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The Unaviodable Ecclesiastical Collision in Virginia

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Section 57-9(A) of the Code of Virginia is a statute that purports to resolve church property disputes. There is, however, a significant amount of controversy as to whether the statute encroaches on the free exercise rights of hierarchical churches located in Virginia and enmeshes Virginia courts in the ecclesiastical thicket. Given the debate surrounding Section 57-9(A) and the controversial shift of several mainstream denominations in matters of substantive church doctrine, Virginia is a fertile breeding ground for church property disputes. Accordingly, the Commonwealth is in the midst of an ecclesiastical crisis. The impact of the crisis is evidenced by the recent division within the Episcopal Church's Diocese of Virginia and the subsequent church property litigation that ensued following the division.

This Comment examines the constitutional standards surrounding various courses of action states may pursue to resolve church property disputes and provides a specific analysis of Virginia's statutory scheme for doing so. Current Supreme Court of the United States precedent establishes that courts have three constitutional options they can rely on in resolving church property disputes. Courts may defer to the decision of the religious organization's adjudicatory body, a method of resolution known as the deference approach. Courts may also decide the case on the basis of a neutral principle of law such as property law or contact law. Finally, states may enact special statutes to direct courts on how to resolve church property disputes. This article argues that Section 57-9(A) does not operate as a constitutional method of resolving church property disputes within the Supreme Court's established framework

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for doing so. Accordingly, due to the constitutional issues with Section 57-9(A), the law in Virginia regulating church property disputes is on a path leading to an unavoidable ecclesiastical collision.

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INTRODUCTION

On a national and international scale—perhaps more so now than ever—religious organizations are wrestling with difficult doctrinal questions relating to abortion, homosexual marriage, and the willingness to ordain homosexual ministers.[1] Many religious bodies are starting to reconsider their positions on these controversial matters. Several denominations have shifted, if not completely reversed, their positions on these issues to the great satisfaction of some and the great dismay of others.[2] Indeed, the country is facing an ecclesiastical crisis. This crisis hails the reemergence of a legal issue that managed largely to disappear into the backdrop for generations: church property disputes.

A significant number of churches receive the majority of their funding to maintain and improve church property from the donations of its members.[3] When those members disagree on significant issues of doctrine, the result can be an internal schism within the church. Members sharing the same perspective on a particular issue form opposing factions that wish to operate independently of those members that maintain the opposite perspective.[4] The question remains, however, as to which faction is entitled to possess and use church property that has been funded by members of both factions.[5] While the dispute amongst factions may sometimes be resolved by a religious institution's own internal tribunals, factions may also seek relief

1. *Compare* Jane Lampman, *A Church's Struggle Over Gay Marriage*, THE CHRISTIAN SCI. MONITOR, Jul. 1, 2005, at 2, *available at* http://www.csmonitor.com/2005/0701/p02s01-ussc.html (noting that mainline denominations take a strong position against gay marriage and leave the decision to individual churches on whether or not to adopt the position), *with* Matt Slick, *Christianity and Homosexuality*, CHRISTIAN APOLOGETICS & RESEARCH MINISTRY, http://carm.org/christianity-and-homosexuality (advocating that Christians become more tolerant of homosexuality).

2. *See* SAMUEL KORANTENG-PIPIM, MUST WE BE SILENT? ISSUES DIVIDING OUR CHURCH, *available at* http://www.drpipim.org/homosexuality-contemporaryissues-47/73-why-attitudes-are-changing-on-homosexuality-part-1.html (2001) (noting the changing attitudes on homosexuality by various churches); *see also* Robert Nugent, *The U.S. Catholic Bishops and Gay Civil Rights: Four Case Studies*, 38 CATH. LAW 1 (1998).

3. John C. LaRue, Jr., *Church Budgets and Income*, YOUR CHURCH, Sept. 1, 2001, *available at* http://www.christianitytoday.com/yc/2000/sepoct/12.128.html (stating that "the typical church counts on tithes and offerings for 93 percent of its budget" and "[c]hurches with budgets greater than $500,000 depend less on tithes and offerings (87[percent] of income) than the average church").

4. *See* Ann Rodgers, *Episcopal Gay Bishops Decision Compounds Activists*, PITTSBURGH POST-GAZETTE, Jul. 16, 2009, at A4; Laurie Goodstein, *Conservative Methodists Propose Schisms Over Gay Rights*, N.Y. TIMES, May 7, 2004, at A20; Associated Press, *Episcopalians Meet to Discuss a Possible Split*, N.Y. TIMES, Jan. 11, 2004, at 116; Don Lattin, *California Episcopal Churches Split Over Gay Marriage*, S.F. GATE (Aug. 6, 2003), http://articles.sfgate.com/2003-08-06/news/17504436_1_gay-bishop-episcopal-diocese-anglican-communion.

5. *See* Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 VA. L. REV. 443 (2010); Dan Dalton, *Who Owns Church Property?* (Apr. 8, 2009), *available at* http://www.attorneysforlanduse.com/pdfs/who%20owns%20church%20property.pdf.

from civil courts.[6] In doing so, they place the judiciary in the center of a doctrinal crossfire where courts are left to resolve the legal aspects of the property dispute while avoiding the ecclesiastical questions that are necessarily attached to the dispute.

A recent example of the current ecclesiastical crisis can be seen in the Episcopal Church. In 2003, the highest governing body of the church passed one resolution ordaining a noncelibate homosexual as a minister and another resolution endorsing homosexual marriage.[7] These actions resulted in a nationwide schism within the church in which thousands of members permanently departed from Episcopalian fellowship,[8] and consequently, disputes over church property erupted in numerous states, including California, Connecticut, Georgia, and Virginia.[9] With an increasing percentage of the United States population shifting away from conservative values and other mainstream denominations reconsidering their traditional positions on issues such as homosexual marriage and ordainment of homosexual ministers,[10] it is likely that courts will be faced with an increasing amount of church property litigation.[11]

Recently, Virginia took center stage in the Episcopal Church's property disputes.[12] Several local parishes within the Commonwealth attempted to separate themselves from the Episcopal Church while retaining possession of their congregational property.[13] The case formed the "perfect storm" of

6. Meghaan Cecilia McElroy, Note, *Possession is Nine Tenths of the Law*, 50 WM. & MARY L. REV. 311, 313 (2008).

7. Protestant Episcopal Church in Diocese of Va. v. Truro Church (*Truro*), 280 Va. 6, 15, 694 S.E.2d 555, 559 (2010).

8. *Id.*; *see also* Michelle Boorstein & Jacqueline L. Salmon, *Diocese Sues 11 Seceding Congregations Over Property Ownership*, WASH. POST, Feb. 1, 2007, at B4.

9. *See* Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc., 305 Ga. App. 87, 699 S.E.2d 45 (2010) (local parish sought to disaffiliate from national church, and national church brought action to retain control of church property); Casa De Oracion, Church of God Prophecy v. Carrasco, Nos. H034092, H034193, 2010 WL 1820438 (Cal. Ct. App. May 7, 2010) (San Jose church members sought to remove the treasurer and trustee of the church and gain sole right to control and possess the church's property); Episcopal Church in Diocese of Connecticut v. Gauss, 49 Conn. L. Rptr. 630, 2010 WL 1497141 (2010) (although parish property was held in trust for the diocese, parish members refused to relinquish church property after defecting from the church); *Truro*, 280 Va. 6, 694 S.E.2d 555 (2010) (Episcopalian congregation, formerly affiliated with first diocese, brought action to determine property rights following alleged division of church).

10. *See* Lampman, *supra* note 1.

11. See George Conger, *No break in pace of Episcopal Church lawsuits: The Church of England Newspaper, August 6, 2010 p 6*, GEOCONGER (Aug. 9, 2010), http://geoconger.wordpress.com/2010/08/09/no-break-in-pace-of-episcopal-church-lawsuits-the-church-of-england-newspaper-august-6-2010-p-6; Lampman, *supra* note 1.

12. Mary Frances Schjonberg, *Virginia: Court Ruling Clears Way for Property-Litigation*, EPISCOPAL NEWS SERV. (Dec. 19, 2008), http://www.episcopalchurch.org/81803_103915_ENG_HTM.htm.

13. *Id.*

church property disputes because it involved a dated Virginia statute purporting to resolve the issue, a unique set of facts underlying the case, and national attention surrounding the litigation and the controversial issues at play. Accordingly, the recent church property litigation in Virginia offers the ideal case study to demonstrate why the issue of church property disputes is more relevant now than ever before.

This article revisits the question of what a court may and may not do to resolve these disputes without violating the Establishment or Free Exercise Clauses of the First Amendment. Although the problem is one of national scope, this article will primarily focus on the law within the Commonwealth of Virginia and the recent legal developments to that law as a result of the recent nationwide rupture in the Episcopal Church. Part I discusses Supreme Court treatment of church property disputes and summarizes the constitutional requirements applicable in these disputes. Part II explains the impact of the ecclesiastical crisis on Virginia and recent developments to Virginia law. Part III demonstrates how Virginia's statutory framework governing church property disputes places Virginia courts on the road for an ecclesiastical collision. Part IV presents conclusions as to the future of church property dispute law in Virginia and what changes the law will undergo in the wake of an impending ecclesiastical collision.

I. DOCTRINAL FOUNDATIONS FOR RESOLVING ECCLESIASTICAL CRISES

This section will discuss prior Supreme Court of the United States treatment of church property disputes related to constitutional law. The constitutional scope of permissible state action in relation to the church property developed over the course of several Supreme Court cases. Accordingly, prior to discussing the historical development of First Amendment jurisprudence surrounding the issue, it is essential to understand the current status of the law.[14] The clearest guiding principle in this relatively undefined area of the law is that a court may not resolve a religious property dispute on the basis of religious practice or doctrine.[15] States have their choice of several options in attempting to approach these disputes: (a) deferring to the resolution of the dispute as decided by the religious organization's adjudicatory body; (b) deciding the case on the basis of a neutral principle of law; or (c) enacting legislation that

14. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church (*Presbyterian Church*), 393 U.S. 440, 449 (1969).

15. Serb. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976); Md. & Va. Churches Eldership of Churches of God v. Church of God at Sharpsburg Church (*Churches of God*), 396 U.S. 367, 368 (1970); *Presbyterian Church*, 393 U.S. at 449.

specifically directs the courts how to resolve church property disputes.[16] The Supreme Court has held that one method is generally not preferred over the other unless a court's reliance on a particular neutral principle of law would require it to resolve ecclesiastical questions. [17] In such a situation, the First Amendment requires that "civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization."[18] The path taken by the Court in shaping these constitutional doctrines governing state action in resolving church property disputes is set forth below.

Originally, American courts relied on the English common law rule to resolve church property disputes.[19] That rule, known as "implied trust theory," provided that a hierarchical church maintains the right to control the church property being utilized by local member churches.[20] Specifically, courts implied a trust between a local church and its parent organization in which the local church held the church property in trust for the parent organization.[21] Implied trust theory also provided protection for local churches in the scenario where doctrinal shifts of the parent organization resulted in members of a local church seeking to disaffiliate from the parent organization while still maintaining possession of church property. A local church facing such a situation could argue the "departure from doctrine" element of implied trust theory.[22] Essentially, the local

16. *Churches of God*, 396 U.S. at 368 (Brennan, J. concurring).

17. Jones v. Wolf, 443 U.S. 595, 602 (1979).

18. *Serb. Orthodox Diocese*, 426 U.S. at 724–25.

19. Schmalzbach, *supra* note 5, at 445.

20. *See* Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 559 (1990) ("In place of a finding of actual intent to create a trust in favor of the hierarchy, courts have relied primarily on the concept of implied consent to the hierarchy's rules."); Notes, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1145–49 (1962) (discussing the English origins and early case law of the implied-trust doctrine). *Contra* Watson v. Jones, 80 U.S. 679 (1871) (rejecting the implied trust doctrine).

21. *Watson*, 80 U.S. at 727 (noting how previously English courts had been willing to decide which of the contending parties adhered to the true standard of faith in the church organization); *Judicial Intervention in Disputes Over the Use of Church Property*, *supra* note 20, at 1151 ("Many courts thus declared that church property no matter how obtained was impressed with a trust for the maintenance of the forms of ecclesiastical government to which the founders had adhered.") (citing First Constitutional Presbyterian Church v. Congregational Soc'y, 23 Iowa 567 (1867); Miller v. Gable, 2 Denio 492 (N.Y. 1845); Kniskern v. Lutheran Churches of St. John's & St. Peter's, 1 Sandf. Ch. 439 (N.Y. 1844); Roshi's Appeal, 69 Pa. 462 (1871); Sutter v. Trustees of the First Reformed Dutch Church, 42 Pa. 503 (1862)); *see also* John E. Fennelly, *Property Disputes and Religious Schisms: Who Is the Church?*, 9 ST. THOMAS L. REV. 319, 320 (1997) (noting that in cases involving hierarchical or congregational churches, "a sound view rooted in our perception of church and state relations would require courts to accept, as final and binding, those decisions pertaining to religious matters made by the church's highest authority").

22. *See* Craigdallie v. Aikman, 4 Eng. Rep. 435 (1820) (resolving a property dispute between factions of a Scottish congregation by holding that unless otherwise agreed, the faction espousing the original founding principles of the group is entitled to the property); H. Reese Hansen, *Religious Organizations*

church would bring a judicial action alleging that the parent church significantly deviated from the fundamental tenets of the particular faith, as they were understood at the time the local church affiliated with it.[23] The court would then examine the doctrinal positions of the local church as opposed to the parent organization, determine which position most closely aligned with the traditional tenets of the faith, and terminate the implied trust between the local church and parent church if the parent church had substantially departed from doctrinal beliefs as they existed at the time that the local parish affiliated with the parent organization.[24] Accordingly, a successful challenge in this manner enabled the local church to withdraw from the parent church while retaining control of the property that it had previously held in trust for the parent church. [25]

The Supreme Court formed an alternative method of resolving church property disputes in the 1871 case of *Watson v. Jones*.[26] In *Watson*, members of the Walnut Street Presbyterian Church were divided over which members constituted the elders of the church,[27] and they ultimately formed two factions—each faction claiming it was lawfully entitled to control the church property.[28] The Supreme Court did not rely on implied trust theory to resolve the dispute, but instead crafted a new rule known as the "deference rule."[29] Under that rule, a court must defer to decisions of a church's internal governing structure "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried."[30]

and the Law of Trusts, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 288 (James A. Serritella et al. eds., 2006) (discussing Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 241 A.2d 691, 700–01 (Md. 1968), *vacated and remanded*, 393 U.S. 528 (1969), *decree aff'd*, 254 A.2d 162 (Md. 1969), *appeal dismissed*, 396 U.S. 367, 367–68 (1970) (per curiam)); Jeffrey B. Hassler, Comment, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 PEPP. L. REV. 399, 408–10 (2008); *see also* Fiona McCarthy, *Church Property and Institutional Free Exercise: The Constitutionality of Virginia Code Section 57-9*, 95 VA. L. REV. 1841, 1863 (2009).

23. *See* Hansen, *supra* note 22, at 286.

24. *Id*.; Fennelly, *supra* note 21, at 320.

25. Fennelly, *supra* note 21, at 320.

26. 80 U.S. 679 (1871).

27. *Id*. at 717.

28. *Id*. at 717–18.

29. *Id*. at 727, 734–35.

30. *Id*. at 727. It is important to note, however, that the deference approach only applies to hierarchical churches because congregational churches do not have a higher adjudicatory body to turn to for making binding determinations as to the status of the property. *See Judicial Intervention in Disputes Over the Use of Church Property*, *supra* note 20, at 1157–58. A church is considered a hierarchical church if the religious organization holding the property is a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory of discipline over the whole membership of that general organization. Protestant Episcopal Church in Diocese of Va. v. Truro Church (*Truro*), 280

Accordingly, following *Watson*, courts were left with two approaches to managing church property disputes: (a) the implied trust theory and (b) the deference approach.[31]

The Court made further developments to First Amendment jurisprudence regarding church property disputes law in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* ("*Presbyterian Church*").[32] The issue in *Presbyterian Church* involved the constitutionality of the English common law approach to church property disputes—implied trust theory.[33] In that case, the Mary Elizabeth Blue Hull Memorial Church ("Hull Church") separated from its parent religious organization, and a dispute arose between the two as to the ownership of the Hull Church and its associated property.[34] Applying the implied trust theory and the "departure from doctrine" test, the Supreme Court of Georgia awarded the property to the local congregation.[35] However, the Supreme Court of the United States struck down implied trust theory as unconstitutional.[36] Specifically, it explained that the "departure from

Va. 6, 13, 694 S.E.2d 555, 558 (2010) (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)). The *Watson* case was not decided on constitutional grounds. *See Judicial Intervention in Disputes Over the Use of Church Property*, *supra* note 20, at 1156 ("To be sure, *Watson* is not a constitutional decision. The [F]ourteenth [A]mendment was only a few years old, and it would be many more years before guarantees in the [F]irst [A]mendment would be deemed operative against state action by virtue of the due process clause."). However, the deference rule articulated in *Watson* was revisited in Kedroff v. St. Nichols Cathedral. 344 U.S. 94 (1952). This case involved two different archbishops that claimed a right to use the church property at issue. *Id.* at 96. The Court declared the New York statute unconstitutional because it violated the First and Fourteenth Amendments. *Id.* at 120–21. It applied the deference rule articulated in *Watson* and explained that deferring to a church's internal ruling "necessarily follows in order that there may be free exercise of religion" under the Constitution. *Id*. at 121.

31. 80 U.S. at 725 (noting that the Supreme Court decided to follow the deference approach without absolutely rejecting the English theory of implied trust); *Judicial Intervention in Disputes Over the Use of Church Property*, *supra* note 20, at 1157–58 ("[W]hile most state courts professed adherence to Watson, and while judicial interference with hierarchically organized churches decreased markedly after Watson, the implied-trust doctrine persisted in most states principally in connection with congregationally governed churches." *Id.*

32. 393 U.S. 440 (1969). *But see* Draskovich v. Pasalich, 280 N.E.2d 69, 78 (1972) (leaving open the possibility that the implied trust theory could be applied on some other basis). The case involved two local Presbyterian churches that voted to withdraw from the parent church and become an autonomous Presbyterian body. *Id*. at 71. The local churches maintained that the various theological, political, and administrative actions and declarations by the parent church constituted a departure from the fundamental tenets of faith, a violation of the church constitution. Subsequently, the parent church attempted to regain control over the property being used by the local churches. *Id*. at 81. Rather than make use of the internal appellate procedures with the church governance system, the churches filed suit seeking to enjoin the parent church from trespassing on the properties. *Id*. at 71, 81. The local churches prevailed at the lower level based on the implied trust theory. *Id*. at 72.

33. 393 U.S. at 443–44.

34. *Id.* at. 442–43.

35. *Id*. at 443–44.

36. *Id*. at 449–51.

doctrine" element of implied trust theory violated the First Amendment mandate that civil courts refrain from making any decision regarding the ownership status of church property rights when that decision involved interpretation of church doctrine.[37] It further added that the internal governing authorities of a religious entity are the appropriate arbitrators in matters of "ecclesiastical cognizance," and civil courts cannot be called up to resolve a dispute when the very nature of the dispute implicates ecclesiastical questions.[38] To rely on the courts to resolve such questions would run directly afoul of the Establishment Clause.[39]

Although the Court seized the opportunity in *Presbyterian Church* to eliminate one possible approach for resolving church property disputes, it also crafted a second alternative for courts to handle such litigation. Indeed, states needed another option because the only remaining approach after the abolishment of implied trust theory—the deference approach—could only be applied if the parties belonged to a religious organization that maintained an adjudicatory body to resolve property disputes between its members. Accordingly, if the parties of a church property dispute were members of a church that did not have such an adjudicatory body, a court would be left without an established legal principle to decide the dispute. The Court, presumably sensitive to this dilemma, preempted the problem by explaining that its holding was not to be construed as requiring courts to close their

37. *Id.*

38. *Id.* at 446–47. The Court reaffirmed this position in Serb. Orthodox Diocese v. Milivojevich. 426 U.S. 696, 724–25 (1976). In that case, Milivojevich acted as the bishop over the general church, and the trial court concluded that the members of the church incorrectly removed him from office and appointed a different bishop to replace him. *Id.* at 697–98. In justifying its holding, the Court mentioned a previous Supreme Court decision that indicated that a civil court may not have to show deference to the decisions of religious governing bodies if the decision was made in a fraudulent, collusive, or arbitrary manner. *Id.* at 712. On review, the Supreme Court rejected that arbitrariness was a valid exception to the deference doctrine. *Id.* at 712, 734. The majority went on to explain that application of an arbitrariness exception impermissibly required judicial "inquiry into the procedures that canon or ecclesiastical law supposedly require the church judicatory to follow or else into the substantive criteria by which they supposedly [are] to decide the ecclesiastical question." *Id.* at 713. To do so "would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." *Id.*

39. 393 U.S. at 451–52. The church property dispute cases decided by the Supreme Court at the time of the neutral principles doctrine serve as a precursor to the probation on excessive government entanglement with religion. At the risk of dramatically understating the current state of First Amendment jurisprudence, one approach to testing whether a government action violates the Establishment Clause is the three-part analysis articulated by the Court in Lemon v. Kurtzman. 403 U.S. 602 (1971). Under the *Lemon* test, government action violates the Establishment Clause, unless: (a) there is a legitimate secular purpose for taking the action, (b) the primary effect of the action is to neither inhibit nor advance religion, and (c) the action does not foster excessive entanglement between government and religion. *Id.* at 615. Although a court would likely couch a decision regarding a church property dispute in terms of the "neutral principles" doctrine, the doctrine appears to be very similar to the concept of excessive entanglement.

doors to religious bodies seeking adjudication of property disputes.[40] Rather courts could decide such disputes on the basis of neutral principles of law—principles applicable in any property dispute—without judicially establishing churches in violation of the First Amendment.[41]

The Court made clear in *Presbyterian Church* that states could resolve church property disputes by either deferring to the internal adjudicatory bodies of the church or by applying neutral principles of law; however, it left unanswered the question of whether one approach should be applied to a dispute before considering the other.[42] In other words, in a situation where a church property dispute arose and the church's judicatory rendered a decision purporting to resolve the dispute, were the courts required to defer to that decision where neutral principles of law commanded a contrary outcome?[43]

The Court clarified the answer to this question in *Jones v. Wolf*,[44] where the majority faction of a divided, local church sought to disaffiliate the church from its parent denomination.[45] The denomination's judicatory made a formal decision that the minority faction of the church—the faction that sought to remain aligned with the denomination—was the rightful owner of the property.[46] The minority faction argued that the trial court was required to defer to the decision of the denomination's judicatory.[47] Nevertheless, the Supreme Court of the United States rejected this argument, explaining that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating church property disputes" and is not required to apply the deference approach in lieu of neutral principles when confronted with a decision between the two.[48] The Court then, however, added a caveat to this rule.[49] A court may only choose

40. 403 U.S. at 625; *see also* Jones v. Wolf, 443 U.S. 595, 606 (1979) (noting that there can be no question that the constitutionally protected religious autonomy concerning "matters of church government" encompass a church's freedom to adopt and demand civil court enforcement of its own rules of property ownership).

41. 393 U.S. at 449, 451–52.

42. *Id*. at 449; Kenneth E. North, *Church Property Disputes: A Constitutional Perspective* (2000), *reprinted in* A GUIDE TO CHURCH PROPERTY LAW: THEOLOGICAL, CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS app. C, at 209 (Lloyd J. Lunceford ed., 2006) (discussing the issue in *Jones v. Wolf* of whether a court may forgo the deference test and apply neutral principles of state law).

43. *See* North, *supra* note 42, at 209.

44. 443 U.S. 595 (1979).

45. *Id*. The majority faction brought suit, and the trial court found for the majority faction on the basis of neutral principles of law. *Id*. at 599.

46. *Id*.

47. *Id*.

48. *Id*. at 604.

49. *Id*.

to resolve a dispute applying neutral principles of law if applying those principles would not require the court to decide ecclesiastical questions.[50] If a court must resolve ecclesiastical questions to apply the neutral principles doctrine, it must "defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[51]

A third constitutional alternative for government resolution of church property disputes likely exists in the form of courts applying legislation that specifically governs such disputes.[52] In other words, state legislatures may enact statutes that guide the outcome of a religious property dispute so long as the statute operates in a manner that avoids state involvement in religious doctrine.[53] The precedential basis for this third option is found in Justice Brennan's concurring opinion in *Churches of God*.[54] While it does not appear that the Court has expressly endorsed special statutes as a third alternative approach, the *Churches of God* Court seemingly adopted the reasoning from Justice Brennan's concurrence in *Jones* by quoting it in its ruling.[55] Specifically, the Court's holding relied on Justice Brennan's argument that "a State may adopt *any* one of various approaches for settling church property disputes," but stopped short of quoting his language that categorized special statutes as their own separate approach to resolving church property disputes.[56] This omission notwithstanding, the context of Justice Brennan's concurrence in referencing "various approaches" included states adopting special statutes.[57] Thus, the Court's use of Justice Brennan's concurrence in *Jones* seemingly lends support to the conclusion

50. *Id.*

51. *Id.* (noting that if the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must "defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body" (citing Serb. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976))); *see also* Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church, 98 F.3d 78, 88 (3rd Cir. 1996) (discussing *Churches of God*, 396 U.S. 367, 368 (1970), indicating there are only two approaches to resolving church property disputes).

52. Some commentators argue that the deference approach and the neutral principles doctrine are the only two methods available to civil courts to resolve church property disputes. *See* Justin M. Gardner, Note, *Ecclesiastical Divorce in Hierarchical Denominations and the Resulting Custody Battle Over Church Property: How the Supreme Court Has Needlessly Rendered Church Property Trust Ineffectual*, 6 AVE MARIA L. REV. 235, 245 (2007) (stating that "as the matter currently stands, the civil courts have two permissible methods of adjudicating church property disputes"—neutral principles of law and the deference approach).

53. *Churches of God*, 396 U.S. 367, 370 (1970) (Brennan, J., concurring); *see also In re* Episcopal Church Cases, 45 Cal. 4th 467, 492, 198 P.3d 66, 83 (2009) (approving of the statute because it leaves control of ecclesiastical policy and doctrine to the church).

54. *Churches of God*, 396 U.S. at 370 (Brennan, J., concurring).

55. Jones v. Wolf, 443 U.S. 595, 602 (1979) (quoting *Churches of God*, 396 U.S. 367, 370 (1970) (Brennan, J., concurring)).

56. *Id.*

57. *Churches of God*, 396 U.S. at 370 (Brennan, J., concurring).

that the Court recognizes the constitutional validity of statutes designed specifically to resolve church property disputes. However, it remains unsettled whether the Court considers these "special statutes" to be their own separate category of resolving church property disputes or merely a subcategory of the broader doctrine of "neutral principles of law."[58]

One possible reading of the Court's use of Justice Brennan's *Jones* concurrence is that, in referencing his discussion of the various approaches available to the states for resolving church property disputes, it adopted his categorization of those approaches. According to Justice Brennan, special statutes were an entirely separate approach to resolving church property disputes than "neutral principles of law."[59] This categorization makes sense given that neutral principles of law are supposed to be principles applicable in any property dispute and a statute specifically targeting religious institutions would not be applicable in disputes not involving such institutions. Courts, however, have read *Jones* as considering special statutes merely one type of neutral principle of law that a state may rely on in resolving church property disputes. As one court explained:

> A statute governing specifically church property obviously is not developed for use in all property disputes, but, as the high court has made clear, it may still be considered in applying neutral principles of law as that court defines the term. Such a statute is-or must be-neutral in the sense that it does not require state courts to resolve questions of religious doctrine.[60]

Indeed, when resolving church property disputes, it remains unsettled how courts should reconcile Justice Brennan's categorization of special statutes as a wholly separate approach from neutral principles of law with the *Jones* analysis, which indicates that a special statute is a neutral principle of law. The Supreme Court of Colorado commented on this issue, noting:

> Justice Brennan identified a third approach-the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine. Since the neutral principles approach involves, among other things, an analysis of relevant state statutes, it is not clear how this third alternative differs from a neutral principles analysis.[61]

58. *Compare In re* Episcopal Church Cases, 45 Cal. 4th 467, 481 n.4, 198 P.3d 66, 76 n.4 (2009), *with* Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 91 n.6 (Colo. 1986).

59. *Churches of God*, 396 U.S. at 370 (Brennan, J. concurring) ("Neutral principles of law, developed for use in all property disputes, provide another means for resolving litigation over religious property" and another "approach is the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine.") (citations omitted).

60. *In re* Episcopal Church Cases, 45 Cal. 4th at 481 n.4, 198 P.3d at 76 n.4.

61. *Bishop & Diocese of Colo.*, 716 P.2d at 91 n.6.

Ultimately, although the question whether special statutes are an entirely separate approach from neutral principles of law remains unclear, it is clear that "such statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies."[62]

In summary, there are two definite approaches courts may pursue to resolve church property disputes that do not offend the First Amendment: (1) a court may resolve church property disputes by deferring to the highest deciding body in a church's internal governance so long as doing so does not require the court to resolve ecclesiastical questions; or (2) a court may resolve church property disputes by applying neutral principles of law—those principles of law that are applicable in any property dispute and do not require the court to resolve any ecclesiastical issues underlying the property dispute. There is some confusion as to whether there is a third approach available in the form of special statutes allowing courts to resolve church property disputes without deciding ecclesiastical questions or whether such statutes are merely a subcategory of neutral principles of law.[63] Although states are not under a general obligation to apply any particular approach of these three options in favor of another,[64] the deference approach must be applied where relying on neutral principles of law would require the court to resolve ecclesiastical questions.[65] Furthermore, if special statutes are categorically different from neutral principles of law, such statutes manifest state legislatures' intent to resolve church property disputes in a particular way and, accordingly, courts should attempt to apply such statutes before considering either the neutral principles approach or the deference approach.[66] As will be shown in the next section, however, determining when such statutes are applicable is—and will continue to be—the subject of significant litigation.

II. RECENT ECCLESIASTICAL CRISIS IN VIRGINIA

The ecclesiastical crisis recently found its way into the Virginia courts. In many ways, Virginia acted as the perfect storm for the ecclesiastical crisis to occur. The Code of Virginia contains a statute dating back to the

62. *Churches of God*, 396 U.S. at 370 (Brennan, J., concurring); *see, e.g.*, Goodson v. Northside Bible Church, 261 F. Supp. 99 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967).

63. *Compare In re* Episcopal Church Cases, 45 Cal. 4th at 481 n.4, 198 P.3d at 76 n.4, *with Bishop & Diocese of Colo.*, 716 P.2d at 91 n.6.

64. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) (quoting *Churches of God*, 396 U.S. at 368); *see also In* re Episcopal Church Cases, 45 Cal. 4th at 478, 198 P.3d at 74) (noting that the First Amendment does not dictate that a state must follow a particular method of resolving church property disputes).

65. *Jones*, 443 U.S. at 604.

66. *See Judicial Intervention in Disputes Over the Use of Church Property*, *supra* note 20, at 1177–80.

Civil War that purports to resolve church property disputes.[67] Additionally, when the Episcopal Church experienced a major division in 2003, several congregations that left the church were located in Virginia.[68] Accordingly, the Virginia congregations' battle to retain their church property gained nationwide attention as similarly situated dissident congregations in other states waited, hoping that the Virginia dispute could lend support to their efforts.[69] This section identifies the relevant background of various factors contributing to Virginia's recent ecclesiastical crisis. Part II.A discusses the Virginia statute that governs church property disputes and the history of that statute. Part II.B explains the events giving rise to the recent schism within the Episcopal Church. Part II.C analyzes the events that unfolded as dissident congregations in Virginia attempted to retain control of church property following their separation from the Episcopal Church. Part II.D summarizes the ruling of the Supreme Court of Virginia on the dispute and its reasoning in reaching that ruling.

A. Virginia's Statutory Framework for Church Property Disputes

As between the deference approach, the neutral principles of law approach, and the special statutes approach, the Virginia General Assembly elected to resolve church property disputes through the use of a special statute.[70] Indeed, Virginia adopted its church property dispute statute, Virginia Code section 57-9 ("Section 57-9"), before the United States Supreme Court made several significant decisions delineating constitutional principles applying to government resolution of church property disputes.[71] Section 57-9(A) is a Civil War-era statute meant to determine various parties' property rights in church property when a congregational "division" occurs within a hierarchical "church" or a "religious society."[72] It provides, in relevant part, that:

> 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.[73]

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

68. *Truro*, 280 Va. 6, 15, 694 S.E.2d 555, 559 (2010); Schjonberg, *supra* note 12.

69. *Truro*, 280 Va. at 15, 694 S.E.2d at 559.

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

71. Virginia Religious Freedom Act, ch. 210, 1867 Va. Acts 649–50 (current version at VA. CODE ANN. § 57-9 (Repl. 2007)).

72. VA. CODE ANN. § 57-9(A).

73. *See id.*

The statute purports to provide courts with a neutral method for resolving property disputes that surround a specific church's property when a congregation of that church divides and a majority of the congregation votes to belong to a branch of the church to which it was formerly attached.[74] However, deciding when a "division" has occurred, or whether a church is a branch of a particular hierarchy, carries its own inherent difficulties.[75] Namely, the resolution of these issues can easily become ecclesiastical quicksand, dragging the courts into the impermissible realm of deciding matters within the province of religious governance.[76]

Section 57-9(A)'s roots reach back to the Reconstruction era. The Virginia General Assembly enacted the Virginia Religious Freedom Act ("VRFA")—the predecessor to Section 57-9(A)—in 1867.[77] The General Assembly enacted the VRFA against the backdrop of several major church divisions that had already occurred as a result of diverging perspectives on the issues of slavery and federalism.[78] John Baldwin—at this point in time

74. *Id.*

75. *See* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1863 (1998) ("A look at appellate decisions, which develop alternatives among the options the Supreme Court has left open, reveals that the law is less straightforward than one might suppose from reading the Court's jurisprudence."); Schmalzbach, *supra* note 5, at 443. *Compare* Hoskinson v. Pusey, 73 Va. (32 Gratt) 428, 439 (1879) (implicitly recognizing that the division statute does not require that a division be authorized or approved by a denomination), *with* Reid v. Gholson, 229 Va. 179, 192, 327 S.E.2d 107, 115 (1985) (defining "division" as "to separate from the body of [the] church . . . to rend it into groups, each of which seeks to take over all the property and characterize the other as apostate, excommunicated, and outcast . . . such a division [must be created] as a prerequisite to relief under [Section] 57-9").

76. Jae-Woo Cha v. Korean Presbyterian Church, 262 Va. 604, 610, 553 S.E.2d 511, 514 (2001); *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 221–22 (1963); *Presbyterian Church,* 393 U.S. 440, 449 (1969) (noting that the First Amendment "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.").

77. *See* Virginia Religious Freedom Act, ch. 210, 1867 Va. Acts 649–50 (current version at VA. CODE ANN. § 57-9 (Repl. 2007)); *see also* Finley v. Brent, 87 Va. 103, 108, 12 S.E. 228, 230 (1890).

78. *See* McCarthy, *supra* note 22, at 1848. One such division involved the Methodist Episcopal Church ("MEC") in 1844. *See* Humphrey v. Burnside, 67 Ky. 215, 225–26 (1868) (noting that the separation within MEC was one of the most prominent divisions at the time and "was an event that . . . formed a part of, the history of the country, of which no well-informed man could be ignorant"). Pursuant to a "plan of separation" adopted by the MEC General Convention, MEC formally divided into a northern and southern branch. *See* Smith v. Swormstedt, 57 U.S. 288, 298-99, 301 (1853). The MEC General Convention's resolution allowed for congregations that resided in the area constituting the border between the northern and southern branch to align itself with either branch. *See* Brooke v. Shacklett, 54 Va. (13 Gratt) 301, 326 (1856). To do so, the individual church needed to present the matter to its congregation to be decided by majority vote; several years after the division occurred, contention arose as to whether the MEC or the MEC South was the appropriate beneficiary of a particular trust. *Id.* at 323–24, 327. The parties to the dispute were opposing factions at two churches in Fauquier County, with one faction being supported by the northern branch and one faction being supported by the southern branch. *Id.* The Supreme Court of Virginia held that, pursuant to the separation plan, the MEC experienced a division subsequent to the effective date of the deed in question, but prior to the date on

the Speaker of the House of Delegates—sponsored the VRFA.[79] The General Assembly's intent behind enacting the statute was to provide the courts with a method of managing church property disputes in light of the doctrinal instability of churches during that period in history.[80] As originally enacted, the statute provided:

> [W]hereas divisions have occurred in some churches or religious societies to which such religious congregations have been attached, and such divisions may hereafter occur, it shall in any such case be lawful for the communicants... by a vote of a majority of the whole number... to determine to which branch of the church or society such congregation shall thereafter belong.[81]

The statute, as originally enacted and currently, affords congregations executing voting procedures in accordance with the provision significant protection against having to surrender their property to the parent church because a judicial determination of property rights under Section 57-9(A) is "conclusive as to the title to and control of any property held in trust for such congregation."[82] Although Section 57-9 provides the basis of considerable church property litigation,[83] it is not the only statute in the Virginia code affecting the ability of religious institutions to own property. Rather, it is one of several statutes in the Virginia Code that address the disposition of property held by religious organizations.[84] This Article,

which the case reached the court. *Id.* at 327. Presuming that the separation plan had been properly adopted by the MEC General Convention—making it valid—the provision of that plan which allowed border societies to vote "to choose to which jurisdictional division of the church they w[ould] belong [either to the MEC or MEC South]," was derivatively valid. *Id.* at 326. Noting that the church at issue fell within the border region and, by majority vote, adhered to the MEC South, the Supreme Court of Virginia held that the deed operated to convey the property to the members of the southern branch. *Id.* at 327–28.

79. *In re* Multi-Circuit Episcopal I, 76 Va. Cir. 786, 843 (Va. Cir. Ct. 2008); *see also* HAMILTON JAMES ECKENRODE, THE POLITICAL HISTORY OF VIRGINIA DURING RECONSTRUCTION 41 (J.M. Vincent et al., eds. 1904).

80. *In re* Multi-Circuit Episcopal I, 76 Va. Cir. at 855.

81. Virginia Religious Freedom Act, ch. 210, 1867 Va. Acts 649–50 (current version at VA. CODE ANN. § 57-9 (Repl. 2007)).

82. *Id.* The first Supreme Court of Virginia case to discuss the predecessor statute to Section 57-9 is *Hoskinson v. Pusey*. 73 Va. (32 Gratt) 428 (1879). Once again, members of the MEC and the MEC South were disputing property rights as to church property purporting to be located within the border area of the 1844 division. *Id.* at 431. Specifically, the property at issue involved a "house of public worship" known as "Harmony Church" and a parsonage. *Id.* at 431, 434. In that case, the deed addressing the disposition of the properties contained the same substantive language as the deed at issue in the *Brooke* case. *Id.* However, the alignment of the members of the church remained unclear because of inconsistent and conflicting voting occurring at local conferences. *Id.* at 440. Although understanding the intricacies of the case's factual background are not necessary for the purposes of this article, it is worth noting that *Hoskinson* could arguably be read as holding that a "division" under Section 57-9 need not occur in accordance with the hierarchical church's policy to qualify as a "division" within the meaning of the statute.

83. *See* Baber v. Caldwell, 207 Va. 694, 152 S.E.2d 23 (1967); Finley v. Brent, 87 Va. 103, 12 S.E. 228 (1890); *Hoskinson*, 73 Va. (32 Gratt) 428 (1879); Brooke v. Shacklett, 54 Va. (13 Gratt) 301 (1856).

84. In distinguishing the statutory framework governing property held for religious purposes, McCarthy

however, will primarily focus on the Supreme Court of Virginia's treatment of Section 57-9(A) in light of the recent rupture in the Episcopal Church.

B. Rupture in the Episcopal Church Reaches Virginia

The Episcopal Church ("TEC") formally organized in 1789 as the successor to the Church of England in colonial America.[85] TEC is primarily located in the United States but also maintains a presence outside the country.[86] It is the principal national church following the Anglican tradition in the United States.[87] As an Anglican church, there is worldwide affiliation between TEC and other Anglican churches by way of the Anglican Communion.[88] The Anglican Communion, however, is not vested with formal decision-making authority over any of its members.[89] Rather, "[t]he churches of the Anglican Communion are held together by bonds of affection and common loyalty, expressed through links with the 'Instruments of Communion.'"[90] These "instruments of communion" are the Archbishop of Canterbury, the Lambeth Conference, the Primates

stated:

> Section 57-9 is connected to a larger statutory scheme in Virginia that governs property held for religious purposes. Overall, the code emphasizes a distinction between congregational and hierarchical churches. It also requires that a trust for an indefinite beneficiary (such as an individual or unincorporated body) be expressly validated by statute. Section 57-7.1 validates transfers of religious property that are "made to or for the benefit of any church, church diocese, religious congregation or religious society." There are two sections of the code that provide alternative methods for holding religious property. Section 57-16(A), enacted in 1942, permits church property to be held in the name of an ecclesiastical officer. Section 57-16.1, enacted in 2005, permits an unincorporated church or religious body to create a corporation to hold, administer, and manage its real and personal property. Thus, if a hierarchical body wants to avoid having the congregational form of governance imposed on it by Section 57-9(A), the alternative options of incorporating or titling the property in the name of an ecclesiastical officer are found in the other statutes. Finally, Section 57-15 addresses alterations made to church property outside of the context of a church division.

McCarthy, *supra* note 22, at 1849–50 (citations omitted).

85. McElroy, *supra* note 6, at 332.

86. *See* The Episcopal Church, Partnerships, http://www.episcopalchurch.org/110056_ENG_HTM.htm (last visited Dec. 10, 2010) (detailing the church's presence and partnerships with countries in Africa, Asia-Pacific, Latin American, the Caribbean and the Middle East).

87. *Truro*, 280 Va. 6, 14, 694 S.E.2d 555, 559 (2010).

88. The Episcopal Church, Partnerships, http://www.episcopalchurch.org/110056_ENG_HTM.htm (last visited Dec. 10, 2010).

89. "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." *Truro*, 280 Va. at 14, 694 S.E.2d at 558 (internal citation omitted).

90. McElroy, *supra* note 6, at 332–33.

Meeting, and the Anglican Consultative Council.[91] TEC maintains a national leadership structure and a regional leadership structure level.[92] At the national level, TEC leadership promulgates canons and constitutional provisions that are binding on the local congregations.[93] At the regional level, the governing authority is the diocese for a particular region.[94] A bishop is charged with governing the diocese and all decisions by the diocese are binding on the parishes that fall within its borders.[95]

Every three years, the highest governing body within TEC—the General Convention—meets to discuss and form resolutions in matters of church governance and doctrine. [96] Resolutions adopted by the General Convention are binding on TEC and the dioceses.[97] In 2003, the General Convention met to address several controversial issues giving rise to internal disputes within the denomination.[98] Specifically, the debate focused on the acceptability of allowing non-celibate homosexuals to serve as Episcopal bishops and whether TEC would offer its blessing and endorsement as to same-sex marriages.[99] As a result of its deliberations, the General Convention took several actions, including: (a) confirming the election of Gene Robinson, a non-celibate homosexual priest, as Bishop of the Diocese of New Hampshire of TEC; (b) adopting resolution allowing

91. *Id.* The actions proposed at these various gatherings are not binding on any members of the Anglican Communion, but are "primarily consultative" in nature. *Truro*, 280 Va. at 14, 694 S.E.2d at 559. Thus, any resolution proposed by the Anglican Communion only becomes binding upon a particular church if that church ratifies the resolution through its own internal governing structure. *Id.*

92. McElroy, *supra* note 6, at 333. *But see* Philip Turner, Communion and Episcopal Authority, http://www.anglicancommunioninstitute.com/2009/07/communion-and-episcopal-authority/ (Jul. 9, 2009) ("Within [t]he Episcopal Church there is no constitutional provision for a hierarchical structure that places the authority of individual Bishops in their Dioceses within a larger structure to which they must defer."). Dr. Turner argues that the Episcopal Church is, in fact, not a hierarchical church but "an association of [d]ioceses that lacks an ordered hierarchy save within the various Dioceses that comprise its membership." *Id.* However, the Supreme Court of Virginia made its ruling on the assumption that TEC is a hierarchical church, not an association of dioceses. *Truro*, 280 Va. at 7, 694 S.E.2d at 557. Thus, this article will proceed under the same assumption.

93. McElroy, *supra* note 6, at 332–33.

94. *Id.*

95. *Id.*

96. *Truro*, 280 Va. at 15, 694 S.E.2d at 559. According to the Executive Offices of the General Convention:

> The General Convention is the governing body of The Episcopal Church (TEC) that meets every three years. The Convention is a bicameral legislature that includes the House of Deputies and the House of Bishops. The work at Convention is carried out by deputies and bishops representing each diocese. During its triennial meeting deputies and bishops consider a wide range of important matters facing the Church.

Executive Offices of the General Convention, Office of the General Convention, http://generalconvention.org/ (last visited Dec. 10, 2010).

97. *Truro*, 280 Va. at 15, 694 S.E.2d at 559.

98. *Id.*

99. *Id.*

churches to offer their blessings and endorsements in regards to same-sex unions; and (c) rejecting a resolution seeking to preserve TEC's position on issues of sexuality in a manner consistent with the traditional Christian faith.[100] These actions were ill-received by many members of TEC nationwide.[101] Indeed, they gave rise to considerable division among congregation members practicing their faith in the Protestant Episcopal Church in the Diocese of Virginia ("the Diocese") because the diocesan leadership supported Robinson's confirmation.[102] Outraged by the resolutions adopted by the 2003 General Convention's and the Diocese's support of Robinson's confirmation, congregants from various churches proceeded to send hundreds of letters of dissent to the Diocese and withhold the payment of pledges previously committed to the Diocese and TEC.[103]

Internal segregation ensued within the TEC on a national level throughout 2004 and 2005, and the Diocese attempted to manage its own internal division by forming a "Reconciliation Commission."[104] The Reconciliation Commission sought to address the congregation's concerns regarding the controversial resolutions of the General Convention.[105] When these efforts proved fruitless, the Reconciliation Commission promulgated voting procedures that allowed the congregations to separate from the Diocese.[106] Several congregations performed the necessary votes to initiate the separation procedures.[107] Their attempts to separate ultimately failed, however.[108] Diocesan leadership informed the congregations that TEC changed its position on congregational separation and any separation purportedly achieved through the Reconciliation Commission's procedures would not be binding on TEC or the Diocese.[109] Despite this change in position, fifteen congregations voted to separate from the Diocese between 2006 and 2007.[110]

After separating from the Diocese, the dissident congregations sought to align themselves with another church affiliated with the Anglican

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 15, 694 S.E.2d at559.
104. *Id.*
105. *Id.*
106. *Id.* at 15–16, 694 S.E.2d at 559–60.
107. *Id.* at 16, 694 S.E.2d at 560.
108. *Id.*
109. *Truro*, 280 Va. 6, 16, 694 S.E.2d 555, 560 (2010).
110. *Id.* Indeed, congregational uproar within TEC was not limited to the Diocese of Virginia. *Id.* Congregations belonging to other dioceses also voiced their discontent with the 2003 General Convention and, ultimately, separated from their respective dioceses. *Id.*

Communion.[111] Ultimately, they voted to attach to a stateside province of the Church of Nigeria.[112] Originally, the Church of Nigeria's ministry consisted of governing the Anglican churches in the Federal Republic of Nigeria.[113] It established a mission in the United States, which was identified as the "Convocation of Anglican Nigerians in America."[114] This mission provided oversight to expatriate Nigerian congregations in the continental United States.[115] In 2006, the Church of Nigeria reorganized and expanded the mission.[116] Amongst other changes, the mission was renamed as the Convocation of Anglicans in North America ("CANA").[117] CANA established a presence in Virginia by forming a district within the Commonwealth that it labeled the Anglican District of Virginia ("ADV").[118] Presumably, CANA's efforts to reorganize its operations and establish a formal presence in Virginia stemmed from its desire to welcome the recently disaffiliated Virginia congregations into ADV.[119] The realignment of the congregations with CANA, however, did anything but bring an end to the dissident congregations interactions with TEC. Indeed, the congregations and TEC were destined to clash again. This struggle, however, would not be over matters of church doctrine. Rather, the stage was set for the parties to begin their battle over who was entitled to possess and make use of the congregation's property occupied when congregations separated from TEC.

C. The Battle for Church Property

Following their attachment to ADV, the dissident congregations sought to establish what property interests, if any, they maintained in their respective locations.[120] In 2006 and 2007, nine congregations within ADV ("CANA Congregations") filed petitions pursuant to Section 57-9(A) within their respective circuit courts seeking a judicial determination that a division occurred within TEC and the congregations had voted to align with

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Truro*, 280 Va. 6, 16, 694 S.E.2d 555, 560 (2010).
116. *Id.*
117. *Id.*
118. *Id.*
119. This conclusion is supported by the fact that, by 2007, 10,000 of CANA's 12,000 members were former members of Episcopalian congregations. *Id.* at 17, 694 S.E.2d at 560.
120. *Id.*

a different branch of the TEC.[121] Per the language of the statute, if a congregation made such a determination, and the court approved that determination, the court should enter an order reflecting that determination, and that order would be "conclusive as to title and control."[122] In support of their petitions, the CANA Congregations argued that: (a) the separations, as they occurred throughout 2004 to 2007, constituted a division within TEC, as contemplated by Section 57-9; (b) subsequent to the division, the congregations voted to affiliate with ADV, a qualifying "branch" of the Anglican Communion; and (c) as a result, ownership of the properties passed to the respective congregations located thereon by operation of Section 57-9.[123]

Not surprisingly, the Diocese and TEC opposed the grant of the petitions and filed complaints against each of the CANA Congregations alleging trespass and conversion.[124] Additionally, the Diocese and TEC filed declaratory judgment actions that sought "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 [Section] 57-9(A) petitions."[125] The Diocese and TEC challenged CANA Congregations' petitions on the basis of several arguments, including: (a) the congregations' separation from the TEC and the Diocese did not qualify as a "division" within TEC or the Diocese, as contemplated by Section 57-9; and (b) even assuming the CANA Congregations' separations did qualify as a division with TEC or the Diocese, the CANA Congregations failed to satisfy the statute's "branch" requirement because CANA or the ADV did not operate as a branch of TEC or the Diocese.[126]

The Supreme Court of Virginia, relying on the Multiple Claimant Litigation Act,[127] appointed a three-judge panel to manage the dispute.[128] The panel consolidated the various actions brought by each of the CANA Congregations and established venue for the matter in Fairfax County.[129] The trial court first held a hearing to determine the applicability of Section 57-9.[130] The CANA Congregations, Diocese, and TEC presented expert

121. VA. CODE ANN. § 57-9(A) (Repl. Vol. 2007 & Cum. Supp. 2010).
122. *Id.*
123. *Truro*, 280 Va. 6, 17, 694 S.E.2d 555, 560 (2010).
124. *Id*. at 17, 694 S.E.2d at 560–61; *In re* Multi-Circuit Episcopal Church Property Litigation, 76 Va. Cir. 786, 788 (Va. Cir. Ct. 2008).
125. *Truro*, 280 Va. at 17, 694 S.E.2d at 560–61.
126. *Id*. at 18, 694 S.E.2d at 561.
127. *See generally* VA. CODE ANN. § 8.01-267.1 (Repl. Vol. 2007 & Cum. Supp. 2010).
128. *Truro*, 280 Va. at 17–18, 694 S.E.2d at 561.
129. *Id*.
130. *Id*. at 18, 694 S.E.2d at 561.

testimony and argument as to whether the statute controlled in the case.[131] The evidence of all parties primarily focused on constructing the definitions of the terms "division" and "branch" in accordance with how those terms would have been used in the context of the various nineteenth century church divisions that gave rise to the enactment of the predecessor statute of Section 57-9.[132] Following the hearing, the court issued an opinion in which it held 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 [Section] 57-9(A)."[133] Furthermore, the court found that CANA and ADV were "branches" of TEC and the Diocese.[134] Thus, according to the circuit court, the CANA Congregations Section 57-9(A) petitions were properly before it and the congregations were entitled to have the court determine what property interests, if any, they were granted by the statute.[135]

Following the circuit court's ruling that Section 57-9(A) provided the controlling authority in the case, TEC and the Diocese challenged the statute's constitutionality on several grounds—namely, that Section 57-9 violated the United States Constitution's and Virginia Constitution's free exercise clauses, principles of due process, and the contracts clause.[136] After holding several hearings on the matter, the circuit court issued an opinion letter upholding the constitutionality of Section 57-9.[137] Shortly thereafter, the court granted the CANA Congregations' Section 57-9 petitions and dismissed TEC's and the Diocese's declaratory judgment actions as moot.[138]

TEC and the Diocese appealed the circuit court's holding to the Supreme Court of Virginia, arguing that the circuit court erroneously concluded that Section 57-9(A) applied in the case. In the alternative, they argued that if the circuit court's holding constituted an appropriate application of the statute, the application of Section 57-9 could not pass constitutional muster.[139] On November 9, 2009, the court granted the appeal.[140] It reversed the circuit court's order in full and reinstated the Diocese's

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 18–19, 694 S.E.2d at 561.
136. *Id.* at 18, 694 S.E.2d at 561.
137. *Id.*
138. *Id.*
139. *Id.* at 19, 694 S.E.2d at 561–62.
140. *Id.*

Episcopal Church's declaratory judgment actions and CANA Congregations' counterclaims to those actions.[141] Although the court remanded the proceeding to the circuit court for further resolution of the issues, it did so with express instructions to decide the dispute by applying real property law and contract law.[142]

D. Summary of Court's Reasoning

At the outset of its review of the circuit court's holding, the court broadly summarized the assignments of error raised by TEC and the Diocese into two principal issues: (a) whether the record supported a finding that Section 57-9(A) controlled over the dispute; and (b) whether the circuit court correctly held that Section 57-9(A) passed constitutional muster under both the United States Constitution and Virginia Constitution.[143] The court explained that, per the principle of constitutional avoidance, it would first review assignments of error challenging the applicability of Section 57-9 before attempting to analyze the constitutionality of the statute.[144]

The court began its review of the applicability of Section 57-9(A) by reviewing the definitions of key statutory language that the circuit court constructed and relied on in granting CANA Congregations' Section 57-9(A) petitions.[145] Specifically, the court focused on the portion of the statute that provided:

> 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.[146]

The circuit court based its holding that the CANA Congregations' were properly before the court on the way in which it interpreted "division," "church or religious society," "attached" and "branch." The Supreme Court of Virginia, however, did not follow the same analytical track.[147] Rather, the statutory language that primarily guided the court's analysis was the "branch" and "division" language of Section 57-9.[148]

141. *Id.* at 29–30, 694 S.E.2d at 568.
142. *Id.*
143. *Id.* at 19, 694 S.E.2d at 562.
144. *Id.* (citing Davenport v. Little-Bowser, 269 Va. 546, 557, 611 S.E.2d 366, 372 (2005)).
145. *Id.* at 21, 694 S.E.2d at 562–63.
146. VA. CODE ANN. § 57-9(A) (Repl. Vol. 2007 & Cum. Supp. 2010).
147. *Truro*, 280 Va. at 22, 694 S.E.2d at 563.
148. *Id.* The Court reviewed the circuit court's definition of these terms *de novo* with the objective of

Having identified which terms appeared relevant to the dispute, the court explained that "whether a congregation is entitled to petition for the relief afforded by [Section] 57-9(A)" is determined by the occurrence of certain factual prerequisites needed to trigger the statute's applicability to the case.[149] The court explained that the CANA Congregations needed to prove that a "'division [occurred]... in a church or religious society [ ] to which... [the congregations were] attached'" and "the 'branch of the church or society' to which the congregation[s] vote[d] to belong... [were] a branch of the 'church or religious society [ ] to which [the congregations were] attached' prior to the 'division.'"[150] As a practical matter, this holding mandates a two-step analytical process.[151] First, the congregation seeking to invoke Section 57-9 must demonstrate that it was previously attached to a church or religious society in which a division occurred.[152] If that hurdle can be overcome, the congregation must next demonstrate that it voted to realign itself with a different branch of the same church or religious society that experienced the division.[153]

Applying the two-step analytical framework to the facts in the record, the court first considered whether a division occurred in any relevant church or religious society.[154] Before assigning any definition to the term "division," the court addressed and quickly disposed of two ancillary issues: (a) whether a division occurred at the Anglican Communion level and (b) whether a division could only occur if performed through the formal procedures of TEC.[155] As to the first preliminary issue, it concluded that the record did not support finding a "division" occurred at the Anglican Communion level and noted the circuit court's error in finding to the contrary.[156] Given the court's conclusion that a division at the Anglican Communion level did not occur, it followed that the CANA Congregations'

assigning their plain and ordinary meaning—in accordance with the historical context that gave rise to the enactment of the predecessor of Section 57-9—the interrelationship of the words being considered. *Id.*

149. *Id.*

150. *Id.* at 21–22, 694 S.E.2d at 563 (alterations in original). Recall that "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 *Judicial Intervention in Disputes Over the Use of Church Property*, *supra* note 20, at 1143–44).

151. *See* Henry L. Chambers Jr. & Isaac A. McBeth, *Much Ado About Nothing Much:* Protestant Episcopal Church in the Diocese of Virginia v. Truro Church, 45 U. RICH. L. REV. 141, 147–48 (2010).

152. *Truro*, 280 Va. 6, 21–22, 694 S.E.2d 555, 563 (2010).

153. *Id.*

154. *Id.* To meet their burden of establishing the applicability of Section 57-9(A) to their respective properties, the CANA Congregations were required to first demonstrate they were previously attached to a church or religious society that experienced a division. *Id.*

155. *Id.*

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

Section 57-9(A) petitions would only be proper if the record established that "division" occurred within some other relevant church or religious society.[157] While the court indicated the next logical step would be to consider whether a division occurred in TEC and the Diocese, it first resolved the second preliminary question surrounding the statutory term "division."[158]

The second preliminary issue—and a major point of contention between the parties—was whether a division, as contemplated by Section 57-9(A), could only occur if it were a formal division in accordance with the church's polity.[159] TEC and the Diocese argued that prior case law interpreting Section 57-9(A) supported the position that, for a division to occur as contemplated by that provision, it must be achieved formally through the church's governing authority.[160] However, according to the court, defining "division" so as to include such a requirement would run afoul to the mandate of the First Amendment by creating a "risk [of] entangling the courts in matters of religious governance."[161] The court explained 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."[162] It based this conclusion on the position that "experience shows that a division within a formerly uniform body almost always arises from a disagreement between the leadership under the polity and a dissenting group."[163]

Having established the CANA Congregations did not need to show that a division was accomplished in accordance with church polity for its Section 57-9 petitions to be appropriate, the court turned to the question of whether

157. *Id.*

158. *Id.*

159. Brief of Appellant at 2, 5, 21,*Truro*, 280 Va. 6, 694 S.E.2d 555 (2010) (No. 090682). "When used in reference to religious entities, the term 'polity' refers to the internal structural governance of the denomination." *Truro*, 280 Va. at 12, 694 S.E.2d at 558 n.1 (citing *Judicial Intervention in Disputes Over the Use of Church Property*, *supra* note 20, at 1143–44).

160. Brief of Appellant, *supra* note 159, at 25. Canon I.7.3 establishes that a trustee of TEC property cannot alienate or encumber the property used solely for church purposes without authorizing the transfer with the bishop and standing committee of the diocese in which the parish is located. THE GENERAL CONVENTION OF THE EPISCOPAL CHURCH, CONSTITUTION & CANONS 48–49 (The Archives of the Episcopal Church, eds., 2009) [hereinafter CONSTITUTION & CANONS]. Canon II.6.2 establishes that a trustee of TEC property cannot alienate or encumber the property used solely for church purposes without authorizing the transfer with the bishop. *Id.* at 72.

161. *Truro*, 280 Va. at 26, 694 S.E.2d at 566; Jae-Woo Cha v. Korean Presbyterian Church, 262 Va. 604, 610, 553 S.E.2d 511, 514 (2001).

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

163. *Id.*

a division had occurred within the Episcopal Church at the Diocese.[164] It noted that the circuit court defined "division," as "'[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.'"[165] Although not expressly commenting on the propriety of this definition, the court implicitly ratified it by analyzing whether the evidence set forth in the record satisfied that legal standard.[166] After reviewing the record, the court concluded "[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."[167]

Following its conclusion that a division occurred at both the regional and national levels of TEC, the court turned to the second of two statutory prerequisites that the CANA Congregations needed to establish to assert property rights pursuant to Section 57-9(A): whether the CANA Congregations voted to affiliate with a "branch" of TEC and the Diocese following the division.[168] Phrased alternatively, the court needed to determine whether CANA or ADV were branches of TEC and the Diocese.[169] In answering this question, the court emphasized the importance of the fact that, although CANA's expansion to allow the newly separated CANA Congregations to join its ranks occurred in response to the disputes within TEC, CANA's expansion did not occur as a result of the division.[170] Thus, it concluded:

> while CANA is an 'alternative polity' to which the congregations could and did attach themselves, we hold that, within the meaning of [Section] 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 [Section] 57-9(A).[171]

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

165. *Id.* at 25, 694 S.E.2d at 565.

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

167. *Id.* at 27, 694 S.E.2d at 566. The CANA Congregations also provided expert testimony supporting their position that a division occurred within the meaning of the statute. *Id.* at 18, 23–24, 694 S.E.2d at 561, 564. Given that there was no serious dispute between the parties that, prior to the 2003 meeting of the General Convention, the CANA Congregations were attached to TEC and the Diocese, the court further added that the circuit court had properly held that a division occurred within TEC and the Diocese and that the CANA Congregations were attached to TEC and the Diocese at the time of the division. *Id.* at 27, 694 S.E.2d at 566.

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

169. *Id.*

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

171. *Id.*

Accordingly, with the common Anglican bond between TEC and CANA notwithstanding, the CANA Congregations failed to demonstrate that they voted to belong to a branch of the TEC or the Diocese following the division and they could not seek relief under the statute.[172]

The court provided additional clarification to prevent its interpretation of Section 57-9(A) from being misunderstood as holding that an organization qualifies as a branch of a church only if it operates under the control of the church that experienced the division. In this regard, the court noted that operation as a separate polity would not necessarily bar a given religious organization from qualifying as a branch of a church or religious society that operates under a different polity or hierarchical structure.[173] However, in that scenario, "[Section 57-9(A)] requires that each branch proceed from the same polity, and not merely a shared tradition of faith."[174] Because CANA and ADV did not proceed from the same polity as TEC, the CANA Congregations could not rely on Section 57-9(A) to establish their rights in their respective properties.[175] Accordingly, the court remanded the proceeding to the circuit court to be decided in accordance with property law and contract law.[176]

The final outcome of *Truro* is yet to be decided. Nonetheless, it is at least worth mentioning that it appears now that the case will be decided under the "neutral principles of law" approach as opposed to the "special statute" approach. Indeed, the court indicated that principles of property and contract law would control the outcome of the dispute.[177] The circuit court will therefore need to examine the exact nature of the trust existing between the CANA Congregations, the Diocese, and TEC. Furthermore, the circuit court will have to identify whether the CANA Congregations are contractually obligated to possess their respective properties in accordance with the canons and constitution of TEC—which specifically require a local parish to hold its respective property in trust for the Diocese and TEC.[178]

Presumably, such legal principles are "neutral" in the sense that they could be applied in any dispute, not just church property disputes.[179] It will

172. *Id.*
173. *Id.* at 28–29, 694 S.E.2d at 567.
174. *Id.*
175. *Id.*
176. *Id.* at 29, 694 S.E.2d at 567 (citing VA. CODE ANN. § 57-7.1 (Repl. Vol. 2007)).
177. *Id.*
178. *See* Wallace v. Hughes, 131 Ky. 445, 469, 115 S.W. 684, 691 (1909) (explaining that "religious organizations are merely voluntary associations, whose constitutions and laws are in their ultimate result, so far as the civil tribunals are concerned, in the nature of contracts between the members").
179. *Presbyterian Church,* 393 U.S. 440, 449 (1969).

be interesting to see, however, if such principles can be applied to *Truro* without implicating ecclesiastical questions. Specifically, the circuit court may struggle to do so because the specifics of the trust relationship between the parties and any contractual obligation of the CANA Congregations to give unqualified accession to TEC canons and constitutions regarding the use of church property is delineated in TEC's Constitution.[180] This is problematic because the court will be required to read and interpret provisions of TEC's Constitution, a situation that creates risk of deciding issues of religious doctrine and practice while attempting to extract the purely relevant legal language from the document.[181]

The court's decision that *Truro* be decided on principles of property and contract law is also noteworthy for another reason.[182] Such a holding, albeit not expressly, manifests the court's preference that lower courts make use of the neutral principles approach over the deference approach, if possible. As noted above, the Supreme Court left the decision of how to prioritize between the two approaches to the states.[183] One could read the holding in *Truro* as establishing the priority that courts in Virginia should assign to the various approaches available for resolving church property disputes. Relying on the Supreme Court of Virginia's approach in *Truro* as an analytical template, a court confronted with a church property dispute should first attempt to apply Section 57-9 to resolve the dispute.[184] If the facts of the case do not allow for application of the statute, the court should then apply neutral principles of law to resolve the dispute.[185] Accordingly,

180. CONSTITUTION & CANONS, *supra* note 160, at 72. Canon II.6(1) requires property dedicated for worship or other ministry to "secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons." *Id.* Canon II.6(2) establishes that a congregation may not alienate or encumber church property without the consent of the respective Diocese that oversees the congregation. *Id.* Additionally, Diocesan Canon 15.1 provides that "[a]ll real and personal property held by or for the benefit of any Church or Mission . . . is held in trust for The Episcopal Church and the Diocese." CONSTITUTION AND CANONS OF THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA 28 (The Diocese of Va., ed., 2008) [hereinafter DIOCESAN CONSTITUTION & CANONS].

181. "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church*, 393 U.S. at 449.

182. *Truro*, 280 Va. 6, 29, 694 S.E.2d 555, 567 (2010) (citing VA. CODE ANN. § 57-7.1(Repl. Vol. 2007)).

183. Jones v. Wolf, 443 U. S. 595, 604 (1979).

184. *Truro*, 280 Va. at 19, 694 S.E.2d at 562 (citing Davenport v. Little-Bowser, 269 Va. 546, 557, 611 S.E.2d 366, 372 (2005)).

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

a Virginia court will only turn to the deference approach in the event that application of the relevant neutral principles of law would require the court decide questions of religious doctrine and practice.[186]

Although the Supreme Court of Virginia never reached the question of Section 57-9(A)'s constitutionality, its interpretation of the statute raises several constitutional issues that future courts applying the statute may be required to address.[187] Indeed, it is likely that a party challenging the applicability of the statute to in a future case would argue in the alternate that the statute, if applicable, is unconstitutional. Accordingly, it is necessary to identify the constitutional issues implicated by Section 57-9(A) and whether the issues provide sufficient basis for a court to hold the statute does not pass constitutional muster.

III. CONSTITUTIONAL ISSUES SURROUNDING SECTION 57-9(A)

Prior to the decision in *Truro*, Section 57-9 drew criticism as a statute destined to draw courts into the ecclesiastical thicket in violation of both the United States and Virginia constitutions.[188] The proper application of the statute, however, remained relatively unknown until the Supreme Court of Virginia issued the *Truro* opinion.[189] The question now lingers if, in light of *Truro's* guidance, the statute can be applied in a way that does not offend the Establishment Clause and Free Exercise Clause of the First Amendment.[190] This Part argues that Section 57-9(A) operates in violation of both religion clauses of the First Amendment. Part III.A identifies the Establishment Clause issues implicated by Section 57-9(A), and Part III.B highlights the Free Exercise Clause issues implicated by Section 57-9(A). Part III.C discusses potential methods to apply the statute as it stands post-*Truro* in light of the Establishment Clause and Free Exercise Clause issues surrounding it.

186. Watson v. Jones, 80 U.S. 679, 727 (1871).

187. *Truro*, 280 Va. at 6, 694 S.E.2d at 555 (declining to address the constitutionality of Section 57-9(A)).

188. *See* McCarthy, *supra* note 22, at 1844–45, 1890.

189. Prior to the *Truro* opinion, the Supreme Court of Virginia applied Section 57-9, or its precursor statute, to only a limited number of church property cases. *See, e.g.*, Reid v. Gholson, 229 Va. 179, 327 S.E.2d 107 (1985); Baber v. Caldwell, 207 Va. 694, 152 S.E.2d 23 (1967); Allaun v. First & Merchs. Nat'l Bank, 190 Va. 104, 56 S.E.2d 83 (1949).

190. Property statutes such as Section 57-9(A) are not unique to the Commonwealth. Several states have statutes meant to resolve property disputes in the event of a division within a church. *See e.g.*, *In re* Episcopal Church Cases, 45 Cal. 4th 467, 488–89, 198 P.3d 66, 81 (2009) (noting California's statute as an example). While such statutes are not *per se* excessive entanglement, "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church,* 393 U.S. 440, 449 (1969).

A. Establishment Clause

1. Section 57-9(A) Entangles the Courts in Church Doctrine

The primary Establishment Clause issue presented in *Truro*'s holding deals with how the court applied the statutory term "branch."[191] In discussing the issue of what constitutes a branch, the court noted that "[w]hile the branch joined may operate as a separate polity from the branch to which the congregation formerly was attached, the statute requires that each branch proceed from the same polity and not merely a shared tradition of faith."[192] In other words, the branch that the dissident congregation votes to affiliate with must be "derived" from the "church or religious society" that the dissident congregation is dividing from.[193] In the case of *Truro*, the death knell to the CANA congregations' petitions was that CANA merely maintained a shared tradition of faith with TEC, presumably through the Anglican Communion.[194] According to the court, however, CANA did not "proceed" from TEC and it was not "derived" from TEC.[195]

The nature of the "derived" standard is unclear though. The court did not provide any guidance as to what the difference is between being "derived" from a church as opposed to merely sharing "a tradition of religious faith" with that church.[196] While one may look at the fact pattern in *Truro* and comprehend the difference under the specific facts of that case (i.e., one can understand the court's reasoning in finding CANA is not derived from TEC),[197] the answer may not come so easily in future cases. Although there does not appear to be any prior legal context for the word in Virginia case law, the standard definition of "derive" is "to trace from a source or origin."[198] Using such a term in relation to religious organizations is problematic because one church may have: (a) a traceable doctrinal connection to another church; (b) a traceable institutional connections to another church; or (c) both. In other words, using the term "derived" in regards to religious institutions could reasonably be interpreted as doctrinal derivation or institutional derivation.[199] While it seems intuitive to argue

191. For the Supreme Court of Virginia's discussion of the term "branch," see *Truro*, 280 Va. at 28–29, 694 S.E.2d at 567.
192. *Id.*
193. *Id.*
194. Brief of Appellant, *supra* note 159, at 23.
195. *Truro*, 280 Va. at 29, 694 S.E.2d at 567.
196. *Id.*
197. *Id.*
198. RANDOM HOUSE UNABRIDGED DICTIONARY 536 (2d ed. 1993).
199. For the purposes of this article, "doctrinal derivation" is used to describe a church that identifies

that a spin-off religious organization of a church of religious society should be doctrinally derived from the parent institution to qualify as a "branch,"[200] there would be no constitutional method of enforcing such a standard. A judicial review of doctrinal derivation is no different than a judicial review of the "departed from doctrine" element of implied trust theory.[201] Such an analysis would require the court decide to degree to which one church doctrinally departs from another church and whether such departures were significant enough that former could not be considered a branch of the latter. To do so would a place a court in the position of assigning weight to various tenets of a particular faith, a role expressly disallowed in *Presbyterian Church*.[202]

Given that a court cannot rely on doctrinal derivation because of the First Amendment's prohibition of government action favoring one religious over another (or no religion at all), one is left to conclude that a court should apply "derived" as meaning the putative branch is institutionally derived from the parent church.[203] Under this standard, the relevant inquiry would be whether an identifiable organizational affiliation between the putative branch and the parent church or religious society that experienced the division existed at some point in time prior to the division.[204] But even this standard has its own ecclesiastical pitfalls. For example, the strength of the connection required between the putative branch and the parent is uncertain. Must the putative branch be directly derived from the parent church that experienced the division, or can it be an institutional descendent of an organization that was directly derived from the parent church? If the latter

itself with a specific polity because of doctrinal similarities, not by way of former congregational migration. "Institutional derivation " refers to the situation in which one can trace the congregational migrations achieved through formal separations of one church to a point of origin in a specific polity.

200. Indeed, this is the point TEC attempted to argue in *Truro*. *See* 280 Va. at 24, 694 S.E.2d at 564. In a hierarchical polity, the internal governing authorities of that polity must be allowed to identify when a church is or is not a branch thereof. *Id.* at 28, 694 S.E.2d at 567. Otherwise, there is a strong risk that there will be many "branches" of that hierarchical church which are not subject to the canons and constitution of the polity. *Id.* at 15, 694 S.E.2d at 559. TEC would argue that a "branch" of TEC not formally recognized by its governing authorities is no branch at all. *Id*. at 27, 694 S.E.2d at 566. Rather it is a wholly different freestanding religious organization. *Id*.

201. For a discussion of "departed from doctrine" element of implied trust theory, see Hassler, *supra* note 22, at 408–10; *see also* McCarthy, *supra* note 22, at 1863–67.

202. *Presbyterian Church,* 393 U.S. 440, 450 (1969).

203. *See* Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*,* 512 U.S. 687, 703 (1994) ("[G]overnment should not prefer one religion to another, or religion to irreligion."); *see also* Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 216–17 (1963).

204. One might be prompted to ask why such a connection would need to be demonstrated under the "derived" standard. The answer is that, absent such a requirement, it would be impossible to distinguish the difference between a church or religious society that merely maintains a tradition of shared faith with the parent church or religious society as opposed to one that is derived from the parent church or religious society. Pursuant to the court's holding in *Truro*, the former does not qualify as a branch under the statute while the latter can. 280 Va. at 28–29, 694 S.E.2d at 567.

situation is permissible, how will the court test the genealogy of the putative branch without becoming enmeshed in questions of church doctrine and structure?

Furthermore, it is important to consider whether the putative branch must have separated from the parent organization in accordance with church polity to "proceed" or "derive" from a particular church. This should not be confused with the question whether a church needed to separate from a religious institution in accordance with church polity for a "division" to occur. The court plainly answered that question.[205] Here, the issue is identifying what the requisite past relationship must be between two religious organizations for one to be considered branch of another. Requiring an unbroken chain of formal separations to connect the putative branch and the church that experienced the division provides a bright line rule on one hand, but a constitutional dilemma on the other. A court attempting to analyze a separation—or a chain of separations—to determine if it can build a sufficient connection between the putative branch and parent church would necessarily have to familiarize itself with religious institutions' various separation policies and procedures and attempt to apply them. It seems unlikely that a court could make such analysis without thoroughly familiarizing itself with various church doctrines and resolving ecclesiastical questions in the process.[206]

A faction does need to separate from the church in accordance with the polity's formal procedures for it to "proceed" or "derive" from that parent church, however, the definition of "branch" becomes unworkably broad and creates the potential for absurd results. For example, could a group of individuals visit a church for one Sunday, attend worship service, and start their own religious organization the following week and technically be

205. *Id.* at 26, 694 S.E.2d at 566.

206. Indeed, the Supreme Court of Virginia realized the constitutional risk inherent in attempting to determine whether one religious body separated from another in accordance with church polity. *Truro*, 280 Va. at 26, 694 S.E.2d 565–66. Of course, the court could simply defer to the position of the parent religious institution that is involved in the dispute on this issue to avoid the ecclesiastical issues altogether. *Id.* at 27, 694 S.E.2d at 566. However, such institutions usually have a significant interest in the outcome of the litigation and this raises concerns about the fairness of the proceeding. The dispute involving Norcrest Presbyterian Church ("Norcrest") is illustrative of this situation. *See* Gardner, *supra* note 53, at 239–40 (citing GUIDE TO CHURCH PROPERTY LAW, *supra* note 42, at 22 (discussing Norcrest's experience with the adjudicatory process)). The members of Norcrest were dissatisfied with the official position of the Presbyterian Church on several issues and wanted to separate from Presbyterianism by use of internal polity procedures. *See id.* at 238–39. After attempting to invoke internal procedures to do so, the governing Presbytery visited Norcrest, seized the pastor's and church property, and changed the locks to the building. *Id.* The majority faction that invoked the separation procedures had no choice but to hold their next service at the local dog pound. However, the minority faction that desired to remain attached to the Presbyterian Church was granted access to Norcrest for worship services. *Id.*

"derived" from the church they visited the week prior? Most would argue that such a result is not in accordance with the purpose and spirit of Section 57-9.[207] Certainly, the Supreme Court of Virginia indicated that the strength of the "historical connection" between the putative branch and the parent church is dispositive.[208] But how does one test the strength of the historical connection between the putative branch and the parent if the standard is not requiring an unbroken chain of formal separations between the putative branch and the parent church? Presumably, to avoid the absurd scenario posed by the question above, a court would need to evaluate the duration and level of involvement in the parent church that the purported branch invested during its time with the parent church. Such an analysis arguably begins to look similar to a "departure from doctrine" analysis in that the court is looking at the level of involvement that one faction invested in a church and using its judgment to decide whether such involvement rose to a level sufficient so that it could be considered a "branch" of that church when it left.[209] Doing so would consist of assigning weight to various religious activities—such as contributing to church funds or attending worship service—and attempting to compare the involvement of one faction of the church with another. Such an analysis definitely raises concerns about offending the principle that a court cannot decide ecclesiastical questions in attempting to resolve a property dispute. If the court attempts to avoid this analysis to remain within the bounds of the First Amendment, however, it is not difficult to envision the result where a rogue faction floats from church and forms its own polity thereafter—thus, becoming a branch of numerous churches.[210]

2. Section 57-9(A) Favors Specific Forms of Religious Government

Potential for excessive entanglement is not the only Establishment Clause concern raised by Section 57-9(A). There is also cause for concern that the statute constitutes a government preference for congregational churches. To this end, the First Amendment requires that government be neutral in matters of religion. Indeed, the government may not

207. *See* McElroy, *supra* note 6, at 335–36; McCarthy, *supra* note 22, at 1849–50.

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

209. *See* Hassler, *supra* note 22, at 408–10; *see also* McCarthy, *supra* note 22, at 1863–67.

210. A hypothetical may help illustrate the point. A group of ten individuals decide to attend the Presbyterian Church for five weeks. Subsequently, they attend services with the Episcopal Church for five weeks. Following the ten-week period, the individuals form their own polity as a combination of lessons learned at the Presbyterian Church and the Episcopal Church. Are they a branch of the Presbyterian Church, the Episcopal Church, both, or neither? Would it matter if, instead of ten individuals, it was one thousand individuals? Would it matter if, instead of attending each church five weeks, the faction attended each church six months?

constitutionally prefer one religion over another or over no religion at all.[211] The mandate of government neutrality towards religion is grounded in both the Free Exercise Clause and the Establishment Clause of the First Amendment.[212] Accordingly, it can be difficult to analyze the issue of government neutrality as purely an establishment issue or a free exercise issue. These difficulties notwithstanding, it is well-settled that the mandate that the "government should not prefer one religion to another" is "a principle at the heart of the Establishment Clause."[213]

There are two potential ways in which Section 57-9(A) violates the Establishment Clause requirement of government neutrality towards different forms of religion: (a) by favoring one form of hierarchical church over another form of hierarchical church; and (b) by imposing burdens on hierarchical churches that it does not impose on congregational churches.[214] As to the first issue, some hierarchical churches, such as the Roman Catholic Church, opt not to hold their property by trustees.[215] Section 57-9(A), by its plain language, only applies to hierarchical churches that hold their property in trust.[216] Hierarchical churches such as the Roman Catholic Church therefore face no risk of losing their property by way of Section 57-9(A) when congregational majorities leave the church.[217] On the other hand, hierarchical churches that have structured their internal governing system so as to hold their property in trust—such as TEC—can lose their property when a congregational majority departs from the church.[218] Indeed, TEC would have lost significant property pursuant to Section 57-9(A) if the CANA Congregations had been more strategic in the realignment process.[219] Accordingly, it could be argued that Section 57-9(A) operates to effectively penalize churches such as TEC for adopting the internal structure they have while simultaneously preferring churches such

211. McCreary County v. ACLU, 545 U.S. 844, 860 (2005) ("The touchstone of our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." (citations omitted)).

212. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532–34 (1993) (explaining the Free Exercise Clause of the First Amendment requires government neutrality towards religion); Larson v. Valente, 456 U.S. 228, 246 (1982) (explaining the Establishment Clause of the First Amendment requires government neutrality towards religion).

213. Bd. of Educ. v. Grumet, 512 U.S. 687, 703 (1994).

214. McCarthy, *supra* note 22, at 1847.

215. *Id.*

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

217. Brief of Appellant, *supra* note 159, at 38–39; McCarthy, *supra* note 22, at 1847.

218. McCarthy, *supra* note 22, at 1844.

219. The Supreme Court of Virginia found the statute inapplicable because CANA and ADV were not branches of TEC. *Truro*, 280 Va. at 28, 694 S.E.2d at 567. If the CANA Congregations would have aligned themselves with a branch of the TEC, the outcome of the case would likely have been very different.

as the Roman Catholic Church for adopting the structure they have.[220] Such a preference runs strictly afoul to "[t]he clearest command of the Establishment Clause" which is "that one religious denomination cannot be officially preferred over another."[221]

As to the second potential issue, Section 57-9 could be read as providing preferential treatment to congregational churches or hierarchical issues.[222] Although Section 57-9 does not expressly make reference to "congregational" churches or "hierarchical" churches, the language of its two provisions establishes that Section 57-9(A) applies to hierarchical churches while Section 57-9(B) applies to congregational churches. This is evident in that Section 57-9(A) applies when a division has occurred "in a church or religious society, to which any... congregation... is attached."[223] Section 57-9(B), on the other hand, applies when division occurs in church or religious society "which, in its organization and government, is a church or society entirely independent of any other church or general society."[224] Section 57-9(B) wholly defers to the religious practice of congregational churches.[225] It provides:

> [The] majority of the members of such congregation, entitled to vote by its constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom, may decide the right, title, and control of all property held in trust for such congregation.[226]

While Section 57-9(B) defers to the constitutions, practices, or religious customs of congregational churches undergoing a division to resolve a church property dispute, hierarchical churches receive no such deference.[227] Indeed, the constitutions, practices, or customs of the hierarchical experiencing the division church are not even mentioned in Section 57-9(A).[228] Rather, Section 57-9(A) removes power to control the disposition of church property from the governing bodies of hierarchical churches and reallocates it in the hands of local congregational majorities. Regardless of what a hierarchical church's constitution, practice, or custom mandates in

220. See McCarthy, *supra* note 22, at 1885–86 (discussing how Section 57-9(A) unnecessarily burdens hierarchical churches that hold their property in trust while not imposing the same burden on hierarchical churches that do not hold their property in trust).

221. Larson v. Valente, 456 U.S. 228, 244 (1982).

222. McCarthy, *supra* note 22, at 1885 ("Under Section 57-9, hierarchical organizations are not free to organize their polity according to their beliefs, while congregational forms of governance are permitted to do so.").

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

224. *Id.* § 57-9(B).

225. *Id.*

226. *Id.*

227. *Id.*

228. *See* § 57-9(A) (omitting a reference to a church's constitution, practices, or customs).

regards to property ownership, Section 57-9(A) allows local congregational majorities to determine ownership of church property if the factual prerequisites identified in the statute are present.[229] Thus, certain hierarchical churches are placed in a position of having to reconfigure their internal structure so they will fall outside Section 57-9(A)—for example, rewriting their constitutions so that church property is titled in the name of an ecclesiastical officer as opposed to being held in trust for the church by a local congregation—or risk having their internal policies ignored and losing their property to a dissident congregation.[230] Section 57-9(B) does not place a similar burden to restructure on congregational churches.[231]

Section 57-9's disparate treatment between different forms of hierarchical churches and between hierarchical churches and congregational churches renders the statute constitutionally suspect.[232] This conclusion is supported by the Supreme Court's reasoning in *Larson v. Valente*.[233] That case involved a statute that required charitable organizations to register and file "extensive annual reports" with the state.[234] However, if a religious organization received more than half of its total contributions from members or affiliates, it would be exempted from the burdens imposed by the statute.[235] Thus, the statute was "not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations."[236] Rather, the language of the statute made "explicit and deliberate distinctions between different religious organizations."[237] The Court explained that "when we are presented with a state law granting denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."[238] Ultimately, the Court invalidated the statute on the ground that the "fifty percent rule" unconstitutionally discriminated among religious groups.[239]

229. *Id.*
230. Schmalzbach, *supra* note 5, at 457–58.
231. McCarthy, *supra* note 22, at 1885.
232. *Id.* at 1885–86.
233. Larson v. Valente, 456 U.S. 228 (1982).
234. *Id.* at 231.
235. *Id.* at 231–32.
236. *Id.* at 247 n.23.
237. *Id.*
238. *Id.* at 246.
239. *Id.* at 255.

Similar to the "fifty percent" statute in *Larson*, Section 57-9 is not a facially neutral statute that, in operation, has a disparate impact on certain religious organizations.[240] Rather, the language of the statute makes "explicit and deliberate distinctions between different religious organizations."[241] Accordingly, the Court's analysis in *Larson* indicates that Section 57-9(A) would need to survive strict scrutiny analysis to pass constitutional muster.[242] Strict scrutiny analysis, "which usually sounds the death knell for constitutionally suspect laws,"[243] requires a law be invalidated "unless it is justified by a compelling governmental interest" and the law is "closely fitted to further that interest."[244] While the state has a compelling interest in resolving religious property disputes, "[t]he state has no compelling interest in restricting the set of legally cognizable forms for determining property rights within religious institutions."[245] Furthermore, the statute is not narrowly tailored to achieve its putative government interest. The government may achieve its interest in resolving religious property disputes in a manner that does not draw the courts into the ecclesiastical thicket without "imposing a rule of congregational majority on hierarchical churches, even when a hierarchical church has already created a rule of decision for resolving property disputes in a legally cognizable form."[246] Indeed, a statute codifying the "deference rule," where applicable, would be far more narrowly tailored to achieve the same interest in that the statute would not impose a congregational form of property dispute resolution on hierarchical churches or vice versa. Ultimately, the fact that Section 57-9(A) discriminates against certain religious bodies far more than is necessary to achieve its putative compelling government interest makes it unlikely that a court would find that it passes strict scrutiny analysis.

240. *Id.* at 247 n.23.
241. *Id.*
242. *Id.* at 229.
243. Falwell v. Miller, 203 F. Supp. 2d 624, 631 (W.D. Va. 2002).
244. *Larson*, 456 U.S. at 247.
245. McCarthy, *supra* note 22, at 1886.
246. *Id.* (citations omitted).

B. Free Exercise Clause[247]

1. Section 57-9(A) as a Neutral Principle of Law

Section 57-9(A), if categorized as a neutral principle of law, raises notable free exercise issues.[248] The Free Exercise Clause of the First Amendment provides that "Congress shall make no law... prohibiting the free exercise [of religion]."[249] The First Amendment's prohibition on government with the free exercise of religion is also binding on state governments by way of the Fourteenth Amendment. Moreover, a similar provision appears in the Virginia Constitution, which provides that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[250] Religious institutions, like individuals, have free exercise rights under the First Amendment.[251] According to Justice Brennan, "[r]eligion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected [by the Free Exercise Clause]."[252] Thus, in order for any statute in Virginia to pass constitutional muster, it must not impermissibly impede on a religious institution's free exercise rights.

Of the three approaches that civil courts may use to resolve religious property disputes—the deference approach, the neutral principles approach, and the special statute approach—Section 57-9(A) could only arguably be considered as either a neutral principle of law or special statute. Indeed, it is necessary to evaluate Section 57-9(A) under the known standards of each potential category because it remains unclear whether there is any difference between the "neutral principles of law" approach as opposed to the "special statutes" approach. [253] If the two are categorically different, Section 57-9(A) is more likely to be considered the latter over the former. Given the ambiguity of the law in this area, however, it is worth considering

247. For an excellent discussion on the free exercise implications posed by Section 57-9(A), see McCarthy, *supra* note 22, at 1855–91.

248. *See* Schmalzbach, *supra* note 5, at 450–51; McCarthy, *supra* note 22, at 1880–84.

249. U.S. CONST. amend. I (alteration in original).

250. VA. CONST. art. I, § 16.

251. Jones v. Wolf, 443 U.S. 595, 606 (1979).

252. Corp. of Presiding Bishop of Jesus Christ of Latter-Day Saints v. Amos, 443 U.S. 327, 342 (1987) (Brennan, J., concurring) (alteration in original) (citations omitted).

253. Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 91 n.6 (Colo. 1986).

whether a party could argue and establish that Section 57-9(A) is a neutral principle of law that does not violate the free exercise rights of the religious institutions it regulates—namely, hierarchical churches.[254]

A neutral principle of law, by design, "is completely secular in operation" and "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[255] Furthermore, it is a principle of law "flexible enough to accommodate all forms of religious organization and polity."[256] One might argue that Section 57-9(A) is a neutral principle of law in that it operates as a presumptive rule of majority representation. This rule acts as a legal assumption that "a voluntary religious association is represented by a majority of its members."[257] Thus, when competing factions of a religious dispute both claim to be the congregation entitled to possess and use church property, the court would determine which faction was the majority faction and presume that faction is one that represents the church.[258] However, the issue of majority representation as it relates to the local church only becomes germane once it has been determined that the property should remain with the local church, as opposed to remaining with the parent church or religious society.[259] The Supreme Court stated that a presumption of majority representation may be constitutional if it is "defeasible upon a showing that the identity of the local church is to be determined by some other means."[260] In other words, "[s]uch a presumption is permissible after it has been determined that the property rights remain with a seceding local church and as long as the presumption can be overcome by certain provisions articulated by the Court."[261]

There is a colorable argument that Section 57-9(A) operates beyond constitutional boundaries as a presumptive rule of majority representation, as those boundaries are defined in *Jones*. There, the Court unequivocally established that "any rule of majority representation can *always be overcome*" by a contrary provision in a corporate charter, a provision in the church's constitution, or provision in the deed of the property identifying

254. Religious institutions, like individuals, have free exercise rights under the First Amendment. *Jones*, 443 U.S. at 606.

255. *Id.* at 603.

256. *Id.*

257. McCarthy, *supra* note 22, at 1868.

258. *Id.* at 1872.

259. *Id.*

260. These other "means" could include a provision in a corporate charter, a provision in the church's constitution, or provision in the deed of the property identifying that the local church holds the property in trust for the parent church. *Jones*, 443 U.S. at 607–08.

261. *See* McCarthy, *supra* note 22, at 1872.

that the local church holds the property in trust for the parent church.[262] Such a holding is consistent with the notion that, as part of its free exercise rights, a religious institution has a right to govern its own internal structure—which includes configuring the manner in which church property is used, managed, and owned.[263] However, Virginia's statutory framework governing ownership of church property limits the manner in which a religious institution can overcome the presumption of majority control. Specifically, a hierarchical church may only overcome the presumption of majority control by "titling the property in the name of an ecclesiastical officer of the general church or holding the property in corporate form."[264]

Virginia's statutory framework, which limits the manner in which hierarchical churches may overcome the presumption of majority control created by Section 57-9(A), is constitutionally problematic. One might argue that hierarchical churches are shortchanged in that they are not afforded the ability to "always" overcome Section 57-9(A)'s presumption of majority control by the methods outlined in *Jones.* A fair reading of *Jones* supports two conclusions surrounding the constitutionality of a presumptive rule of majority representation: (a) a state may empower a religious institution to overcome a presumption of majority representation by any legally cognizable method; and (b) there are certain methods—a contrary provision in a corporate charter, a provision in the church's constitution, or provision in the deed of the property identifying that the local church holds the property in trust for the parent church—that will "always" overcome a presumption of majority representation.[265] In other words, it is fair to read *Jones* as holding that—at a bare constitutional minimum—religious entities must be allowed to direct how their property is held by one of those three methods.[266] The fact that they cannot do so under Virginia law could be perceived as an impermissible interference with a religious organization's free exercise rights.[267]

Admittedly, reasonable minds could differ as to the proper interpretation of the Court's holding in *Jones*. Some read *Jones* as supporting the position that a state need only provide an "escape hatch" for religious institutions to overcome the presumption of majority representation.[268] Under this

262. *Jones*, 443 U.S. at 607 (emphasis added).

263. Schmalzbach, *supra* note 5, at 459.

264. McCarthy, *supra* note 22, at 1872–73 (demonstrating how Section 57-9 is inconsistent with *Jones v. Wolf*'s holding that a hierarchical church must have a certain methods available to it to overcome a presumptive rule of majority representation).

265. *Jones*, 443 U.S. at 607–08.

266. McCarthy, *supra* note 22, at 1874.

267. *Id.*

268. *See In re* Multi-Circuit Episcopal II, 76 Va. Cir. 894, 923–24 (Va. Cir. Ct. 2009).

reading, the three methods discussed by the Court for overcoming the presumptive rule of majority control—a contrary provision in a corporate charter, a provision in the church's constitution, or provision in the deed of the property identifying that the local church holds the property in trust for the parent church— are not compulsory.[269] Rather, the state need only provide some method of overcoming the rule that does not otherwise inhibit the institution's free exercise rights or thrust the court into the ecclesiastical thicket.[270] Proponents of this view focus on the Court's statement that "the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy."[271] While the "escape hatch" view is consistent with this statement, it contradicts the court's earlier statement a presumptive rule of majority representation "can *always* be overcome" by the three methods outlined above. Accordingly, while the escape hatch method is a colorable reading of *Jones* that may prevent Section 57-9(A) from being found unconstitutional, such a reading is inconsistent with the context of the whole opinion and should be disfavored over reading *Jones* in a manner that reconciles the two statements.[272] Such a reading perceives *Jones* as holding that: (a) a state may empower a religious institution to overcome a presumption of majority representation by any legally cognizable method; and (b) there are certain methods—a contrary provision in a corporate charter, a provision in the church's constitution, or provision in the deed of the property identifying that the local church holds the property in trust for the parent church—that will "always" overcome a presumption of majority representation.[273]

The issue of how *Jones* should be interpreted notwithstanding, another relevant free exercise question that must be considered is whether Section 57-9(A) encroaches on the right of churches to develop its internal structure as it sees fit. In electing to uphold the "neutral principles" doctrine over the objection of four dissenting justices, the Court explained that the constitutionality of the doctrine depended on its proper application to religious organizations. Specifically, it stated:

> 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

269. McCarthy, *supra* note 22, at 1873.
270. *Id.*
271. Jones v. Wolf, 443 U.S. 595, 608 (1979).
272. McCarthy, *supra* note 22, at 1875.
273. *Id.*

> 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*.[274]

This language suggests that the Court's basis for finding the doctrine of neutral principles constitutional was the flexibility of the doctrine enabling the governing bodies of hierarchical churches to "ensure... that the faction loyal to the hierarchical church will retain the church property."[275] Indeed, the Court places the burden on religious institutions to "structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."[276] The relevant question is whether state governments can dictate how a religious institution must structure its relationship in this regard. For example, the Episcopal Church had numerous canons in place to ensure that, in the event of property dispute, the property at issue would remain under the control of the of TEC, the Diocese, and the congregational faction loyal to TEC.[277] However, Virginia only allows a hierarchical church to overcome the presumption of majority control by "titling the property in the name of an ecclesiastical officer of the general church or holding the property in corporate form"—a structural measure not provided for in TEC's canons and constitution.[278]

These limitations seem at odds with the scope of choice religious institutions were supposed to be offered in order to preserve the constitutionality of neutral principles of law being a viable solution to resolving church property disputes.[279] Specifically, the Court clearly stated religious institutions must be given the opportunity to ensure "that the faction loyal to the hierarchical church will retain the church property" by

274. *Jones*, 443 U.S. at 606 (emphasis added); *see also* Hassler, *supra* note 22, at 430–31 (noting that one of the benefits to the neutral principles approach is flexibility).

275. *Jones*, 443 U.S. at 606.

276. *Presbyterian Church,* 393 U.S. 440, 449 (1969).

277. Canon II.6(1) requires property dedicated for worship or other ministry to "secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons." CONSTITUTION & CANONS, *supra* note 160, at 64. Canon II.6(2) establishes that a congregation may not alienate or encumber church property without the consent of the respective Diocese that oversees the congregation. *Id.* Additionally, Diocesan Canon 15.1 provides that "[a]ll real and personal property held by or for the benefit of any Church or Mission . . . is held in trust for The Episcopal Church and the Diocese." DIOCESAN CONSTITUTION & CANONS, *supra* note 180, at 41.

278. McCarthy, *supra* note 22, at 1873. One distinctive feature of the TEC is that its structure calls for "lay involvement in [church] governance." Brief of Appellant, *supra* note 159, at 32. According to TEC, to title the property in the name of an ecclesiastical officer "would require the Diocese either to remove property authority from lay persons or somehow to restructure its polity to preserve lay involvement. *Id.*

279. Schmalzbach, *supra* note 5, at 460–61.

configuring its property holdings in "*some legally cognizable form*."[280] The Court did not limit the ability of religious organizations to exercise this right according to a narrow and specific set of options, or only those options provided for by a state's statutory framework.[281] Rather, the Court deliberately used broad language, giving hierarchical religious organizations the ability to structure its property holdings in "some" legally cognizable form.[282] Allowing religious organizations this broad range of decision-making makes sense because a constitutional neutral principle of law, by its very definition, is one that must be "flexible enough to accommodate *all forms of religious organization and polity*."[283] Certain hierarchical churches, such as TEC, structure their property holdings in a legally cognizable form—such as having its property held in trust by local parishes—but still remain at risk of a disloyal faction retaining control of the property because of Section 57-9(A).[284] Thus, Section 57-9(A) falls well short of being flexible enough to accommodate "all forms" of church government.[285] Indeed, hierarchical churches that configure their government in a manner similar to TEC must restructure to accommodate Section 57-9(A) or remain at risk of losing significant church property.[286] Placing hierarchical churches in this sort of dilemma is a far cry from the sort of flexibility envisioned by the Court when discussing the constitutionality of applying neutral principles of law to resolve church property disputes.[287]

It may very well be that the Court stressed the need for neutral principles of law to be flexible enough to accommodate all forms of government because it realized to hold otherwise and craft a rule of law that required churches to reorganize their internal structures would unduly inhibit those churches' free exercise rights. Indeed, the manner in which a hierarchical church structures itself—included in which is the manner in which the church manages its property—seems to be purely ecclesiastical in nature.[288] The Supreme Court confirmed this position when it stated religious freedom encompasses the "power [of religious organizations] to decide for themselves, free from state interference, matters of church government as

280. *Jones*, 443 U.S. at 606 (emphasis added).
281. *Id.*
282. *Id.*
283. *Id.* at 603 (emphasis added).
284. Schmalzbach, *supra* note 5, at 458–59.
285. McCarthy, *supra* note 22, at 1876.
286. Schmalzbach, *supra* note 5, at 459.
287. *Id.* at 458–59.
288. *Id.* at 459 (noting that a church's internal governing structure and property ownership system are doctrinal in nature).

well as those of faith and doctrine." [289] Likewise, the Supreme Court of Virginia also acknowledged that the manner in which a religious organization crafts its internal governing structure—particularly, in hierarchical churches—is wholly doctrinal in nature. [290] These "issues of church governance... [are] unquestionably outside the jurisdiction of the civil courts."[291]

In summary, Section 57-9(A) fails to be a viable neutral principle of law that the courts may rely on to resolve church property disputes for the reasons set above. Specifically, hierarchical religious organizations are unconstitutionally limited in the manner by which they can overcome a presumptive rule of majority representation and by the way they can configure their own internal structures to ensure that, in the event of a schism within the church, the faction loyal to the hierarchy can maintain control over church property.[292] Furthermore, not only does the statute enable any congregation that leaves a hierarchical church to overcome its original contractual agreement to be subject to the canons and constitutions of that church,[293] the statute ignores the reality that "[r]espect for the First Amendment free exercise rights of persons to enter into a religious association of their choice... requires civil courts to give effect to the provisions and agreements of that religious association."[294] Accordingly, if Section 57-9(A) is to pass constitutional muster, it must do so as a special statute.

289. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) (alteration in original).

290. Reid v. Gholson, 229 Va. 179, 189, 327 S.E.2d 107, 113 (1985) (citing Serb. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724–25 (1976); Green v. Lewis, 221 Va. 547, 549 272 S.E.2d 181, 181–82 (1980)).

291. Bowie v. Murphy, 271 Va. 126, 133, 624 S.E.2d 74, 78 (2006) (citing *Reid*, 229 Va. at 187, 327 S.E.2d at 111–12).

292. Schmalzbach, *supra* note 5, at 458–59; McCarthy, *supra* note 22, at 1875 (citing Jones v. Wolf, 443 U.S. 595, 600–01, 604 (1979)). Indeed, several statutes similar to Section 57-9(A) have been struck down as unconstitutional. *See* Goodson v. Northside Bible Church, 261 F. Supp. 99, 104 (S.D. Ala. 1966) (finding a statute unconstitutional that allowed sixty-five percent of a local church in disagreement with a parent church to separate from the parent church and retain control over church property); Sustar v. Williams, 263 So. 2d 537, 543 (Miss. 1972) (finding a statute unconstitutional that allowed a two-thirds majority of congregation to obtain control and authority over trust property when a schism occurred between beneficiaries and church authorities).

293. Wallace v. Hughes, 131 Ky. 445, 469–70, 115 S.W. 684, 691 (1909) (explaining that "religious organizations are merely voluntary associations, whose constitutions and laws are in their ultimate result, so far as the civil tribunals are concerned, in the nature of contracts between the members").

294. *In re* Episcopal Church Cases, 45 Cal. 4th 467, 489, 198 P.3d 66, 82 (2009).

2. Section 57-9(A) as a Special Statute

Another method of approaching Section 57-9(A) is to categorize it as a special statute that governs "church property arrangements in a manner that precludes state interference in doctrine."[295] As noted above, there is no Supreme Court opinion setting aside special statutes as a third constitutional approach for resolving church property disputes.[296] The precedential origin for this approach is a concurring opinion written by Justice Brennan in *Churches of God*. [297] Some commentators argue the concept of special statutes as a third approach to resolving church property disputes is moot as a result of subsequent developments in Supreme Court jurisprudence since that case.[298] Accordingly, courts remain unclear as to whether special statutes are a separate approach for resolving church property disputes unto themselves or a subcategory of neutral principles of law.[299] As a result, there is no clear standard—if special statutes are categorically different than neutral principles of law—as to how they must be crafted to satisfy First Amendment requirements.[300] The clearest guidance available in this respect is found in Justice Brennan's concurring opinion in *Churches of God*.[301] Justice Brennan explained that for such statutes to be constitutional, they "must be carefully drawn to leave control of ecclesiastical policy, as well as doctrine, to church governing bodies."[302]

Per the Supreme Court of Virginia's holding in *Truro*, a congregation of a hierarchical church may divest the church of its property rights if it establishes: (a) that a division occurred within the hierarchical church; (b) the congregation was attached to the church at the time of the division; (c) the congregation separated from the church and voted to align itself with a "branch" of the church that experienced the division.[303] It is important to

295. *Churches of God*, 396 U.S. 367, 370 (1970) (Brennan, J., concurring).

296. *See supra* Part I.

297. *Churches of God*, 396 U.S. at 370 (Brennan, J., concurring).

298. McCarthy, *supra* note 22, at 1887. McCarthy explains that:

> The concurrence was written prior to the Court's statement in *Jones v. Wolf* that tied the protection of free exercise rights to "neutral provisions of state law governing the manner in which churches own property." It was also written prior to *Employment Division v. Smith*, an opinion that substantially altered the Court's approach to the Free Exercise Clause. Finally, Justice Brennan's statement does not necessarily sanction treating religious and secular voluntary associations differently, nor does it suggest that a state might distinguish between denominations.

Id. (internal citations omitted).

299. Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 91 n.6 (Colo. 1986).

300. *Id.*

301. *Churches of God*, 396 U.S. at 370 (Brennan, J., concurring).

302. *Id.* (citing Kedroff v. St. Nichols Cathedral. 344 U.S. 94 (1952)).

303. *Truro*, 280 Va. 6, 21-22, 694 S.E.2d 555, 563 (2010)

note that the "division" need not occur in accordance with church polity and the "branch" need not operate under the same polity.[304] Thus, Section 57-9(A) strips governing bodies of hierarchical churches of control over matters of ecclesiastical policy and doctrine.[305] Namely, the statute divests the governing body of hierarchical churches of the ability to configure their own structure without facing a very real risk of losing significant church property to a dissident congregation.[306] Accordingly, Section 57-9(A) does not meet the requirement of being "carefully drawn to leave control of ecclesiastical policy, as well as doctrine, to church governing bodies."[307]

Indeed, the manner in which a church arranges for its property to be held is a central issue to the church's internal structure.[308] The Court's reasoning in *Kreshik v. Saint Nicholas Cathedral* supports this conclusion.[309] In that case, the Court invalidated a statute purporting to transfer control of church property from one hierarchical religious entity to another hierarchical religious entity. [310] In holding the statute unconstitutional, the Court explained "the right conferred under canon law... to [use and occupy church property] was 'strictly a matter of ecclesiastical government,' and... could not constitutionally be impaired by a statute purporting to bestow that right on another."[311] Thus, even as a special statute, Section 57-9(A) unconstitutionally invades the province of religious governing bodies because "the reorganization of [a hierarchical religious body] involves a matter of internal church government, an issue at the core of ecclesiastical affairs."[312]

Section 57-9's encroachment on structural control that is properly left to the governing bodies of hierarchical religious institutions seems to stray outside what the First Amendment will tolerate of any special statute. *Kedroff* is illustrative of this principle.[313] That case involved a statute that purported to divest the governing body of the Russian Orthodox Church in Moscow of its control over local churches in the United States. Furthermore, the statute transferred vested control over the local churches from the governing body of the church in Russia to the governing

304. *Id.* at 26, 28–29, 694 S.E.2d at 556, 567.
305. Schmalzbach, *supra* note 5, at 457–58.
306. *Id.* at 458–59.
307. *Churches of God*, 396 U.S. at 370 (Brennan, J., concurring).
308. Schmalzbach, *supra* note 5, at 459.
309. 363 U.S. 190, 190 (1960).
310. *Id.* at 190–91.
311. *Id.*
312. Serb. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976).
313. 344 U.S. at 94. For a complete discussion of this issue, see McCarthy, *supra* note 22, at 1887–88.

authorities located stateside.[314] The Court explained that the statute operated to pass "control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment."[315] In other words, the Court held that religious bodies are constitutionally entitled to freely exercise their religious beliefs in regards to their own structure, administration, and operation.[316] The First Amendment requires that these institutions be allowed to decide for themselves how they will resolve matters of church government, faith, and doctrine without interference from the state.[317] Even when viewed as a special statute specifically meant to address church property disputes, Section 57-9(A) impermissibly divests the governing bodies of religious institutions of "control of ecclesiastical policy" in violation of the First Amendment.[318]

C. Navigating the Ecclesiastical Collision in the Future

If there is one thing that *Truro* did make clear, it is that Section 57-9(A) is not the only principle of law Virginia courts may turn to in attempting to resolve a hierarchical church property dispute.[319] Indeed, the court established that such disputes may be resolved by use of contract and property law.[320] Accordingly, it is possible that future church disputes litigated in Virginia courts may run their course without triggering the statute. Rather a court may find the statute inapplicable for one of several reasons and then turn to contract and property to law as the controlling doctrines in the case.[321] To illustrate this point, a Virginia court confronted

314. 344 U.S. at 119.

315. *Id.* at 119.

316. *Id.*

317. *Id.*

318. *Churches of God*, 396 U.S. 367, 370 (1970) (Brennan, J., concurring) (citations omitted).

319. *Truro*, 280 Va. 6, 29, 694 S.E.2d 555, 567 (2010); Chambers & McBeth, *supra* note 151, at 150, 166–67.

320. *Truro*, 280 Va. at 29, 694 S.E.2d at 567; Chambers & McBeth, *supra* note 151, at 146, 150, 161.

321. *Truro*, 280 Va. at 21–22, 694 S.E.2d at 563. The court established the following factual prerequisites that a congregation must establish to avoid itself of Section 57-9(A):

> There has been a "division . . . in a church or religious society to which any such congregation . . . is attached." Likewise, the authority afforded by the statute permitting such congregations to vote in order to determine "to which branch of the church or society such congregation shall thereafter belong" must be construed within the context of the first phrase of the statute. That is, the "branch of the church or society" to which the congregation votes to belong must be a branch of the "church or religious society to which [the petitioning congregation] is attached" prior to the "division."

Id. If a congregation failed to establish one of these elements, a court could find the statute inapplicable

with a hierarchical church property dispute should follow the analytical model set forth in *Truro* and first attempt to apply Section 57-9(A).[322] If the court finds the statute inapplicable, it should next turn to neutral principles of law—such as property law and contract law—as the law governing the outcome of the case.[323] If applying neutral principles of law implicates ecclesiastical questions, the court should then defer to the outcome proposed by the adjudicatory body of the hierarchical church involved.[324]

Not every possible application of Section 57-9(A) to hierarchical church property disputes will trigger all of the constitutional issues that were identified in Part III.[325] One constitutional issue that will always be present when applying the statute is whether the court can determine whether one church is a branch of another church without becoming enmeshed in the ecclesiastical thicket.[326] Going forward, the most constitutionally problematic scenario is one in which a congregation separates from a parent church and realigns itself with a branch of the parent church that is not subject to the governing body of the parent church. This scenario is completely plausible given that the Supreme Court of Virginia held that operation as a separate polity would not necessarily bar a given religious organization from qualifying as a branch of a church or religious society that experienced division.[327] A successful Section 57-9(A) petition under this fact pattern would strip one hierarchical church of its property rights and redistribute those rights to a completely different religious organization. This scenario would open the door for the hierarchical church deprived of its property to argue that Section 57-9 violates the requirement of government neutrality towards religion by operating as a government preference for congregational churches and by inhibiting the hierarchical church's free exercise rights to structure its property holdings in a manner that, but for the statute, would legally ensure that the faction loyal to the church retained control of the property.[328]

and defer to property law and contract law as the court in *Truro* did. *See id.* at 29, 694 S.E.2d at 567.

322. *Truro*, 280 Va. at 19, 694 S.E.2d at 562 (citing Davenport v. Little-Bowser, 269 Va. 546, 557, 611 S.E.2d 366, 372 (2005)).

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

324. Watson v. Jones, 80 U.S. 679, 726-27 (1871).

325. *Truro*, 280 Va. at 28–29, 694 S.E.2d at 567.

326. *See supra* Part III.A.

327. *Truro*, 280 Va. at 28–29, 694 S.E.2d at 567.

328. Bd. of Educ. v. Grumet, 512 U.S. 687, 703 (1994) (stating that the principle of government neutrality towards religion is at the heart of the Establishment Clause); *Jones*, 443 U.S. at 603 (explaining that the neutral principles of law doctrine does not implicate free exercise issues because a hierarchical church will be able to ensure the faction loyal to the church because civil courts are bound to give effect to any such arrangement made in some legally cognizable form); *see supra* Part III.A–B.

In the event that a court is called upon to apply Section 57-9(A) in such a scenario, it may be able to avoid some of the statute's constitutional infirmities by categorizing Section 57-9(A) as a neutral principle of law—specifically, a presumptive rule of majority representation—and interpreting the Supreme Court's holding in *Jones* as merely requiring states to provide an "escape hatch" for hierarchical churches to ensure they can overcome the presumptive rule of majority representation.[329] Such an interpretation would arguably enable a court to justify holding the statute constitutional by resolving free exercise concerns surrounding the statute. Namely, the "escape hatch" reading of *Jones* provides that a hierarchical church's free exercise rights are not violated by the application of the presumptive rule of majority representation as long as there is some method to overcome the presumption.[330] Given that Virginia allows hierarchical churches to avoid the application of Section 57-9(A)'s presumptive rule of majority representation in a property dispute by titling the property in the name of an ecclesiastical officer,[331] a court could hold a sufficient "escape hatch" exists to find the statute constitutional.[332] Indeed, the circuit court in *Truro* used a similar reasoning in response to TEC and the Diocese's constitutional challenges of Section 57-9(A).[333]

Ultimately, however, courts should not find Section 57-9 to be constitutional for several reasons. First, evaluating whether one church is sufficiently derived from another so as to qualify the former as a branch of the latter raises Establishment Clause concerns by requiring the court to examine prior religious affiliations between the two entities. Such an analysis is likely to place the court in a position necessitating the interpretation of religious canons that govern such relationships. Additionally, Section 57-9 violates the principle of government neutrality towards all forms of religion. Section 57-9(B) expressly applies to congregational churches because it only applies to a church "entirely independent of any other church or general society." Section 57-9(A), by practical implication of 57-9(B)'s language, governs church property disputes in hierarchical churches—those churches not governed that are not "entirely independent of any other church or general society." The former defers to the property dispute resolution procedures of a congregational church, while the latter ignores a hierarchical church's property dispute resolution procedures and imposes a rule of congregational majority vote on

329. McCarthy, *supra* note 22, at 1873.

330. *See supra* text accompanying notes 269–74.

331. VA. CODE ANN. § 57-15 (Repl. Vol. 2007).

332. *Id.*

333. *See In re* Multi-Circuit Episcopal II, 76 Va. Cir. 894, 923–24 (Va. Cir. Ct. 2009).

hierarchical churches. As to the "escape hatch" reading of *Jones*—the reading necessary to prevent Section 57-9(A) from violating a hierarchical church's free exercise rights—such a reading views one statement of the opinion out of context and renders the majority opinion inconsistent.[334] Furthermore, even if the "escape hatch" reading of *Jones* were correct, Section 57-9(A) lacks sufficient flexibility towards all forms of religious government to qualify as a constitutional neutral principle of law that can be applied to resolve church property disputes.[335] Admittedly, it is well settled that statutes should be interpreted and applied so as to preserve their constitutionality.[336] This rule of statutory interpretation notwithstanding, courts should not go to extreme or extraordinary lengths to apply Section 57-9(A) in whatever way best preserves constitutionality.[337] Rather, the Virginia courts should welcome the coming ecclesiastical collision as an opportunity to purge the Virginia Code of a statute that is not consistent with the First Amendment of the U.S. Constitution.

IV. CONCLUSION

Church property disputes are rife with lurking ecclesiastical issues that are outside the jurisdiction of the civil courts.[338] Churches are being forced to wrestle with difficult doctrinal questions because of trending changes in the overall political temperament of the general United States' population.[339] Accordingly, the internal disputes within a religious organization that arise from church leadership revisiting and changing positions on issues such as homosexual marriage and ordainment of homosexual ministers are only expected to increase in the future.[340] An increase in such disputes will also cause an increase in church property litigation as more congregations splinter. This Article examined the

334. McCarthy, *supra* note 22, at 1875.

335. Schmalzbach, *supra* note 5, at 458–59.

336. Commonwealth v. Doe, 278 Va. 223, 229, 682 S.E.2d 906, 908 (2009); Marshall v. N. Transp. Auth., 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008) (noting that courts interpret statutory language in a manner that avoids a constitutional question); Kolpalchick v. Catholic Diocese of Richmond, 274 Va. 332, 340, 645 S.E.2d 439, 443 (2007) (stating that the General Assembly intends to enact statutes that comply with the Constitution in every respect).

337. *See* Chambers & McBeth, *supra* note 151, at 150.

338. *E.g.*, Bowie v. Murphy, 271 Va. 127, 133, 624 S.E.2d 74, 78 (2006) (church deacon brought action against pastor and other church members for assault and defamation).

339. *See* Lampman, *supra* note 1.

340. *Id.*

constitutional standards surrounding various courses of action states may pursue to resolve these types of property disputes and provided a specific analysis on Virginia's statutory scheme for doing so.[341]

The law in Virginia regulating church property disputes is on a path leading to an unavoidable ecclesiastical collision. While that collision will likely occur sooner than later, it is not a question of "if," it is only a question of "when." The wreckage that follows the collision may bring one of several potential changes to the law. The General Assembly may attempt to draft a new statute to govern hierarchical churches that falls within constitutional boundaries or the courts may simply turn to neutral principles of law—such as contract and property law—from that day forward.[342] It is also possible—albeit unlikely, given there is no strong history of this practice in Virginia—that courts will more frequently defer to the internal adjudication of such disputes so as to avoid another ecclesiastical collision.[343]

Ultimately, Section 57-9 will not survive the coming collision. Although it is interesting to speculate what form Virginia law governing church property disputes will take from the post-collision wreckage, this is a question that can only be answered in time. In the end, however, Virginia will only gain from this change in the law. Portions of the Virginia Code not in accordance with the U.S. Constitution will be put to rest, and courts will be empowered to resolve church property disputes because the difference between a church property dispute and any other property dispute will no longer exist. Instead, courts will be guided by uniform legal principles that are applicable in any property dispute. The fact that Virginia is on the road to an unavoidable ecclesiastical collision is not something to be feared. Rather, it is something to be appreciated as it brings with it new and exciting developments to Virginia law.

341. *See supra* Parts II–III.

342. *Id.*

343. Watson v. Jones, 80 U.S. 679, 734-35 (1871).