> Unlike the strict title doctrine, the courts in these jurisdictions look outside of traditional trust and property law to find implied or express trusts based solely on finding that either “the national organization, the local church, or the grantor of the property intended that the property be dedicated to the particular denomination as defined by the national church.”<sup>108</sup> Oftentimes the denominational documents supporting such conclusions do not support the creation of a trust under state law.<sup>109</sup> Such evidence often includes “reference to the denomination in the deeds of the property; reference to the denomination in the articles of incorporation, charter, or by-laws of the local entity[] . . . and other provisions in the charter, constitution, or discipline of the national church.”<sup>110</sup>

The recent case of *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church*<sup>111</sup> presents a typical example of how courts interpret *Jones* as mandating enforcement of language in a denomination’s constitution that unilaterally declares an express trust.<sup>112</sup> Much like *Gashland*, this case

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103. *Id.* at 544-45.

104. *Id.* at 545; *see, e.g.*, *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 591-92 (Mo. App. W.D. 2012), *transfer denied*.

105. *See, e.g.*, *Gashland*, 364 S.W.3d at 592. In cases in which the local church is divided into factions or there is a question as to who controls the local corporate entity, most courts follow the presumption of majority control suggested in *Jones*. Gerstenblith, *supra* note 53, at 546.

106. *See infra* Part IV.

107. Gerstenblith, *supra* note 53, at 537; *see, e.g.*, *Gashland*, 364 S.W.3d at 581-82.

108. Gerstenblith, *supra* note 53, at 537.

109. *See id.* at 537-38.

110. *Id.* at 538.

111. 719 S.E.2d 446 (Ga. 2011), *cert. denied*, 132 S. Ct. 2772 (2012).

112. *Id.* at 457-58. The court below found for the local church and adopted the “strict title” interpretation of the neutral principles. *Id.* at 450. In the court of appeals’ decision, it characterized PCUSA as unilaterally imposing the trust provision. *Id.* The Supreme Court rejected this characterization, stating “Timberridge’s act of

involved the PCUSA and the property-trust clause in Section G 8.0201 of the Book of Order.<sup>113</sup> The court began its discussion by dismissing the probative value of the deeds, which were vested in the local church and did not show any intent by the grantors to create a trust.<sup>114</sup> Instead, the court relied on the passage from *Jones*<sup>115</sup> that suggested the recitation of an express trust in favor of the denomination, if embodied in a national church's constitution, must be enforced by a court.<sup>116</sup> The court explicitly eschewed traditional state law rules regarding trusts when it stated "the fact that a trust was not created under our state's generic express (or implied) trust statutes does not preclude the implication of a trust on church property under the neutral principles of law doctrine."<sup>117</sup> In place of traditional trust law, the court resolved the conflict on the reasoning that the national church's property-trust clause, in combination with the local church's articles of incorporation, created an implied trust in favor of the national church.<sup>118</sup>

### C. Church Property Disputes in Missouri

For the better part of the 20th century, Missouri adhered to the rule of deference set forth in *Watson*.<sup>119</sup> However, following the Supreme Court of the United States' decisions in *Blue Hull* and *Jones*, the Supreme Court of Missouri adopted the neutral principles approach as the sole method for resolution of church property disputes in *Presbytery of Elijah Parish Lovejoy v. Jaeggi*.<sup>120</sup>

*Elijah Parish*, like *Gashland*, dealt with a local church that unanimously voted to disaffiliate with the larger denomination.<sup>121</sup> In this case, the national church acknowledged that looking strictly to Missouri trust law, no trust relationship was created.<sup>122</sup> Instead, the national church attempted to persuade the court to side with the other states that had chosen to adopt the deferential

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affiliating with the PCUSA in 1983 with the trust provision *already* in its governing constitution demonstrated that Timberridge assented to that relinquishment of its property rights[.]" *Id.* at 456.

113. *Id.* at 458; see *supra* note 29 and accompanying text.

114. *Timberridge*, 719 S.E.2d at 451.

115. See *supra* note 94 and accompanying text.

116. *Timberridge*, 719 S.E.2d at 453.

117. *Id.* at 454.

118. *Id.* at 458.

119. *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 579, 580 (Mo. App. W.D. 2012) (citing *Hayes v. Manning*, 172 S.W. 897, 904-06 (Mo. 1914) (en banc)).

120. *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 467 (Mo. 1984) (en banc).

121. *Id.* at 466.

122. *Id.* at 473.

approach still permitted by *Jones*.<sup>123</sup> The Supreme Court of Missouri dismissed this argument stating that the neutral principles of law could be used to settle church property disputes regardless of the structure of the denomination.<sup>124</sup> Despite rejecting the deferential approach, the court left open the possibility that alterations to the denomination's Book of Order could result in a victory for the national church under the neutral principles approach.<sup>125</sup> Specifically, it left open the possibility that a trust might be created by the insertion of trust language in the denomination's governing documents.<sup>126</sup>

A little more than a decade later in *Church of God in Christ, Inc. v. Graham*,<sup>127</sup> the Eighth Circuit, applying Missouri law, was faced with how to handle a property-trust clause in a denomination's constitution that required all associated local churches to hold title to their property in trust for the denomination.<sup>128</sup> Much like in *Elijah Parish*, the denomination did not contribute any funds toward the purchase of the property or ever exert control over the property.<sup>129</sup> Furthermore, the deeds vested title only in the local church and the local church's articles of incorporation were explicit in its assertion of independence from any higher church body.<sup>130</sup> In the end, the Eighth Circuit determined that upon examining the language of the deed, the local church's articles of incorporation, and the actions of the local church in relation to the denomination, the local church "existed in an 'independent relationship with'" the denomination.<sup>131</sup> Upon establishing this fact, the court was able to bypass much of the neutral principles application in regard to the property-trust clause because it determined that the church was not even bound by the denomination's ecclesiastical decisions – a realm in which the civil courts are not to venture – no less decisions regarding church property.<sup>132</sup> Thus, the court never made it to the question of whether the property-trust clause in the denomination's constitution created a trust relationship with the local church absent the normal requirements of Missouri trust and property law.<sup>133</sup>

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123. *Id.* at 466-67, 471.

124. *Id.* at 467.

125. *Id.* at 474 ("In order for the national church to prevail under the neutral principles approach on the instant record it must do so on the basis of the Book of Order."). The court never reached this point in their reasoning because the property trust clause was not adopted until after the local church had split from the denomination. *See id.*

126. *Id.*

127. 54 F.3d 522 (8th Cir. 1995).

128. *Id.* at 524.

129. *Id.* at 526.

130. *Id.*

131. *Id.* at 527.

132. *Id.*; *see also* Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevic, 426 U.S. 696, 713 (1976) (noting that "religious controversies are not the proper subject of civil court inquiry").

133. *See Graham*, 54 F.3d 522.

## IV. INSTANT DECISION

Writing for the Missouri Court of Appeals for the Western District, Judge Alok Ahuja first addressed the issue of whether to follow the rule of deference or neutral-principles approach in resolving the dispute.<sup>134</sup> The court determined that, under *Elijah Parish*, Missouri had adopted the neutral principles approach as the exclusive means of resolving church property disputes.<sup>135</sup> Under *Elijah Parish*, the court must “rel[y] ‘exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges.’”<sup>136</sup>

Before addressing Heartland’s arguments, the court recognized that there was no declaration that applying a strict application of Missouri trust law would result in the creation of a trust relationship between Heartland and Gashland.<sup>137</sup> Instead, Heartland attempted to show that, under *Jones* and *Elijah Parish*, Missouri trust law was not applicable.<sup>138</sup>

The court rejected Heartland’s first assertion that Gashland’s Articles of Agreement and amended By Laws, viewed alongside PCUSA’s Book of Order, established that Gashland held the disputed property in trust for PCUSA.<sup>139</sup> In an attempt to frame the dispute as ecclesiastical, and off limits to civil courts,<sup>140</sup> Heartland argued Gashland’s Articles of Agreement, which specified that Gashland was “connected with and ecclesiastically subject to” PCUSA, established that Gashland agreed to be bound by all of the provisions of the denomination’s present and future constitutions.<sup>141</sup> In rejecting this argument, the court noted that in *Elijah Parish*, the court did not take into consideration the structure, hierarchical or congregational, of the church.<sup>142</sup> The court also noted that property disputes did not implicate any ecclesiastical questions, which it defined as any matter that:

[C]oncerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of the membership, and the power of excluding from such associations those

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134. *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 579, 579-81 (Mo. App. W.D. 2012), *transfer denied*.

135. *Id.* at 581. For discussion of *Elijah Parish*, see *supra* notes 120-26 and accompanying text.

136. *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 473 (Mo. 1984) (en banc) (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)).

137. *Gashland*, 364 S.W.3d at 583.

138. *Id.* at 583.

139. *Id.* at 583-84, 586-87.

140. See *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 702 (1976).

141. *Gashland*, 364 S.W.3d at 586-86.

142. *Id.*



deemed unworthy of membership by the legally constituted authorities of the church[.]<sup>143</sup>

In interpreting Gashland's intent to be "ecclesiastically subject to" PCUSA, the court applied the rule of *expressio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another."<sup>144</sup> By expressing the church's intent to be ecclesiastically subject to PCUSA, the court determined that Gashland's charter intended for all non-doctrinal decisions to be reserved for the congregation.<sup>145</sup>

Alternatively, Heartland asserted that the property-trust clause in the Book of Order alone established a trust.<sup>146</sup> Again, the court rejected Heartland's claim on the grounds that Missouri law could only make PCUSA's Book of Order binding if Gashland were to give some affirmative expression of Gashland's agreement to be bound.<sup>147</sup> Finding that neither Gashland's Articles of Incorporation nor amended By Laws displayed its intent to be bound by PCUSA in any matters that are not ecclesiastical, Heartland's assertion failed.<sup>148</sup> The court held that under Missouri law, PCUSA's Book of Order, in conjunction with Gashland's Articles of Agreement and amended By Laws, established that Gashland did not hold the disputed church property in trust for PCUSA.<sup>149</sup>

## V. COMMENT

*Gashland's* application of the neutral principles approach firmly places Missouri in the "strict" neutral principles of law camp. This approach, compared to the hybrid neutral principles advocated in *Timberidge* and other lower courts, represents the most appropriate reading of *Jones* for two compelling reasons. First, the primary advantages of applying the neutral principles approach, as laid out in *Jones*, are only advanced by *Gashland's* strict title interpretation. Second, *Gashland's* approach is more in line with the Supreme Court of the United States' First Amendment jurisprudence.

### *A. The Primary Advantages of the Neutral Principles Approach*

An approach that allows the imposition of a trust relationship absent the traditional requirements of state trust and property law conflicts with the un-

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143. *Id.* at 586 (quoting *Marr v. Galbraith*, 184 S.W.2d 190, 193-94 (Mo. App. W.D. 1944)).

144. *See id.* at 586.

145. *Id.*

146. *Id.* at 583-84.

147. *Id.* at 591.

148. *Id.* at 586-88.

149. *Id.* at 581.

derlying rationale for adoption of the neutral principles approach in *Jones*. The *Jones* court's enthusiasm for the neutral principles stemmed from the belief that by being completely secular in operation, it would free civil courts from entanglement in religious doctrine and that by only applying "well-established concepts of trust and property law," it would ensure that any dispute would be resolved "in accord with the desires of the members."<sup>150</sup> Only *Gashland*'s application of the law furthers these advantages of the neutral principles approach.

Perhaps the greatest advantage of the neutral principles approach envisaged in *Jones* was that it would create a simple framework of interpretation for local churches and denominations alike that would accurately reflect the desires of both the local and national churches.<sup>151</sup> By viewing only deeds, relevant state statutes, the local church's charter, and the denomination's constitution, it should be readily apparent to both sides if the denomination possessed a legally cognizable interest in the local church's property. Such an examination would be relatively inexpensive and allow both parties to make an informed decision regarding their future actions.

The strict title approach taken in *Gashland*, in which any trust must comply with the generally applicable rules of trust law, best reflects *Jones*' intention of applying only "well-established concepts of trust and property law" that were "developed for use in all property disputes."<sup>152</sup> The approach taken in "hybrid" neutral principles jurisdictions flatly rejects this straightforward dictate in *Jones*.<sup>153</sup> The court in *Timberidge*, for example, explicitly stated that Georgia's "generic express (or implied) trust statutes [do] not preclude the implication of a trust on church property under the neutral principles of law doctrine."<sup>154</sup> Instead of applying state law principles used in other property disputes that are "familiar to lawyers and judges," the *Timberidge* court adopts a wholly judge-made law that is applicable *only* in church property disputes.<sup>155</sup> The *Timberidge* court was erroneous in stating that church governing documents are the "sort of legal materials familiar to lawyers and judges."<sup>156</sup> To the contrary, *Jones* suggests that courts should rely on *generally applicable* rules for trust creation.<sup>157</sup> Such an application of the neutral principles creates uncertainty on the part of judges, lawyers, and members of the church. Such uncertainty is inconsistent with the very concept of neutral principles.

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150. *Jones v. Wolf*, 433 U.S. 595, 603-04 (1979).

151. *See id.*

152. *Id.* at 599, 603.

153. *See, e.g.,* *Presbytery of Greater Atlanta, Inc. v. Timberidge Presbyterian Church*, 719 S.E.2d 446 (Ga. 2011), *cert. denied*, 132 S. Ct. 2772 (2012).

154. *Id.* at 451.

155. *Id.* at 458.

156. *Id.*

157. *Jones*, 443 U.S. at 603.

Conversely, *Gashland's* reliance on tried and tested state trust and property law is certainly familiar to judges and lawyers. This familiarity makes planning for a particular contingency much simpler and more reflective on the parties' true intent. Requiring local churches to amend their deed or articles of incorporation requires minimal effort on the part of the local church and amounts to clear and convincing evidence that the church intended to confer property rights to the national church.

In addition to giving churches certainty about the future, *Jones* imagined an application of the neutral principles that would "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."<sup>158</sup> Again, *Gashland's* application of the neutral principles matches this vision. By holding churches to the same rules regarding trust formation as other voluntary associations, the court steers clear of having to rule on anything that could be construed as religious doctrine.<sup>159</sup> Courts on the other side of the split, however, base their decisions solely on religious documents. Purporting to apply the neutral principles approach, the court in *Timberridge* found that trust language present only in the denomination's constitution was sufficient to create an implied trust.<sup>160</sup> Relying solely on the denomination's constitution is tantamount to applying the compulsory deference standard used in *Watson*. While this standard is still permitted by *Jones*, it is misleading to purport to apply neutral principles and then give deference to the national church.

### *B. The Neutral Principles Approach and Free Exercise*

In addition to being more consistent with the overall tenor of *Jones*, *Gashland's* approach is more in line with the Supreme Court of the United States' free exercise jurisprudence. *Gashland* respects both the ability of a church to submit to a denomination and the ability of local churches to disaffiliate if there are substantial disagreements. A church may still choose to expressly give a property interest in all church property by altering their deed or through a signed writing. However, unlike the compulsory deference approach or the application of the neutral principles in courts such as *Timberridge*, a strict title interpretation supports the free exercise of individuals by not making them beholden to the dictates of the national church. One only needs to look as far as Georgia to see that churches who disagree with the doctrines of their denomination are forced to decide whether to exercise their religious conscience at the risk of losing all of their church property or sit quietly on the sidelines.

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158. *Id.*

159. *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 579, 590 (Mo. App. W.D. 2012), *transfer denied*.

160. *Timberridge*, 719 S.E.2d at 451.

By finding trusts absent any grounding in traditional state law, courts are in essence giving some churches the ability to do what no other voluntary association may do – unilaterally create a trust. To adopt a reading of *Jones* that would allow denominations to unilaterally take a property interest in the local church without following the ordinary avenues of trust creation works to undermine the purpose of such statutes and give some denominations powers not granted to any other secular or religious entity. The result is that any church that chooses to affiliate with a denomination that has or could adopt a property-trust clause in its constitution is building its church on sinking sand.

## VI. CONCLUSION

The holding in *Gashland* establishes a framework for how Missouri courts should apply the neutral principles approach in church property disputes. By holding that the property trust clause in a denomination's constitution cannot, standing alone, establish that the local church held property in trust for the denomination, the Western District sides with "strict title" application of the neutral principles approach and deepens the divide among lower courts on the interpretation of *Jones*.<sup>161</sup> Looking forward, *Gashland* established an easy-to-apply model that other Missouri courts should implement. Following *Gashland*, local churches are now free to affiliate with the denomination that most closely resembles their beliefs without the fear of losing decades worth of parishioner funded buildings and property. This model will reduce church property litigation by holding fast to the easily recognizable and oft-applied principles of Missouri trust law rather than an alien and wholly judge-made law for use solely in church property disputes.

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161. *Gashland*, 364 S.W.3d at 590.