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Henry L. Chambers Jr.  
*University of Richmond School of Law*

Isaac A. McBeth  
*University of Richmond School of Law*

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MUCH ADO ABOUT NOTHING MUCH: *PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA V. TRURO CHURCH*

*Henry L. Chambers, Jr.* \*  
*Isaac A. McBeth* \*\*

I. INTRODUCTION

*Protestant Episcopal Church in the Diocese of Virginia v. Truro Church* (“*Truro*”) involves a property dispute.<sup>1</sup> The core issue is who owns or controls property held in trust for an Episcopal congregation after a majority of that congregation votes to disaffiliate from the Episcopal Church of the United States of America (“TEC”) and affiliate with a different church.<sup>2</sup> Deciding a church property dispute is inherently difficult because courts are generally “not a constitutionally permissible forum” to resolve ecclesiastical issues.<sup>3</sup> Indeed, the desire to avoid such issues can lead courts to decline to decide particular cases. However, faced with the property dispute, a significant procedural history, and the need to determine the application of Virginia Code section 57-9(A) to the dispute, the Supreme Court of Virginia decided this case.<sup>4</sup>

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\* Professor of Law, University of Richmond School of Law.

\*\* J.D. Candidate, 2011, University of Richmond School of Law.

1. *Protestant Episcopal Church in Diocese of Va. v. Truro Church*, 280 Va. 6, 12, 694 S.E.2d 555, 557 (2010).

2. *Id.*, 694 S.E.2d at 557–58.

3. *Jae-Woo Cha v. Korean Presbyterian Church*, 262 Va. 604, 610, 553 S.E.2d 511, 514 (2001) (citations omitted).

4. *See generally Truro*, 280 Va. at 6–30, 694 S.E.2d at 555–68. Virginia Code section 57-9(A) reads:

If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof

This case raises several issues involving church doctrine.<sup>5</sup> However, rather than resolve any of those issues or the broad issue of who owns the property, the court focused on issues of statutory interpretation and the statute's applicability to the dispute, leaving other issues for the circuit court to decide or decline to decide on remand.<sup>6</sup> It is understandable that the court took such a narrow approach. However, it neither resolved all of the issues that the appellants raised on appeal nor provided significant guidance to the circuit court regarding lurking ecclesiastical issues that may need to be addressed for the underlying property dispute to be resolved fully.<sup>7</sup>

This essay reviews the issues the Supreme Court of Virginia resolved in *Truro* and notes important issues it did not resolve. Part II supplies the factual background and procedural history of the dispute. Part III summarizes the court's opinion and the reasoning underlying its determination that Virginia Code section 57-9(A) is not applicable to this particular action. Part IV critiques the opinion, noting the issues the court resolved and how it resolved them. Part V briefly addresses issues that remain unresolved by the court's decision and discusses the implications of leaving those issues unresolved. Part VI presents the authors' conclusions.

## II. BACKGROUND

In 2003, the General Convention ("GC") of the Episcopal Church met, inter alia, to address several controversial issues within the church,<sup>8</sup> including concerns surrounding the accepta-

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is; and if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth.

VA. CODE ANN. § 57-9(A) (Repl. Vol. 2007 & Cum. Supp. 2010).

5. Most importantly, the court faced the issues of when a "division" occurs within a church or religious society and what constitutes a "branch" of a church or religious society. *Truro*, 280 Va. at 22, 27, 694 S.E.2d at 563, 566.

6. *Id.* at 29, 694 S.E.2d at 567.

7. For example, the court declined to address whether the Anglican Communion is a church or religious society, arguing that doing so was not necessary to the resolution of the action. *Id.* at 22, 694 S.E.2d at 563.

8. TEC is a province of the Anglican Communion and the principal national church following the Anglican tradition within the United States. *Id.* at 14, 694 S.E.2d at 559. TEC is comprised of 111 regional dioceses, which collectively manage the Church's seven thousand congregations and two million total members. *Id.* Within the hierarchical struc-

bility of allowing non-celibate homosexuals to serve as Episcopal bishops and the blessing of same-sex marriages.<sup>9</sup> Ultimately, the GC took several actions: (1) it confirmed the election of Reverend V. Gene Robinson, a non-celibate homosexual priest, as the bishop of one of the dioceses of TEC; (2) it adopted a resolution permitting the blessing of same-sex unions; and (3) it rejected a resolution relating to the “historic formularies of the Christian faith.”<sup>10</sup> The actions of the GC gave rise to considerable consternation on the part of many congregants of the Protestant Episcopal Church in the Diocese of Virginia (“the Diocese”).<sup>11</sup> The diocesan leadership’s support for Bishop Robinson’s confirmation fueled some of the discontent.<sup>12</sup> In response to the actions of the GC and the diocesan leadership, congregants sent hundreds of letters of dissent to the Diocese and some congregations withheld the payment of pledges committed to the Diocese and TEC.<sup>13</sup>

Throughout 2004 and 2005, the Diocese formed and relied on a “Reconciliation Commission” to resolve the concerns of the congregations that opposed the GC’s actions.<sup>14</sup> However, these efforts failed.<sup>15</sup> In 2006, the Reconciliation Commission promulgated voting procedures for the congregations to separate from the Diocese.<sup>16</sup> Several congregations initiated separation procedures in accordance with the protocol but were subsequently informed that, due to a change in leadership in TEC, any such separation would not be binding on TEC or the Diocese.<sup>17</sup> This guidance notwithstanding, fifteen congregations voted in 2006 and 2007 to separate from the Diocese.<sup>18</sup> Likewise, the actions of the GC

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ture of TEC, the GC acts as the highest governing body and meets triennially. *Id.* at 15, 694 S.E.2d at 559. As part of its duties, the GC adopts TEC’s *Constitution and Canons*. *Id.*

9. *See id.*

10. *Id.*

11. *See id.* The actions of the GC are binding on the dioceses. *Id.* Each diocese is governed by a Bishop and an Annual Council that, similar to the GC’s relationship with the national church, adopts the *Constitution and Canons* for the respective diocese. *Id.*

12. *See id.*

13. *Id.* Each congregation, so long as it falls under the governance of TEC, is bound by the national and diocesan constitutions and canons. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 15–16, 694 S.E.2d at 559–60.

17. *Id.* at 16, 694 S.E.2d at 560.

18. *Id.*

prompted congregations of several other dioceses to follow a similar course of action and separate from their respective dioceses.<sup>19</sup>

Following their separation, the congregations sought to align themselves with another church affiliated with the Anglican Communion.<sup>20</sup> The Church of Nigeria—a province of the Anglican Communion governing the Anglican churches in the Federal Republic of Nigeria—had previously established a mission in the United States, designated the “Convocation of Anglican Nigerians in America,” to provide oversight to expatriate Nigerian congregations therein.<sup>21</sup> In 2006, the Church of Nigeria relabeled the mission the Convocation of Anglicans in North America (“CANANA”).<sup>22</sup> CANANA formed a new statewide district, the Anglican District of Virginia (“ADV”), and received the recently disaffiliated Virginia congregations as congregations of ADV.<sup>23</sup> This migration of estranged former Episcopal Church congregations continued on a nationwide scale. In 2007, ten thousand of the CANANA congregations’ twelve thousand members were former members of Episcopalian congregations.<sup>24</sup>

Following the exodus of congregants and putative disaffiliation of congregations from the Diocese, the issue of what property interests, if any, the congregations maintained in their church buildings became of central concern to the continuing congregations, the disaffiliating congregations, the Diocese, and TEC. Dur-

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19. *Id.* Though the 2006 and 2009 General Conventions left the issues that sparked controversy in 2003 largely alone, see THE GENERAL CONVENTION OF THE EPISCOPAL CHURCH, SUMMARY OF ACTIONS OF THE 76TH GENERAL CONVENTION (2009), available at [http://ecusa.anglican.org/documents/GC2009\\_SummaryofActions\\_2.pdf](http://ecusa.anglican.org/documents/GC2009_SummaryofActions_2.pdf); THE GENERAL CONVENTION OF THE EPISCOPAL CHURCH, SUMMARY OF ACTIONS OF THE 75TH GENERAL CONVENTION (2006), available at [http://episcopalchurch.org/documents/summary\\_of\\_Actions\\_GC2006\\_ENG.pdf](http://episcopalchurch.org/documents/summary_of_Actions_GC2006_ENG.pdf), the issues continue to reverberate in TEC and the Anglican Communion.

20. *Truro*, 280 Va. at 16, 694 S.E.2d at 560. “The Anglican Communion is an international body that consists of 38 ‘provinces,’ which are ‘regional and national churches that share a common history of their understanding of the Church catholic through the See of Canterbury’ in England.” *Id.* at 14, 694 S.E.2d at 558 (citation not provided). The Anglican Communion takes action through three different gatherings: (1) the decennial Lambeth Conference, (2) the Anglican Consultative Council, and (3) the biennial Primates’ Meeting. *Id.*, 694 S.E.2d at 559. However, the international gatherings of the Anglican Communion are “primarily consultative” in nature, and any course of action decided on by the Anglican Communion will affect a regional or national church only if the church formally adopts that course of action through its own protocols. *Id.*

21. *Id.* at 16, 694 S.E.2d at 560.

22. *Id.*

23. *Id.*

24. *Id.*

ing 2006 and 2007, nine CANA/ADV congregations (“CANA Congregations”) that formerly were affiliated with the Diocese filed petitions pursuant to Virginia Code section 57-9(A) with their respective circuit courts.<sup>25</sup> In their petitions, the CANA Congregations maintained that: (1) their separation constituted a division within TEC, as contemplated by Virginia Code section 57-9(A); (2) they affiliated with ADV, a branch of the Anglican Communion; and (3) accordingly, Virginia Code section 57-9(A) conveyed ownership interest in the properties to the respective congregations located thereon.<sup>26</sup>

Both the Diocese and TEC intervened, opposing the grant of the petitions and filing a declaratory judgment action against the congregations “seeking a determination of trust, proprietary, and contract rights, if any, that the Diocese and TEC had in the properties used by the CANA Congregations which were the subject of the Code § 57-9(A) petitions.”<sup>27</sup> They challenged the congregations’ petitions on several grounds, arguing: (1) that the congregations’ separation did not constitute a division within TEC or the Diocese; and (2) that, even if the congregations’ separations could be perceived as a qualifying division, CANA was not a branch of TEC.<sup>28</sup>

Pursuant to the Multiple Claimant Litigation Act,<sup>29</sup> the Supreme Court of Virginia appointed a three-judge panel to manage the dispute.<sup>30</sup> The panel consolidated the proceedings and arranged for the Fairfax County Circuit Court to hear the matter.<sup>31</sup> At the hearing, the CANA Congregations, the Diocese, and TEC presented evidence attempting to define the terms “division” and “branch” in the context of Virginia Code section 57-9(A).<sup>32</sup> On

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25. *Id.* at 17, 694 S.E.2d at 560. The CANA congregations consisted of:

The Church at the Falls—The Falls Church, in Arlington County; Truro Church, Church of the Apostles, and Church of the Epiphany, Herndon, in Fairfax County; St. Margaret’s Church, Woodbridge, St. Paul’s Church, Haymarket, and Church of the Word, Gainesville, in Prince William County; Church of Our Saviour at Oatlands, in Loudoun County; and St. Stephen’s Church, Heathsville, in Northumberland County.

*Id.* at 17 n.7, 694 S.E.2d at 560 n.7.

26. *Id.*, 694 S.E.2d at 560.

27. *Id.*, 694 S.E.2d at 560–61.

28. *Id.* at 18, 694 S.E.2d at 561.

29. *See generally* VA. CODE ANN. § 8.01-267.1 (Repl. Vol. 2007 & Cum. Supp. 2010).

30. *Truro*, 280 Va. at 17–18, 694 S.E.2d at 561.

31. *Id.*

32. *Id.* at 18, 694 S.E.2d at 561.

April 3, 2008, the circuit court issued a letter opinion in which it concluded that “the Diocese, TEC, and the Anglican Communion were all ‘church[es] or religious societ[ies],’ and that CANA, the ADV, the Church of Nigeria, TEC, and the Diocese were all ‘branches’ of the Anglican Communion for purposes of applying Code § 57-9(A).”<sup>33</sup> Additionally, the circuit court held that CANA and ADV were “branches” of TEC and accordingly, the Diocese could seek judicial resolution of its potential interests in the property at issue.<sup>34</sup>

Having established that Virginia Code section 57-9(A) provided the controlling authority over the proceeding, the circuit court held additional hearings to address the constitutionality of the statute.<sup>35</sup> Specifically, TEC and the Diocese argued that Virginia Code section 57-9(A) violated the United States Constitution’s and the Virginia Constitution’s free exercise clauses, principles of due process, and the contracts clause.<sup>36</sup> However, the circuit court upheld the constitutionality of Virginia Code section 57-9(A).<sup>37</sup> On January 8, 2009, the court granted the CANA Congregations’ petitions and simultaneously dismissed TEC’s and the Diocese’s declaratory judgment actions as moot.<sup>38</sup>

On November 9, 2009, the Supreme Court of Virginia agreed to hear TEC’s and the Diocese’s appeal from the circuit court’s judgment.<sup>39</sup> In its June 10, 2010 opinion, the court reversed the circuit court’s order granting the CANA Congregations’ petitions, reinstated the Diocese’s and TEC’s declaratory judgment actions and the CANA Congregations’ counterclaims to those actions, and remanded the proceeding to the circuit court with instructions to decide the dispute pursuant to principles of real property law and contract law.<sup>40</sup>

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33. *Id.*

34. *Id.* at 18–19, 694 S.E.2d at 561.

35. *Id.* at 19, 694 S.E.2d at 561.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*, 694 S.E.2d at 561–62.

40. *Id.* at 29–30, 694 S.E.2d at 567–68.

## III. SUMMARY OF THE COURT'S OPINION

The court began its review of the circuit court's holding by establishing that the assignments of error raised by TEC and the Diocese could be broadly summarized into two principal issues: (1) the district court erred in holding that Virginia Code section 57-9(A) controlled the dispute in light of the facts of the cases, and (2) the district court erred in finding that Virginia Code section 57-9(A) did not violate the United States Constitution and Virginia Constitution.<sup>41</sup> Applying the principle of constitutional avoidance, the court explained it would first determine if Virginia Code section 57-9(A) controlled the cases before evaluating the statute's constitutionality.<sup>42</sup>

To analyze the applicability of the statute, the court reviewed the key terms within the statute that the circuit court relied on in granting the CANA Congregations' Virginia Code section 57-9(A) petitions.<sup>43</sup> Although the court noted that the circuit court's analysis focused on the meaning of "division," "church or religious society," "attached" and "branch," it opted to primarily focus on the "branch" and "division" language of Virginia Code section 57-9(A).<sup>44</sup> The court reviewed the circuit court's definition of the terms *de novo*, with the guiding standard of the analysis being that the terms should be assigned their plain and ordinary meaning in accordance with the context in which the terms were used and the interrelationship of the words being considered.<sup>45</sup>

The court concluded that "whether a congregation is entitled to petition for the relief afforded by Code § 57-9(A)" depends on whether the congregation can demonstrate the statutory prerequisites.<sup>46</sup> Namely, "the congregation must show that there has been a 'division . . . in a church or religious society[ ] to which any such congregation . . . is attached'" and "the 'branch of the church or society' to which the congregation votes to belong must be a

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41. *Id.* at 19, 694 S.E.2d at 562.

42. *Id.* (citing *Davenport v. Little-Bowser*, 269 Va. 546, 557, 611 S.E.2d 366, 372 (2005)).

43. *Id.* at 21, 694 S.E.2d at 562-63.

44. *Id.* at 22, 694 S.E.2d at 563.

45. *Id.* at 21, 694 S.E.2d at 563 (citing *Sansom v. Bd. of Supervisors*, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999)).

46. *Id.*



branch of the 'church or religious society[ ] to which [the petitioning congregation] is attached' prior to the 'division.'"<sup>47</sup> In other words, the court adopted a two-step process for determining the applicability of Virginia Code section 57-9(A): (1) the petitioning congregation must establish that it was attached to a church or religious society in which a division occurred, and (2) the petitioning congregation must establish it voted to belong to a branch of the church or religious society that experienced the division.<sup>48</sup>

The court explained that the facts in the record clearly established that no "division" occurred at the Anglican Communion level and the circuit court erred in holding otherwise.<sup>49</sup> Thus, the relevant inquiry consisted of whether a "division" occurred within TEC and the Diocese.<sup>50</sup> Prior to making this determination, the court restated, and seemingly adopted, the circuit court's definition of "division,"—"[a] split . . . or rupture in a religious denomination that involve[s] the separation of a group of congregations, clergy, or members from the church, and the formation of an alternative polity that disaffiliating members could join."<sup>51</sup> Although TEC and the Diocese argued that a division—as contemplated by Virginia Code section 57-9(A)—could only occur when completed in accordance with the church's polity,<sup>52</sup> the court rejected that position on the grounds that such a requirement would "risk entangling the courts in matters of religious governance" in violation of the First Amendment.<sup>53</sup> Additionally, it noted that "[w]hile it is certainly possible that a division within a hierarchical church could occur through an orderly process under the church's polity, history and common sense suggest that such is rarely the case."<sup>54</sup> Rather, "experience shows that a division within a formerly uniform body almost always arises from a disa-

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47. *Id.* at 21–22, 694 S.E.2d at 563 (quoting VA. CODE ANN. § 57-9(A) (Repl. Vol. 2007 & Cum. Supp. 2010)).

48. *See id.*

49. *Id.* at 22, 694 S.E.2d at 563.

50. *Id.*

51. *Id.* at 25, 694 S.E.2d at 565 (internal quotation marks omitted).

52. "When used in reference to religious entities, the term 'polity' refers to the internal structural governance of the denomination." *Id.* at 12 n.1, 694 S.E.2d at 558 n.1 (citing Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1143–44 (1962)).

53. *Id.* at 26, 694 S.E.2d at 556; *Jae-Woo Cha v. Korean Presbyterian Church*, 262 Va. 604, 610, 553 S.E.2d 511, 514 (2001).

54. *Truro*, 280 Va. at 26, 694 S.E.2d 566.

greement between the leadership under the polity and a dissenting group.”<sup>55</sup>

The court applied this definition of “division” to the facts presented in the record.<sup>56</sup> It noted that “[t]he evidence presented by the CANA Congregations clearly establishes that a split or rupture has occurred within the Diocese and, given the evidence of similar events in other dioceses of TEC, the split or rupture has occurred at the national level as well.”<sup>57</sup> Furthermore, there was no serious dispute that, prior to the 2003 meeting of the GC, the CANA Congregations were attached to TEC and the Diocese.<sup>58</sup> Accordingly, the court held that the circuit court properly concluded a division occurred within TEC and the Diocese and that the CANA congregations were previously attached to those bodies.<sup>59</sup>

Having established that a “division” occurred within TEC and the Diocese, the court turned to the next statutory issue: whether the CANA Congregations voted to affiliate with a “branch” of TEC and the Diocese as a result of the division.<sup>60</sup> The CANA Congregations’ Virginia Code section 57-9(A) petitions turned on whether CANA and ADV were branches of TEC and the Diocese. Noting that CANA’s expansion to allow the newly separated CANA Congregations to join its ranks occurred in *response* to the disputes within TEC—as opposed to being a *result* of the disputes—the court reasoned that

while CANA is an “alternative polity” to which the congregations could and did attach themselves, we hold that, within the meaning of Code § 57-9(A), CANA is not a “branch” of either TEC or the Diocese to which the congregations could vote to join following the “division” in TEC and the Diocese as contemplated by Code § 57-9(A).<sup>61</sup>

It further explained that operation as a separate polity would not preclude a religious entity from being a branch of the church or religious society that the congregation previously attached to, but that “[Virginia Code section 57-9(A)] requires that each branch proceed from the same polity, and not merely a shared tradition

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55. *Id.*

56. *See id.* at 27, 694 S.E.2d at 566.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 28, 694 S.E.2d at 567.

of faith.”<sup>62</sup> Accordingly, because the CANA Congregations did not belong to a branch of TEC, Virginia Code section 57-9(A) did not control the outcome of the dispute and the action needed to be remanded to the circuit court with instructions to decide the dispute pursuant to principles of real property law and contract law.<sup>63</sup>

#### IV. CRITIQUE OF OPINION AND COMMENTARY

The Supreme Court of Virginia resolved the case simply enough, deciding that Virginia Code section 57-9(A) did not apply.<sup>64</sup> However, it left many issues underlying the statute and the case unresolved.<sup>65</sup> The court could have interpreted the statute in its entirety by considering the implications of fully defining all of the statute’s important terms. Indeed, the court began its analysis by approaching Virginia Code section 57-9(A) as a whole—defining various key terms in relationship with each other—rather than defining terms in isolation as the circuit court did.<sup>66</sup> However, the court interpreted the statute only as deeply as necessary to deem it inapplicable, then ended its analysis.<sup>67</sup> In truncating its analysis, the court declined to provide a full analysis that might have changed its views underlying its partial analysis. That is, had the court addressed some of the difficult issues it ignored, it might have found that the partial analysis that became the core of its opinion rested on a possibly insufficient foundation. Nonetheless, given the doctrine of constitutional avoidance, the court’s approach is understandable.<sup>68</sup>

The court may have provided its truncated analysis due to a concern that it not become too enmeshed in ecclesiastical issues surrounding and underlying the statute and the case.<sup>69</sup> Unfortu-

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62. *Id.* at 28–29, 694 S.E.2d at 567.

63. *Id.* at 29, 694 S.E.2d at 567 (citing VA. CODE ANN. § 57-7.1 (Repl. Vol. 2007)).

64. *Id.*

65. *See id.* at 21, 694 S.E.2d at 562.

66. *Id.* at 21–22, 694 S.E.2d at 563.

67. *See id.*

68. Per the principle of constitutional avoidance, the court will not examine the constitutionality of a statute unless it first determines the statute is applicable in the particular action. *Id.* at 19, 694 S.E.2d at 562 (citing *Davenport v. Little-Bowser*, 269 Va. 546, 557, 611 S.E.2d 366, 372 (2005)).

69. *Id.* at 26, 694 S.E.2d at 565–66 (quoting *Jae-Woo Cha v. Korean Presbyterian Church*, 262 Va. 604, 610, 553 S.E.2d 511, 514 (2001)).

nately, in declining to address those questions, the court appears to have ignored their relevance and existence. Given that the court believed it did not need to enter the ecclesiastical thicket or fully analyze Virginia Code section 57-9(A) to decide the case in front of it, it arguably resolved the case justifiably.<sup>70</sup> However, the court's approach leaves an opinion that does not provide much guidance for the circuit court or future litigants. The court may have believed it impossible to analyze the statute any more deeply without resolving ecclesiastical issues. However, in order to give guidance to the hierarchical churches to which Virginia Code section 57-9(A) explicitly applies,<sup>71</sup> the court arguably should have acknowledged the existence of the ecclesiastical issues that arise when attempting to apply Virginia Code section 57-9(A) in the context of hierarchical churches, even if it could not resolve those issues.

The court approached Virginia Code section 57-9(A) more broadly than the circuit court but possibly still not broadly enough. The court noted that proper statutory construction requires that statutory terms be read in relation to one another, rather than in isolation.<sup>72</sup> Indeed, the court suggested that the circuit court had improperly defined a number of key statutory terms in isolation, rather than in relation to one another.<sup>73</sup> Nonetheless, the court did not define all of the terms it could have defined.

The supreme court defined the terms it believed necessary to define and declined to define other terms in applying the statute.<sup>74</sup> For example, it specifically declined to define "church or re-

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70. See *Alexander v. Allen*, No. 1680-09-1, 2010 Va. App. LEXIS 66, at \*2 n.1 (Ct. App. Feb. 23, 2010) (noting that "an appellate court decides cases 'on the best and narrowest ground available'" and will "not decide the remaining questions presented in [a] case" (quoting *Luginbyhl v. Commonwealth*, 48 Va. App. 58, 64, 628 S.E.2d 74, 77 (Ct. App. 2006) (en banc))).

71. *Truro*, 280 Va. 13, 694 S.E.2d at 558 (citing *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967) (explaining that Virginia Code section 57-9 applies to congregations of hierarchical churches)).

72. *Id.* at 21–22, 694 S.E.2d at 563. The court noted that defining words in a statute individually is not the appropriate way to determine what a statute means. *Id.* at 21, 694 S.E.2d at 563 ("When considered in the overall context of the statute, a proper construction of language of Code § 57-9(A) must take into account the interrelationship of the words being considered.").

73. *Id.* at 21, 694 S.E.2d at 562–63 (suggesting that the circuit court defined "division," "church or religious society," "attached," and "branch" in isolation and outside of the context of the statute as a whole).

74. *Id.*, 694 S.E.2d at 562 ("[W]e will first consider de novo the meaning of the rele-

ligious society” or determine whether the Anglican Communion is a church or religious society.<sup>75</sup> The court elided the issue, noting there had been no division in the Anglican Communion regardless of whether the entity was a church or religious society.<sup>76</sup> However, the court declined to provide guidance regarding how a future court ought to determine whether the Anglican Communion or similar entity is a church or religious society.<sup>77</sup>

In discussing the term “division,” the court followed a similar path and declined to address the implications of its interpretation.<sup>78</sup> The court appeared to recognize that the term “division” should be treated as a term of art in the statute, but, for purposes of determining if there had been a division in TEC or the Diocese, approached the term—like the circuit court did—as if the term has a relatively common meaning.<sup>79</sup> The court simply retraced the steps of the circuit court and concluded that the circuit court was correct on some issues regarding the application of “division” to the instant situation and incorrect on others.<sup>80</sup> The court reviewed the evidence that the circuit court examined, including the testimony of experts, and reached a somewhat different set of conclusions than the circuit court did.<sup>81</sup> The court found—as the circuit court did—that a division had occurred in the TEC and Diocese,

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vant terms in Code § 57-9(A), and then apply our construction of those terms to the circuit court’s findings of fact to the extent that they remain applicable.”).

75. *Id.* at 22, 694 S.E.2d at 563.

76. *Id.* (“[W]e conclude that the circuit court erred in its holding that there was a division in the Anglican Communion for purposes of the application of Code § 57-9(A) in these cases.”).

77. Whether the Anglican Communion is a church for purposes of Virginia Code section 57-9(A) may be an easy question if the term “church” is supposed to focus on a structured body or may be more difficult if it is supposed to focus on a shared group of beliefs. Compare CHRISTOPHER L. WEBBER, WELCOME TO THE EPISCOPAL CHURCH 108 (1999) (“The Episcopal Church is a member of what is called the worldwide Anglican Communion: a family of churches spread around the world and sharing a common understanding of the Christian faith.”), and *id.* at 109 (“Anglicans took their faith with them and knew they had an obligation to share it with others, gradually becoming a family of independent churches bound together by a common heritage and a common understanding of the faith.”), with *id.* at 110 (“But the Anglican Communion remains an international church without a governing body.”).

78. *See Truro*, 280 Va. at 22–27, 694 S.E.2d at 563–66.

79. Compare *id.* at 23, 694 S.E.2d at 563–64 (recognizing the majority of expert testimony attempted to define the term “division” in accord with the General Assembly’s intention when enacting the predecessor statute of Virginia Code section 57-9(A)), with *id.* at 26–27, 694 S.E.2d at 566 (discussing division in the more general application of occurring in uniform bodies and applying those principles to the case).

80. *See id.* at 22–27, 694 S.E.2d at 563–66.

81. *Id.* at 23–27, 694 S.E.2d at 564–66.

but that—unlike the circuit court’s finding—no division had occurred within the Anglican Communion.<sup>82</sup>

How the court reached its conclusions is worth discussion. The court chose to define division in a manner that avoided grappling with ecclesiastical issues.<sup>83</sup> The court noted that it cannot get entangled in ecclesiastical matters.<sup>84</sup> It then suggested that the fact that the circuit court’s definition of “division” avoids entanglement makes it the proper definition.<sup>85</sup> The court specifically declined to accept TEC’s and the Diocese’s definition of division, arguing that it would require that the court become involved in ecclesiastical issues.<sup>86</sup> Unfortunately, the court did not provide sufficient analysis to conclude that it believed the circuit court’s definition to be a better reading of the words of the statute than TEC’s and the Diocese’s position.<sup>87</sup> It merely argued that the circuit court’s definition allowed courts to avoid entanglement in ecclesiastical issues when applying the statute.<sup>88</sup> It is curious that the court defined the term without reference to context of the term or discussion of the General Assembly’s intent regarding the application of the statute, given that the court began its discussion of the statute noting that its analysis would be guided in that way.<sup>89</sup> Moreover, if the court’s interpretation is not in accord with the context of the term and the General Assembly’s intent, it

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82. *Id.* at 22, 27, 694 S.E.2d at 563, 566.

83. *Id.* at 26–27, 694 S.E.2d at 565–66.

84. *Id.* at 26, 694 S.E.2d at 566 (citing *Reid v. Gholson*, 229 Va. 179, 187, 327 S.E.2d 107, 111–12 (1985)).

85. *See id.* at 26–27, 694 S.E.2d at 566.

86. *Id.* at 26, 694 S.E.2d at 565–66 (“Inherent in the concept that a division must be recognized through a formal process within the church’s polity is that the courts would ultimately be drawn into an ecclesiastical dispute to determine whether a division as contemplated by Code § 57-9(A) had occurred.”).

87. Indeed, the court restates the definition of the circuit court and applies it, but never expressly concludes that the definition is in accord with the intention of the General Assembly as it existed at the time it enacted the predecessor statute to Virginia Code section 57-9(A). *Id.* at 25, 694 S.E.2d at 565, 566.

88. *Id.* at 27, 694 S.E.2d at 566.

Moreover, in resolving the issue of whether a division has occurred under the standard adopted by the circuit court, there is no requirement that the court involve itself in questions of religious governance or doctrine. Rather, the court simply determines from the facts presented whether the division has occurred, without regard to the nature of the dispute, whether over doctrine or some other cause, which lead to the separation of the congregation and its attachment to a different polity.

*Id.*

89. *See id.* at 21–22, 694 S.E.2d at 562–63.

cannot be justified on the basis of constitutional avoidance.<sup>90</sup> The doctrine of constitutional avoidance suggests that constitutional questions be avoided when possible, not that statutes be interpreted in any way possible so as to avoid a constitutional question.<sup>91</sup>

The court came closest to meeting its requirement that terms be interpreted in relation to one another in its discussion of the term “branch.”<sup>92</sup> It defined “branch” in relation to “division.”<sup>93</sup> The court appeared to suggest that a branch of a church can only be created as a direct result of a division within the church, as opposed to merely being created in response to a division.<sup>94</sup> Thus, Virginia Code section 57-9(A) was not applicable in this action because—even though there was a division in TEC and the Diocese—the dissenting congregations did not join a branch of TEC or the Diocese when they aligned themselves with CANA and ADV.<sup>95</sup> Rather, given the fact that CANA and ADV existed before the division and were merely restructured in response to it, the

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90. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007) (citations omitted) (“If a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.”).

91. Granted, the court’s jurisprudence requires it to interpret a statute to avoid a constitutional infirmity. *Burns v. Warden*, 268 Va. 1, 2, 597 S.E.2d 195, 196 (2004) (citation omitted). The predisposition to avoid constitutional issues notwithstanding, it is still true that construing statutes to cure constitutional deficiencies is allowed only when such construction is reasonable. *Va. Soc’y for Human Life v. Caldwell*, 256 Va. 151, 157, 500 S.E.2d 814, 816–17 (1998) (citation omitted). Indeed, it is well settled that a statute cannot be judicially rewritten so as to bring it within constitutional requirements. *Reno v. ACLU*, 521 U.S. 844, 884–85 & nn.49–50 (1997) (citation omitted); *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1988). It is important to note that this is not to suggest that the court adopted the incorrect interpretation. However, the only express justification the court offered for adopting its definition of division is that it was the definition that avoided entangling the courts in ecclesiastical issues. Although certainly a valid consideration in statutory interpretation, that is not the dispositive issue in defining the term. The dispositive issue is whether the court defined the term reasonably, in accordance with its context, and faithful to the General Assembly’s intent. There is insufficient comment by the court as to whether it did so when it adopted this definition of “division.”

92. *Truro*, 280 Va. at 27, 694 S.E.2d at 566–67.

93. *Id.* at 28, 694 S.E.2d at 566–67.

94. *Id.*, 694 S.E.2d at 567.

95. *Id.*

We further conclude that a proper construction of Code § 57-9(A) requires a petitioning congregation to establish both that there has been a division within the church or religious society to which it is attached and that subsequent to that division the congregation seeks to affiliate with a branch derived from that same church or religious society.

*Id.*

effect of the dissenting congregations' decision was to join a branch of a different church—the Church of Nigeria.<sup>96</sup> It appears that the branch to be joined must be one that comes into existence as a result of the division, not one that is preexisting.<sup>97</sup>

However, according to the court, though a qualifying branch can only be created from a division, it is not a necessary result of a division.<sup>98</sup> A division can occur within a church or religious society without a branch of that church or religious society being created.<sup>99</sup> The plain statutory language of Virginia Code section 57-9 appears to contemplate that a branch exists whenever a division occurs.<sup>100</sup> Indeed, the existence of a branch may be the only fact that creates a property dispute of the type Virginia Code section 57-9(A) is supposed to resolve. The existence of a branch arguably creates the uncertainty as to ownership of the property or the allegiance of the congregation that makes the dispute a real property issue. If one views a church's or religious society's division—as opposed to the existence of personal division among the members of the church or religious society—as a separation (“separation approach”), the body of a church splits into two parts: the original church and a branched church.<sup>101</sup> Under this separation approach to the concept of “division,” a division creates a branch and a branch is proof that a division has occurred.<sup>102</sup>

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96. *Id.*

97. *See id.* at 28, 694 S.E.2d at 566–67. In its discussion of the terms “branch” and “division,” the court briefly discussed the term “attached.” *Id.* at 27–28, 694 S.E.2d at 566. After interpreting “division,” the court interpreted “attached,” then “branches.” *Id.*, 694 S.E.2d at 566–67. However, the court did not delve deeply enough into how these terms related to one another to provide substantial guidance regarding Virginia Code section 57-9(A)'s meaning. The court may have sought to avoid addressing an ecclesiastical question. However, its decision either avoided the question for just a bit of time or may have inadvertently resolved an ecclesiastical question that the court did not want to address. It is possible that whether a branch—an attached piece—of a hierarchical, geographically based church exists is an ecclesiastical matter.

98. *See id.* at 28, 694 S.E.2d at 567.

99. *See id.* at 28–29, 694 S.E.2d at 567.

100. VA. CODE ANN. § 57-9(A) (Repl. Vol. 2007 & Cum. Supp. 2010) (arguably suggesting that a branch exists whenever a division occurs).

101. The court seemed to hint it agreed with this separation approach—that a division necessarily leads to branching—when it discussed the issue in relation to the Anglican Communion. *Truro*, 280 Va. at 22, 694 S.E.2d at 563. However, it clearly rejected such an approach shortly thereafter when it discussed branching in the context of TEC and the Diocese. *Id.* at 28, 694 S.E.2d at 567.

102. *Id.* at 28–29, 694 S.E.2d at 567.



The court rejected a separation approach reading of the statute.<sup>103</sup> However, in doing so, it left the precise relationship between division and branch unclear. What is clear is that, to invoke Virginia Code section 57-9(A), a congregation has to join a branch of the church with which it had been affiliated.<sup>104</sup> It is not enough that the congregation merely leave the original church; it must divide from the original church and subsequently vote to belong to a branch of that church.<sup>105</sup> In this regard, the court suggests that a branched church must exist, that the branched church must have come about as a result of the division, and that the branched church must have a link to the original church.<sup>106</sup> However, it is unclear whether the linkage between the branched church and the original church must be ongoing or if the link needs to be merely that the branched church came from the original church. The court appears to require, at some point after the division and as a result of the division, the creation of a formal church that could accept the congregations that had decided to disaffiliate with the original church.<sup>107</sup> Without a qualifying branched church for the congregation to vote to belong to, Virginia Code section 57-9(A) does not apply.<sup>108</sup>

Under the court's construction of Virginia Code section 57-9(A), it appears that—as a result of the supposed division in TEC—the dissident congregations or an entity associated with them could have formed an empty church polity with doctrine similar to TEC. That polity, whether approved by TEC or not, could have qualified as a branched church of TEC.<sup>109</sup> The dissident congregations would then have been free to vote to affiliate with the branched church. One could claim that this result avoids deciding ecclesiastical questions. However, that is unclear. Whether a separate branched church remains connected to a mother church appears to be an ecclesiastical question.<sup>110</sup> The court implicitly conceded

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103. *Id.*

104. *Id.* at 28, 694 S.E.2d at 567.

105. *See id.*

106. *See id.* at 27–29, 694 S.E.2d at 566–67.

107. *Id.* at 28–29, 694 S.E.2d at 567.

108. *Id.*

109. *Id.*

110. *See St. John's Presbytery v. Cent. Presbyterian Church of St. Petersburg*, 102 So. 2d 714, 719 (Fla. 1958) (noting that it would be impermissible to address the ecclesiastical question regarding which of several factions of a religious entity was the successor of the religious entity).

that in its opinion.<sup>111</sup> Rather than answer the ecclesiastical question, the court restated the question as a technical question of branching that could be viewed as non-ecclesiastical.

At the heart of the issue is the need to distinguish between a dissident congregation that leaves TEC and a congregation that joins a different branch of TEC.<sup>112</sup> TEC's position is that it must make the decision because whether an entity is a true branch of TEC is an issue of internal church governance.<sup>113</sup> However, the court seems to suggest that allowing TEC to decide whether a church is a branch of it would allow the church to decide when the statute applies to it.<sup>114</sup> Although allowing TEC to decide when the statute applies to it seems inappropriate, the current interpretation of the statute creates this problem, not the church's doctrine.<sup>115</sup>

The statute suggests that there is a difference between leaving a hierarchical church and joining a branch of the same hierarchical church.<sup>116</sup> Specifically, the statute provides the majority of the congregation the right to take property "[i]f a division . . ." occurs within the church or religious society to which they are at-

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111. *Truro*, 280 Va. at 26, 694 S.E.2d at 566.

112. *See In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 785, 831 (Cir. Ct. 2008) (Fairfax County).

113. Namely, this is TEC's point in suggesting that a division must be achieved in accordance with its polity. *See Truro*, 280 Va. at 26, 694 S.E.2d at 566. Unless a division is achieved in accordance with denominational polity, dissident congregations that vote to disaffiliate with TEC are not branches of the church. *See id.* Rather, they have opted to simply leave the Church. *See id.*

114. *See id.* at 26, 694 S.E.2d at 565–66.

115. Specifically, it is the nature of hierarchical churches to exert centralized control over those entities affiliated with it. *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967) (describing hierarchical churches as churches "that are subject to the control by super-congregational bodies"). Thus, interpreting the statute as to allow a church to be a branch of TEC, although TEC never approved the church as a branch, appears to divest TEC (or any hierarchical church, for that matter) of authority that it is exclusively entitled to exercise. Thus, were "division" to be read as division in accordance with a church's polity—in which case, a branch is a necessary result—the hierarchical church would not control the application of the statute. Rather, the facts of the case would trigger the applicability of the statute. Of course, one could argue that such a standard would create an incentive for hierarchical churches to prevent congregations from "dividing." Of course, any dispute regarding whether a division occurred in accordance with the church's polity would be a question beyond the jurisdiction of the civil courts to resolve. *Jae-Woo Cha v. Korean Presbyterian Church*, 262 Va. 604, 610, 553 S.E.2d 511, 514 (2001) (noting that "civil courts are not a constitutionally permissible forum for a review of ecclesiastical disputes").

116. *See* VA. CODE ANN. § 57-9(A) (Repl. Vol. 2007 & Cum. Supp. 2010).

tached.<sup>117</sup> Thus, this language gives rise to an inference that a scenario exists in which a dissident congregation could part ways with the church, but that doing so would not qualify as a “division.”<sup>118</sup> The court appears to agree that such a scenario exists.<sup>119</sup> However, the substantive line to be drawn between leaving a church altogether as opposed to separating from the church and joining a branch of the same church almost has to be ecclesiastical or at least quite related to ecclesiastical issues.<sup>120</sup> Unless a branch is any formal polity formed by former members of the original church—a definition foreclosed by the court’s decision—an evaluation of the theological connection between the branch and the original church would seem to require the resolution of ecclesiastical questions.<sup>121</sup> Indeed, that appears to be TEC’s point in suggesting that it must be allowed to decide if a supposed branch of TEC really is a branch of TEC.<sup>122</sup> The fact that the court did not have to draw the substantive line in this case does not mean that the line-drawing is not ecclesiastical.<sup>123</sup> As importantly, the fact that the decision has been taken out of the hands of the

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117. *Id.*

118. *See id.*

119. *Truro*, 280 Va. at 27, 694 S.E.2d at 566 (“Indeed, it is clear that a majority vote by one or more congregations to separate from a hierarchical church under Code § 57-9(A) would not alone be sufficient to establish the fact of a division. To the contrary, we agree with the circuit court that the standard it adopted places a significant burden on the petitioning congregation to establish that the requisite ‘division’ has occurred and that this ‘division’ led to the vote to separate.”).

120. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952) (explaining that the state cannot transfer authority “from one church authority to another” or seek to interfere with a “Church’s choice of its hierarchy”).

121. *See Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“[T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”). In that case, the Supreme Court refused to recognize an implied trust in a dispute over church property between a local church and the general hierarchical church from which the local church departed. *Id.* at 449–50. According to the appellee, the implied trust was conditioned on the general church adhering to its tenets of faith and practice during the time of the local church’s affiliation with it. *Id.* at 443–44. The Court explained that “the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion.” *Id.* at 450.

122. *See In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 785, 828, 831 (Cir. Ct. 2008) (Fairfax County).

123. *See Berkaw v. Mayflower Congregational Church*, 144 N.W.2d 444, 455–56 (Mich. 1966) (indicating that questions involving the existence or nonexistence of affiliation between congregations and general churches are ecclesiastical questions).

church does not make the substance of the line drawing non-ecclesiastical.<sup>124</sup> Rather, it requires that the ecclesiastical line-drawing be completed by other courts.<sup>125</sup> Ultimately, courts will need to deal with the existence of the ecclesiastical issues or possibly give a sterile answer to how section 57-9(A) applies to hierarchical churches.<sup>126</sup>

Courts are involved in an ecclesiastical dispute whenever they must distinguish between a group that is leaving the church and one that is seeking to join a branch of its original church at least when the church disputes whether a branch of it can ever exist. In its discussion, the court alludes to, but does not discuss, the difference between leaving a church and disaffiliating to join a branch of the mother church to which a congregation had been attached.<sup>127</sup> Rather, Virginia courts are left with two pieces of guidance. If the body with which the congregation affiliates after the division is one merely with a “shared tradition of faith,” the congregation has seemingly left the church and affiliated itself with an independent religious body.<sup>128</sup> However, if the entity with which the congregation affiliates is “derived” from the original church and was created as a result of the division, the congregation has joined a branch of the original church.<sup>129</sup> What exactly distinguishes these two standards is unknown, and may even be illusory. Evaluating whether a church merely maintains a shared tradition of faith with another church rather than being derived from it is ecclesiastical in nature, particularly as the doctrinal differences that trigger the split become more pointed. Furthermore,

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124. Indeed, one might argue that leaving the determination of the existence of a branch of a hierarchical church deprives TEC and the Diocese “of the right of construing their own church laws . . . and . . . , in effect, transfer[s] to the civil courts[,] where property rights [are at issue], the decision of all ecclesiastical questions.” *Watson v. Jones*, 80 U.S. (1 Wall.) 679, 733–34 (1871).

125. *See id.* For a discussion of this issue, see Henry L. Chambers, Jr., *Biblical Interpretation, Constitutional Interpretation, and Ignoring Text*, 69 MD. L. REV. 92, 100–02 (2009).

126. A relevant question that remains unanswered is whether the Supreme Court of Virginia provided the lower courts a neutral principle by which to apply the statute. *Presbyterian Church*, 393 U.S. at 450 (1969) (noting that civil courts may only apply neutral principles of law to resolve church property disputes and cannot “determine matters at the very core of religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion” because “the First Amendment forbids civil courts from playing such a role”).

127. *Protestant Episcopal Church in Diocese of Va. v. Truro Church*, 280 Va. 6, 28–29, 694 S.E.2d 555, 567 (2010).

128. *Id.*

129. *See id.* at 28, 694 S.E.2d at 567.

whether a church will be deemed to have derived from another church is an ecclesiastical question, whether the derivation is based on the physical or the doctrinal. The resolution of these issues is arguably the crux of the case and the crux of the statute.

If TEC were a province of an overarching Anglican Communion that had power over TEC, joining the Church of Nigeria might count as joining a branch of the Anglican Communion—a church to which the dissenting congregations would have been attached through the Diocese and TEC. However, that is not the structure of the Anglican Communion.<sup>130</sup> The Anglican Communion is akin to a conference of churches that divides itself along geographical lines.<sup>131</sup> It is not a church itself.<sup>132</sup> Given that the only relationship between TEC and CANA is the communion they share as members of the Anglican Communion, the CANA Congregations aligned themselves with a church that is not related to TEC.<sup>133</sup> The scenario may be described as such: the CANA congregations left TEC and joined a branch of another church.<sup>134</sup> Although that church is in brotherhood with TEC by way of the Anglican Communion,<sup>135</sup> it is not a branch of TEC.<sup>136</sup> Leaving TEC and joining a wholly separate church is the right of the members of the congregation. However, that would not trigger a property dispute covered by Virginia Code section 57-9(A)<sup>137</sup> and may not trigger a property dispute at all.<sup>138</sup> The court declined to interpret Virginia Code section 57-9(A) more fully when it declined to distinguish more fully between leaving a hierarchical church and joining a

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130. *See id.* at 14, 694 S.E.2d at 558–59.

131. *Id.*

132. *See id.*

133. *See id.* at 14, 16, 694 S.E.2d at 559, 560 (noting both TEC and CANA are provinces of the Anglican Communion).

134. *Id.* at 28, 694 S.E.2d at 567.

135. *See id.* at 14, 16, 694 S.E.2d at 559, 560.

136. *Id.* at 28, 694 S.E.2d at 567 (“Thus, while CANA is an ‘alternative polity’ to which the congregations could and did attach themselves, we hold that, within the meaning of Code § 57-9(A), CANA is not a ‘branch’ of either TEC or the Diocese to which the congregations could vote to join following the ‘division’ in TEC and the Diocese as contemplated by Code § 57-9(A).”).

137. Per its plain statutory language, Virginia Code section 57-9(A) only applies in the situation where a dissident congregation votes to belong to a branch of the church with which it was formally attached, not a church or religious society that merely possesses a shared communion with the original church. *See* VA. CODE ANN. § 57-9(A) (Repl. Vol. 2007 & Cum. Supp. 2010).

138. However, this issue will not be addressed as the general application of property law, trust law, and contract law is outside the scope of this comment.

branch of it.<sup>139</sup> That issue is not an abstract issue. It is an important gateway issue to the ultimate interpretation of Virginia Code section 57-9(A), and it is one of a number of issues the court left unresolved.

## V. WHERE DO WE GO FROM HERE?

The court is clear that Virginia Code section 57-9(A) does not apply to this case.<sup>140</sup> The Virginia courts and the parties must look to real property law and contract law to resolve the dispute.<sup>141</sup> The broad question remains: whose property is it? Given that the property at issue is held in trust for the individual congregations,<sup>142</sup> the simple answer may be that the trustees of the property retain control over the property and must use or dispose of it for the benefit of the congregation. However, at least three issues with ecclesiastical implications may arise before such a conclusion can be reached. One issue focuses on what is the congregation for purposes of the continuing trustee/beneficiary relationship. A second issue is whether a congregation that has been attached to a hierarchical church can leave that church. A third issue is under what circumstances, if any, such a congregation may take property with it. Many ways may exist to resolve these issues. All of them will involve addressing or specifically ignoring ecclesiastical issues or canon law.

The majority of each of the CANA congregations voted to disaffiliate with the Episcopal Church.<sup>143</sup> However, it is unclear what that means with respect to who is in the congregation in whose name the property is held in trust. That is, it is unclear whether the congregation—for the purposes of the trust relationship—includes all of the members of the pre-disaffiliated congregation, only includes the congregation members who voted to remain affiliated with TEC, or only includes the congregation members who voted to leave TEC. If Virginia Code section 57-9(A) applied to this case, the congregation as an entity presumably would have

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139. See *Truro*, 280 Va. at 28–29, 694 S.E.2d at 566–67.

140. *Id.* at 29, 694 S.E.2d at 567.

141. *Id.*

142. *Id.* at 12, 694 S.E.2d at 557–58.

143. See *id.* at 16, 694 S.E.2d at 560; Committee Report and Protocol for Departing Congregations from A. Hugo Blankingship, Jr., The Falls Church, et al., to the Rt. Rev. Peter J. Lee, Bishop of Virginia 2 (Sept. 28, 2006) (on file with author).

been deemed to have joined CANA—the putative branch of TEC. CANA's rules on membership would presumably apply, though the issue would not matter to any issue of substance. The property dispute would be resolved. However, the statute does not apply.<sup>144</sup> Consequently, it is unclear what the effect of the votes to disaffiliate may have had on the membership of the relevant congregation.

It is possible that the vote to disaffiliate has had no legal effect. The vote may be nothing more than an expression of displeasure with TEC felt by a majority of the congregation. However, the practical effect has been to convince the CANA Congregations that they have the right to exclude from the parish property the congregants who voted to remain in TEC.<sup>145</sup> Not surprisingly, the congregants who voted to remain affiliated with TEC want to use the parish property.<sup>146</sup>

If the vote has no legal effect, the congregation is presumably comprised of either those who chose to stay in TEC or the entire congregation at the time of the vote adjusted by the members who have formally joined or left the congregation since the vote. However, the issue would seem to be one to be resolved by the internal rules of TEC and the Diocese. The issue may be complicated under canon law given that the dissenters voted to leave TEC.<sup>147</sup> The courts may want no part of resolving the substance of that dispute, given that it is fraught with ecclesiastical issues. Indeed, they could avoid entanglement by allowing internal church policy to resolve the dispute. Nonetheless, the issue needs to be resolved for purposes of determining who should be able to exercise property rights over the parish property until the case is ultimately resolved.

The second issue is related to whether a congregation can leave a hierarchical church. The court determined that the CANA Congregations were clearly affiliated with TEC and the Diocese of

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144. *Truro*, 280 Va. at 29, 694 S.E.2d at 567.

145. See Terms of Standstill Agreement, Approved by the Standing Committee and Executive Board of the Diocese of Virginia (Dec. 18, 2006), available at <http://www.docstoc.com/docs/2937334>.

146. *In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 785, 826 (Cir. Ct. 2008) (Fairfax County).

147. See Resolution of the Executive Board of the Protestant Episcopal Church in the Diocese of Virginia (Jan. 22, 2007) (on file with author).

Virginia before the vote to disaffiliate.<sup>148</sup> A congregation or parish is literally a part of a diocese<sup>149</sup> and must accede to the canons and constitutions of TEC and the Diocese.<sup>150</sup> Individuals may leave TEC.<sup>151</sup> However, it is unclear under canon law whether parishes or congregations can leave TEC. It appears that a congregation may cease to exist under Virginia law.<sup>152</sup> Similarly, a parish may cease to exist under canon law.<sup>153</sup> However, it is unclear that a congregation or parish may literally leave and still be recognized as an entity that, prior to leaving, was an Episcopal congregation or parish. Whether a congregation can leave TEC—as opposed to disbanding and reforming with a similar membership—would appear to be an ecclesiastical question.<sup>154</sup>

The third issue is whether a congregation can leave a hierarchical church and take property with it. This issue is only relevant if the first two issues can be resolved to the benefit of the disaffiliating congregations. The clash of property interests makes the issue important. A congregation, as a direct beneficiary of the trust relationship, has property interests in the subject property.<sup>155</sup> However, all of the subject congregations were attached to TEC and the Diocese.<sup>156</sup> Consequently, it is quite likely that the TEC and the Diocese of Virginia also have property interests in the subject property.<sup>157</sup> Indeed, the entire point to this

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148. *Truro*, 280 Va. at 14–15, 694 S.E.2d at 559.

149. THE GENERAL CONVENTION OF THE EPISCOPAL CHURCH, CONSTITUTION & CANONS 51 (The Archives of the Episcopal Church, eds., 2009) [hereinafter CONSTITUTION & CANONS].

150. *See id.* at 64.

151. *See id.* at 148–49.

152. *See* VA. CODE ANN. §§ 57-11, -15 (Repl. Vol. 2007) (discussing the implications for trustees when a congregation becomes extinct).

153. At the least, it may be returned to mission status. *See* CONSTITUTION & CANONS, *supra* note 149, at 41 (establishing that property will be held in trust for a parish “so long as the particular Parish . . . remains a part of, and subject to, this Church and its Constitutions and Canons”).

154. If Virginia Code section 57-9(A) is constitutional, it would appear to allow a congregation to remain intact in legal form after leaving a hierarchical church. However, the issue of that section’s constitutionality was not addressed in *Truro*.

155. *Marcus, Santoro & Kozak, P.C. v. Hung-Lin Wu*, 274 Va. 743, 751, 652 S.E.2d 777, 781 (2007) (quoting *Broadus v. Gresham*, 181 Va. 725, 731–32, 26 S.E.2d 33, 35 (1943)).

156. *Truro*, 280 Va. at 27, 694 S.E.2d at 566.

157. *See id.*



case is that there are clashing interests.<sup>158</sup> The issue is whether the congregation's interests can override and sever TEC's interests.

The issue that must be resolved and that Virginia courts have avoided thus far focuses on the nature of the relationship that exists among the property, the congregation, and TEC when the property is held in trust for the congregation. This issue can be resolved conceptually in at least three different ways, though the three different solutions are not equally available under either Virginia or canon law. First, a trustee may hold the property for the congregation alone. If one considers the congregation an autonomous entity that can leave the church, it might make sense to allow the congregation to take the subject property and exit. Second, a trustee may hold the property for the congregation and the Diocese, but hold the property for the benefit of the congregation as a limitation on what the Diocese can do with the property. The trustee may hold the property in this manner so that there will be property for the congregation's use as long as the congregation exists.<sup>159</sup> This might restrict the Diocese from repurposing the property during the congregation's existence.<sup>160</sup> Of course, if the congregation ceased to exist, the Diocese might be the entity with a superior interest in the property and might be able to repurpose or dispose of the property.<sup>161</sup> This vision might be sensible if it is thought that individual parishioners may leave a congregation or the Diocese but that congregations cannot leave the Diocese. Third, a trustee may hold the property for TEC or the Diocese through the congregation. That is, given that the congregation or parish has acceded to the canons and constitutions of TEC and the Diocese, one could consider the property as the hierarchical church's property held for the benefit of the con-

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158. See *id.* at 16–18, 694 S.E.2d at 560–61.

159. See generally CONSTITUTION & CANONS, *supra* note 149, at 41, 64 (discussing the means by which property is held for a church); THE DIOCESE OF VIRGINIA, CONSTITUTION AND CANONS 26–27 (2008) [hereinafter DIOCESE OF VIRGINIA] (discussing the means by which property is held for Episcopal churches in Virginia).

160. See VA. CODE ANN. § 57-15 (Repl. Vol. 2007) (outlining the procedure by which abandoned property previously held by a religious group may be transferred when such religious group is "extinct"). See generally CONSTITUTION & CANONS, *supra* note 149, at 40–41, 64; DIOCESE OF VIRGINIA, *supra* note 159, at 26 (discussing the conveyance of abandoned property).

161. See § 57-15; DIOCESE OF VIRGINIA, *supra* note 159, at 26 ("[S]o that the same may be regarded as abandoned property by the Executive Board, which shall have the authority . . . to take charge and custody thereof.").

gregation.<sup>162</sup> This conception of the relationship would suggest that even if a congregation could leave the Diocese intact, its rights in the property would not override the Diocese's rights. Of course, this conception is most sensible if one considers the congregation or parish a part of the Diocese that no longer has the ability to leave the Diocese.<sup>163</sup> How Virginia courts proceed to determine the nature of the relationship or whether the courts couch the issue in precisely this way is not clear. However, the issue is lurking in the dispute, and it is an ecclesiastical one.<sup>164</sup>

All three issues raised above require the consideration of significant ecclesiastical questions. Each of these issues could be resolved without entangling Virginia courts in ecclesiastical issues if TEC were allowed to determine the issues based on internal canon law. However, Virginia courts have an obligation to resolve the issues in accord with Virginia law as long as the courts do not enmesh themselves too thoroughly in issues of church doctrine.<sup>165</sup> The Supreme Court of Virginia provided little if any guidance on any of the issues mentioned above. It is not the court's responsibility to resolve issues not before it.<sup>166</sup> However, some of these issues arguably were before it.

Virginia Code section 57-9(A) is about resolving property disputes.<sup>167</sup> It may well be that Virginia Code section 57-9(A) backhandedly resolves the issues in this case. Colloquially, a property dispute may arise whenever two entities claim to own or have the right to use property. However, Virginia Code section 57-9(A) applies to a more limited style of property dispute: a dispute be-

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162. See generally CONSTITUTION & CANONS, *supra* note 149, at 41, 64 ("All real . . . property held . . . for the benefit of any . . . Congregation is held in trust for this Church and the Diocese thereof."); DIOCESE OF VIRGINIA, *supra* note 159, at 26 ("All real and personal property held by or for the benefit of any Church or Mission within this Diocese is held in trust for The Episcopal Church and the Diocese of Virginia.")

163. See *Truro*, 280 Va. at 15–17, 694 S.E.2d at 559-60 (noting that Truro Church's actions to leave TEC were ineffective according to TEC).

164. See *id.*

165. See *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("[T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine."); *Harris v. Royer*, 165 Va. 461, 465, 182 S.E. 276, 278 (1935) (noting that a court may "neither amend or annul [a] statute . . . unless it [is] unconstitutional" (quoting *Matthews v. Warner's Adm'r.*, 70 Va. (29 Gratt.) 570, 578 (1877))).

166. *Truro*, 280 Va. at 79 n.11, 694 S.E.2d at 567 n.11.

167. *In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 960, 964 (Cir. Ct. 2008) (Fairfax City) (noting that "§ 57-9(A) is a statute that determines *property rights* upon a division in a church or religious society").

tween a hierarchical church and one of its congregations surrounding property that is held in trust for the benefit of the congregation.<sup>168</sup> It is possible that Virginia Code section 57-9(A) provides the only way for a congregation to separate itself from a hierarchical church.<sup>169</sup> It could be thought that the statute only applies in certain situations and appears to resolve specific types of property disputes—disputes where there is confusion about which church a congregation is affiliated with or where there is a legitimate choice for the congregation to make regarding to which of two churches it ought to be deemed attached.<sup>170</sup> Arguably, unless one of these two types of disputes exists, the parish or congregation is considered to remain attached to the church to which it was originally attached.<sup>171</sup>

It may be that situations covered by Virginia Code section 57-9(A) are the only situations in which ecclesiastical property disputes are intractable. It is possible that no property dispute exists in situations not covered by Virginia Code section 57-9(A) or that they can be handled relatively easily without a special statute. The issue of the application of the statute and the existence of a property dispute may dissolve if a court decides that the statute exists to deal with issues of discord in situations where ownership is unclear and intractable, not situations where a majority of members of a congregation are unhappy about the direction of the hierarchical church.<sup>172</sup> That may be the situation in *Truro*. It is possible that no serious property dispute exists.<sup>173</sup> *Truro* may simply involve a situation in which a majority of members of various congregations are unhappy about TEC's stand on church issues and have decided to leave the denomination.<sup>174</sup> If this is the situation, this case could be resolved easily. However, if this case

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168. VA. CODE ANN. 57-9(A) (Repl. Vol. 2007 & Cum. Supp. 2010); see *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 502, 201 S.E.2d 752, 755 (1974) (citing *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967)).

169. See § 57-9(A).

170. See *Episcopal Church Cases*, 198 P.3d 66, 76 n.4 (Cal. 2009) (noting that “[a] statute governing specifically church property obviously is not developed for use in all property disputes”).

171. *Truro*, 280 Va. at 27–28, 694 S.E.2d at 556–67 (passing the distinction between “branches” of a faith for purposes of section 57-9(A)).

172. See *id.* at 15–19, 694 S.E.2d at 559–62 (discussing the events leading to the *Truro* case).

173. See *id.* at 15–16, 694 S.E.2d at 559–60 (noting that the underlying action stems from the approval of the election of Gene Robinson as an Episcopal bishop).

174. *Id.*

is a bit more than that and a serious property dispute remains, this litigation may have a long way to go.

## VI. CONCLUSION

Virginia Code section 57-9(A) is supposed to resolve particular church property disputes without entangling the courts in ecclesiastical issues.<sup>175</sup> Given that Virginia Code section 57-9(A) does not apply to this particular case, the courts may have to navigate a thicket of ecclesiastical issues despite the efforts of the Supreme Court of Virginia to avoid those issues.<sup>176</sup> The Virginia courts could navigate the thicket by recognizing that the issues are ecclesiastical and ceding the issues to internal church canon law or by addressing the issues without becoming too entangled with those ecclesiastical issues. However it is to be resolved, the church property dispute that is the basis of this case still exists, and the Virginia courts will certainly look for a neutral principle to resolve the matter.<sup>177</sup> The Supreme Court of Virginia has, so far, avoided addressing ecclesiastical issues in *Truro*,<sup>178</sup> but it is unclear that the dispute underlying this case can ultimately be resolved without doing so.

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175. *Id.* at 22, 694 S.E.2d at 563.

176. *Id.* at 29 n.11, 694 S.E.2d at 567 n.11.

177. *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (noting that while civil courts may only apply neutral principles of law to resolve church property disputes and cannot “determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion” because “the First Amendment forbids civil courts from playing such a role”).

178. *Truro*, 280 Va. at 29 n.11, 694 S.E.2d at 567 n.11.

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