NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Letter Opinion

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Re: Letter Opinion in *In re Multi-Circuit Episcopal Church Property Litigation* (CL 2007-0248724) Regarding ECUSA/Diocese's Assertion that 57-9 is Unconstitutional Because it Violates the Contracts Clause

Dear Counsel:

Left unresolved in this Court's June 27, 2008 opinion on the constitutionality of 57-9 was the contention asserted by ECUSA/Diocese that 57-9 is unconstitutional because it violates the Contracts Clause. Today, this Court answers several questions of law that collectively resolve the Contracts Clause issue, as follows: 57-9, as applied to the churches that filed petitions in the instant case, is not unconstitutional on Contracts Clause grounds. With this opinion, the last remaining open question regarding the constitutionality of 57-9, as applied, has been resolved. For purposes of this litigation, 57-9 is constitutional.

Specifically, this letter opinion addresses issues 4D and 4E as presented in the Court's Order of July 16, 2008. Those issues are: 1.) (4D): Whether the

Contracts Clause[1] protects only contractual rights that existed prior to the effective date of the 1867 predecessor statute to 57-9; and 2.) (4E): Whether in determining the applicability of the Contracts Clause to particular congregations, the Court should consider only the applicable deeds.

Upon a careful review of the briefs submitted to the Court, and upon oral argument regarding these issues held on August 11, 2008, the Court holds, for reasons set forth in the following letter opinion, that the answer to Issue 4D is that the Contracts Clause protects only contractual rights that existed prior to the effective date of the 1867 predecessor statute to 57-9[2] [hereinafter February 18, 1867]. Further, the Court today holds that, in regard to the question as to the exact nature of the "contractual rights" relevant to issue 4D, the only "contractual rights" that are even possibly subject to the protection of the Contracts Clause here, are contractual rights that ECUSA/Diocese possessed in the *property itself* of the CANA Congregations that *vested* prior to February 18, 1867.

The Court also resolves, within this letter opinion, several sub-issues related to 4D that were presented to this Court in both the briefs and during oral argument. These are:

1.) Whether the Contracts Clause protects ECUSA/Diocese's alleged contractual rights in "church plants"—that is, rights in the property of congregations that came into existence after February 18, 1867, but which were "planted" or "started" by other congregations that existed and possessed property prior to February 18, 1867. *The Court today holds that "church plants" which came into existence subsequent to February 18, 1867 are not subject to a Contracts Clause claim.*

2.) Whether the Contracts Clause protects ECUSA/Diocese's alleged contractual rights in property as to congregations that were founded or that "existed" prior to February 18, 1867, but that did not possess actual *parcels of property* prior to 1867. *The Court holds today that the property subject to a 57-9 petition must have been obtained by the church prior to the enactment of 57-9's predecessor in order to even be potentially subject to a Contracts Clause claim.*

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[1] U.S. Const. art I. § 10, cl. 1 states, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

[2] See Hoskinson v. Pusey, 73 Va. 428 (1879) ("It is also insisted that the action of the congregation of 'Harmony' church, after the conference at Alexandria held in 1866, operated to transfer the title and control of the property to that portion of the congregation which adhered to the Methodist Episcopal Church South. That action has already been adverted to, and is claimed to have been had under an act of the general assembly, passed February 18th, 1867 . . . .").

3.) Whether the holding of Green v. Lewis, 221 Va. 547 (1980) addresses the question as to whether this Court should look to the law as it existed in the Commonwealth of Virginia as of February 18, 1867 in order to determine whether ECUSA/Diocese had any vested property rights as of that date. *The Court holds that Green does not speak to this issue.*

4.) Whether, under Virginia law in effect on February 18, 1867, denominations and dioceses could own, hold, or otherwise acquire an enforceable contractual interest in, property in the Commonwealth of Virginia.[3] *The Court holds today that they could not, an answer which by itself is dispositive of all Contracts Clause claims.*[4]

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[3] This specific issue was not presented to the parties in the Court's July 16, 2008 order; rather, at oral argument on August 11, 2008, the Court ordered two additional rounds of supplemental briefs on this issue, which have now been submitted.

[4] The Court therefore need not reach Issue 4E, which is rendered moot by the Court's decision as to sub-issue #4. The Court further notes that, in its briefs, the Commonwealth of Virginia argues that even "if this litigation involves contracts formed prior to 1867, § 57-9 does not violate the Contracts Clause." Commonwealth's Resp. Br. Pursuant to the July 16, 2008 Order at 1. This is because, according to the Commonwealth, "[i]n determining whether § 57-9 impairs contracts that existed prior to its enactment, this Court must apply a three-step analytical inquiry." Commonwealth's Br. in Resp. to the Post-Decision Briefs at 29 (citing John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW § 11.8 (7th ed. 2004)). These three steps include, "[f]irst, has the enactment of § 57-9 'operated as a substantial impairment of a contractual relationship,'" Commonwealth's Br. in Resp. at 29 (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978)), "[s]econd, '[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem,'" Commonwealth's Br. in Resp. at 30 (citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983)), and "[t]hird, the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations," in that "[a] court must also satisfy itself that the legislature's 'adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" Commonwealth's Br. in Resp. to the Post-Decision Briefs at 30 (citing Keystone Bituminous Coal Ass'n v. DeBenticus, 480 U.S. 470, 506 (1987)). The Court need not reach the issues raised by the Commonwealth's argument, because it finds the Contracts Clause to be inapplicable to any of the petitioner congregations.

1.) The Contracts Clause protects only "contractual rights" that existed prior to February 18, 1867.

A.) The Contracts Clause only applies retrospectively.

On this issue, the parties are in agreement. As ECUSA/Diocese state, "according to applicable case law, legislative action may violate the Contracts Clauses when it impairs 'preexisting' or 'past' contracts. In other words, the Contracts Clauses protect rights and obligations in contracts that existed prior to February 18, 1867, the effective date of the predecessor statute to 57-9."[5] It is, in fact, black-letter constitutional law that the Contracts Clause has only a retrospective application. See Ogden v. Saunders, 25 U.S. 213, 260-62 (1827). Similar to the Due Process Clause, the Contracts Clause "solely protect[s] pre-existing entitlements," Weaver v. Graham, 450 U.S. 24, 30 (1981), and thus "whether a right has vested is important for claims under the Contracts or Due Process Clauses." Id. at 29-30. It follows, then, that, in applying the Contracts Clause to this litigation, the Court must consider February 18, 1867 as the "cut-off date" for determining whether "rights" relevant to this litigation were vested, and thus protected by the Contracts Clause.

B.) Definition of "contractual rights"

The parties do not agree, however, as to the actual nature of the "contracts" that are subject to the Contracts Clause in the present litigation. On this point, ECUSA/Diocese assert that it "is not disputed that the polity and rules of the Episcopal Church and the Diocese pre-date 1867. Those contracts have continued to the present, and the relevant contractual obligations have not changed."[6] Similarly, ECUSA/Diocese argue that "case law cited by both sides refutes the argument that the Contracts Clauses protect only interests in specific pieces of property."[7] To this end, ECUSA/Diocese frame the issue as follows:

> [T]he issue is *not* whether the Church and the Diocese have title or 'property ownership' rights (which are enforceable against the

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[5] ECUSA/Diocese Opposition Br. Pursuant to July 16, 2008 Order [hereinafter "ECUSA/Diocese Opp."] at 6.

[6] ECUSA/Diocese Opp. at 6.

[7] ECUSA/Diocese Opp. at 7.

> property itself).[8] The issue is whether the Episcopal Church and the Diocese have *contractual* rights (which are enforceable *in personam* against the Congregations), which are protected from divestiture by the Contracts Clauses.[9]

ECUSA/Diocese further argue that "the [CANA] Congregations cite no decision holding that the Contracts Clauses protect only vested interests in specific real property."[10] However, this statement does not accurately describe the CANA Congregations' position, which can be summarized as follows:

> Rather [the CANA Congregations] are noting that the Contracts Clause protects only contractual rights that vested prior to the challenged statute's adoption, and that whether a right has vested *here* must be analyzed under the specific law (church property) that applied in the relevant jurisdiction (Virginia) during the relevant time period (prior to 1867). In some hypothetical case, the Contracts Clause might prevent impairment of vested contract rights based on associational rules.[11]

The Court today finds that ECUSA/Diocese's argument in regard to the "contractual rights" at issue in this litigation contains a fatal flaw in logic. That is, ECUSA/Diocese proceed upon the assumption that there is ultimately a difference between the assertion of "contractual rights" enforceable *in personam* against the Congregations, versus asserting contractual rights enforceable against the *actual property at issue in this litigation* itself. But ECUSA/Diocese's *in personam* contractual rights argument ultimately places them in the same position as if they were in fact asserting "property ownership" rights enforceable against the property itself, since ECUSA/Diocese, under either assertion, are in fact "asserting rights to specific properties, and they are seeking specific relief" from this Court—"an order transferring title to the

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[8] See August 11, 2008 Hr'g Tr. [hereinafter "Hr'g Tr."] at 61:20-62:13, in which Mr. Somerville, arguing for ECUSA/Diocese, argued that neither ECUSA nor the Diocese were asserting a vested right in real property prior to 1867.

[9] ECUSA/Diocese Opp. at 8.

[10] ECUSA/Diocese Opp. at 7-8.

[11] CANA Congregations' Reply Brief Pursuant to the Court's July 16, 2008, Order [hereinafter "CANA Reply"] at 5. See also the statement of CANA's counsel at oral argument on August 11, 2008: "**Mr. Johnson**: I didn't mean to suggest that the contracts clause in the abstract couldn't protect some other sort of contractual interest, but this case is about property and the statute is about property." August 11, 2008 Hr'g Tr. 84:15-18.

diocesan bishop."[12] In other words, both assertions of contractual rights are ultimately the same, and they lead to the same relief.

Moreover, 57-9(A) is a statute that determines *property rights* upon a division in a church or religious society. ECUSA/Diocese state that "the Contracts Clauses . . . protect more than just vested interests in specific pieces of real property. Existing contractual commitments are protected, whether they establish only contingent interests in property or indeed have nothing to do with real property at all."[13] The Court fully agrees with this statement. The problem with the statement, however, is that it makes an irrelevant point, since, at its heart, this dispute is about specific pieces of property. When this Court eventually issues a final order, that final order will determine which of two competing parties is entitled to a *specific piece of property.*[14]

2.) The Contracts Clause does not protect ECUSA/Diocese's "contractual rights" in "church plants" that came into existence after February 18, 1867.

ECUSA/Diocese argue, for example, that "Church of the Apostles, Church of the Epiphany, and Potomac Falls Church claim to be 'plants' of pre-1867 congregations and may be bound by the contractual obligations of the

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[12] CANA Reply at 10.

[13] The Episcopal Church's and the Diocese of Virginia's Opening Br. Pursuant to July 16, 2008 Order [hereinafter "ECUSA/Diocese Opening Br."] at 16.

[14] Even assuming, *arguendo* that there were somehow a valid distinction between a.) a claim of pre-1867 vested rights in a contractual agreement with a congregation that all property it owns or will own will be for the benefit of ECUSA/Diocese, versus b.) a pre-1867 vested right *in the property itself*, any such *beneficial* ownership interest would not have been recognized prior to 1867. See, e.g., Maguire v. Lloyd, 193 Va. 138, 149 (1951), in which the Supreme Court of Virginia remarks that

> [i]n the light of the historical background, the constitution, and the legislative enactments [in Virginia], it is clear that the economic and resulting political power of churches was what was sought to be limited. The limitation contemplates a restriction on this power in all its forms, not only where the legal title is vested in the church or religious congregation, or the trustees thereof, but where the beneficial title, the right to use the fruits of the corpus of the gift, grant, or bequest, is vested in the church or religious congregation, or the trustees thereof.

Id. at 149 (emphasis added).

'planter' congregations."[15] Even assuming, *arguendo*, that ECUSA/Diocese possessed vested "contractual obligations" relevant to this litigation in any pre-1867 congregations, it does not follow that they would thus also have rights in

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[15] ECUSA/Diocese Opp. at 6 n.4. ECUSA/Diocese cite National Collegiate Athletic Association v. Roberts, 1994 U.S. Dist. LEXIS 21576 (N.D. Fla. 1994) in support of this argument, even while acknowledging that it does not "squarely address[] this issue." ECUSA/Diocese Opening Br. at 13. ECUSA/Diocese state that, in Roberts,

> the court held that a state statute establishing requirements and procedures applicable to the NCAA's disciplinary proceedings that varied from those set forth in the NCAA's own rules and bylaws violated the Contracts Clause *in toto*, and it permanently enjoined the defendants from enforcing the statute. At the time of the decision, there was at least one Florida institution (the University of North Florida) that had joined the NCAA after the adoption of the statute in 1991. Several others have joined subsequently. The Court did not hold or even suggest that the statute might be constitutionally applied to the NCAA in its dealing with new members. The statute purported to impact the NCAA's pre-existing rules and procedures, and that legislative intervention could not survive the Contracts Clause challenge. The same is true here.

ECUSA/Diocese Opp. at 13 (citations and footnotes omitted).

Roberts, however, is not binding upon this Court, nor does it address the subject of vested rights in real property. But even if it were relevant, Roberts appears actually to support the CANA Congregations' position here. Roberts relies upon National Collegiate Athletic Association v. Miller, 795 F. Supp. 1476 (D. Nev. 1992), aff'd, 10 F.3d 633 (9th Cir. 1993), cert. denied, 511 U.S. 1033 (1994), for its holding in regard to the Contracts Clause. In Miller, the court held that the "threshold issue" for it to consider in determining whether a Contracts Clause violation had occurred was "whether a contractual relationship existed between the Nevada member institutions and the NCAA prior to the passage of [the state statute at issue]." Id. at 1486. Because both of the Nevada NCAA member institutions in question became members of the NCAA before the passage of the statute, the Miller Court concludes that "the record establishes that the NCAA and the Nevada NCAA member institutions have a contractual relationship sufficient to trigger review under the Contract Clause." Id. Thus, it is true that, "even judged by [ECUSA/Diocese's] own standard of what is relevant (cases involving laws restricting NCAA rules), the only reported decision rejects their position that the affected party need not have been a member of the association prior to the statute's adoption." CANA Resp. at 12.

the property of congregations that came into existence after February 18, 1867, but which were "planted" or "started" by other pre-1867 congregations. That is because a "vested" right is "a right, so fixed that it is not dependent on any future act, contingency or decision to make it more secure." Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 45 (1924). ECUSA/Diocese thus cannot have a pre-1867 vested right in properties of congregations that did not even exist prior to 1867, because that would mean that any "rights" of ECUSA/Diocese in such "planted" congregations were dependent upon a future event or contingency (the formation of the new congregation), and thus not vested. Indeed, "forming a contract requires *mutual* assent and the communication of that assent. A congregation that did not yet exist and hold property in 1867, therefore, cannot have communicated its assent to grant the Church pre-1867 vested rights."[16]

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[16] CANA Reply at 4. At oral argument, counsel for ECUSA/Diocese conceded that its position presented a "question of first impression:"

> **The Court**: But how—well, let's address the various issues one at a time . . . it sounds like you acknowledge the fact that your strongest case involves a congregation that existed prior to 1867.
>
> You're saying that a congregation that comes into existence after 1867, that knowingly signs on to the agreements that existed prior to 1867, is in the same posture as a congregation that existed prior to 1867.
>
> **Mr. Somerville**: Yes, and we think the best analogy would be a collective bargaining agreement between an employer and a union. New workers who are employed after the date of the collective bargaining agreement are bound by that agreement, and the employer is bound by that agreement as to those workers. We think that's a good analogy to the case that we have here.
>
> **The Court**: Except there is a strong public policy, even a constitutional interest, in a legislative body, such as the General Assembly, being able to have statutes that . . . are enforced, and the contract clause, it appears, makes—renders unenforceable and unconstitutional those statutes.
>
> So it's a little different than a collective bargaining agreement. Here you're asking me to invalidate a statute as applied based on a contract, that there were not two parties to it at the time the statute was passed.
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> . . . . it's a pretty ambitious position you're asking me to take, that a congregation that came into existence, say, in 1980 would—that the 1867 statute would be unconstitutional on contract clause grounds because they accepted the polity and the Constitution and the Canons of the Episcopal Church that existed back in 1867.

3.) The Contracts Clause does not protect ECUSA/Diocese's alleged contractual rights in property not acquired prior to February 18, 1867, whether or not the congregations acquiring the property did themselves exist prior to 1867.

The Court today finds that even if a congregation was "in existence" prior to Feb. 18, 1867, if that congregation had not actually acquired a specific parcel of property by that date, the Contracts Clause would not protect any alleged "rights" that ECUSA/Diocese may have as to any post-1867 property obtained by that congregation.[17] Vested rights in property cannot lie where the property itself has not been acquired as of the date of the supposed vesting. Nor can ECUSA/Diocese convert or transmute property acquired after 1867 into property treated as if it was acquired prior to 1867, even by reference to ECUSA/Diocese's constitution or canons. The Contracts Clause limits the power of the state to impair contract rights. It is not alchemy.[18]

> **Mr. Somerville**: Well, we think, Your Honor, that it makes sense for the same rules to apply to all parties to the contract. . . .
> **The Court**: Excuse me. Isn't there a difference? The difference is the contract that existed, according to you, between the congregation and the general church in 1867, it existed at the time the statute was passed.
>
> The contract between a church that came into existence in 1960 or 1980, that contract did not exist back in 1867. They weren't parties to that contract. You're saying that an entity in 1980 can invalidate a statute passed in 1867 by agreeing to the general church's Constitution and Canons that existed in 1867. Don't you see that as a pretty ambitious position?
> **Mr. Somerville**: I see that as a question of first impression.

Hr'g Tr. 54:13-57:1.

[17] At oral argument, counsel for ECUSA/Diocese conceded that this also appears to be a question of "first impression." Hr'g Tr. 57:8-59:5.

[18] In fact, although it is not the basis of this Court's decision, it is worth noting that the approach urged upon this Court by ECUSA/Diocese, which would require significant parsing of their canons and rules, would risk placing this Court in the midst of the very religious thicket about which ECUSA/Diocese has frequently warned the Court. See Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), in which the U.S. Supreme Court held that the First Amendment does not "permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine." Id. at 441.

4.) The holding of Green v. Lewis does not address the issues presented in today's letter opinion, and more specifically, Green does not address the question as to whether this Court should look to the law as it existed in the Commonwealth of Virginia as of February 18, 1867 in order to determine whether ECUSA/Diocese had any vested property rights as of that date, a question that the Court today answers in the affirmative.

Green v. Lewis, 221 Va. 547 (1980), does not speak to whether the Contracts Clause renders 57-9(A) unconstitutional as applied to the specific properties at issue in this litigation. ECUSA/Diocese argue that "the Virginia Supreme Court has specifically identified the evidence that religious denominations may use, . . . to prove a contractual interest in local church property: the rules of the general church and the 'course of dealing between the parties,' no less than the deeds, may reveal such contractual interests."[19] ECUSA/Diocese also argue that Green v. Lewis "answers th[e] question" as to "whether [the Court] should look only to the law in effect in 1867 or look to the law in effect today."[20] As the Court has previously held, however, Green v. Lewis is not a 57-9(A) case,[21] nor a Contracts Clause case. That is a significant distinction, because the question of vested rights must turn on the law as it existed at the alleged date of vesting.

5.) Under Virginia law in effect on February 18, 1867, denominations and dioceses could not own, hold, or otherwise acquire an enforceable contractual interest in, property in the Commonwealth of Virginia.

The Court has already partially ruled upon this issue in its Five Questions Letter Opinion of June 27, 2008,[22] and today, it does so completely.

It is a historical and legal fact that, as the CANA Congregations argue, "Virginia law in effect in 1867 did not permit denominations such as the Episcopal Church or the Diocese of Virginia to hold or acquire interests in

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[19] ECUSA/Diocese Opening Br. at 17.

[20] Hr'g. Tr. 62:16-18.

[21] "Letter Opinion on the Court's Five Questions" (June 17, 2008) at 4 ("Green v. Lewis is not a case interpreting or applying § 57-9(A).").

[22] See "Letter Opinion on the Court's Five Questions" at 14 ("Thus, 57-7.1 did not change the policy in Virginia, which is that church property may be held by trustees for the local congregation, not for the general church.").

property."[23] In 1867, Virginia churches and religious societies were not permitted to incorporate—in 1850, the Virginia Constitution had specifically provided that " '[t]he General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law.'"[24] Because they could not incorporate, "[d]enominations were therefore without a 'legal existence' in Virginia."[25]

Because denominations did not have a legal existence, they "held the status of voluntary associations under 1867 Virginia law," and "[b]ecause their membership was 'indefinite,' attempts to transfer interest in property to (or for the benefit of) such entities were void unless expressly authorized by statute."[26] Brooke v. Shacklett, 54 Va. 301 (1856), provides a helpful summary of the history of early church property law in Virginia:

> In the case of Gallego's ex'ors v. Attorney General, 3 Leigh 450, decided by this court in 1832, it was held that the courts of chancery in this state had no jurisdiction to enforce devises and bequests to religious societies or congregations. The court said, that as the statute of charitable uses, 43 Eliz. under which alone such vague bequests could be established, if ever in force in Virginia, had been repealed in 1792, in the general repeal of English statutes, charitable bequests were to be treated as standing on the same footing with other bequests. If definite, they were to be treated as trusts which courts of equity would execute by virtue of their ordinary jurisdiction; but if indefinite, they were no longer recognized by law, and could not be enforced: And a devise or bequest of property to or for the uses of a religious congregation was, it was said, of the character last mentioned. It was too uncertain as to the beneficiaries.

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[23] CANA Congregations' Opening Br. on Supplemental Issue Pursuant to the Court's August 11, 2008, Hearing [hereinafter "CANA Supp'l Opening Br."] at 2.

[24] CANA Supp'l Opening Br. at 2-3 (citing Va. Const., art. IV, § 32 (1850)). This changed in 2005, when, in the wake of Falwell v. Miller, 203 F. Supp. 2d 624 (W.D. Va. 2002), Va. Code § 57-16.1 was added, which allowed Virginia churches to incorporate. See "Letter Opinion on the Court's Five Questions" at 11-12.

[25] CANA Supp'l Opening Br. at 3 (citations omitted).

[26] CANA Supp'l Opening Br. at 5.

Id. at 309 (emphasis added). Brooke further adds, however, that an "act" passed in 1842 and then reenacted and amended in 1849[27] specifically authorized conveyances, devises and dedications of property to religious societies and congregations, so that such conveyances, devises, and dedications of property would not fail for indefiniteness. However, the Court in Brooke further clarifies that

> the conveyances, devises and dedications to which the acts mean[t] to give validity, are conveyances, devises and dedications of property for the use of the 'religious congregations' therein mentioned, in the limited and local sense of the term, viz: for the members (of these religious congregations) as such, who, from their residence at or near the place of public worship, may be expected to use it for such purpose.

Id. at 313. Indeed, the Court added that

> [n]o dedication of property to religious uses, which does not respect these rights of the local society or religious congregation, no deed which does not design such enjoyment of the uses of the property conveyed, by the local religious society or congregation, can be placed within the influence and protection of the statutes.

Id. (emphasis added). Thus, if, for example, the deed at issue in Brooke had established a

> trust, not for the benefit of a local society, or congregation of Methodists worshiping or expected to worship at a particular place, but for the benefit of the 'Methodist Episcopal church in the United States as an aggregate body or sect,' to the exclusion of any peculiar rights of property in the land conveyed, in such local society or congregation. . . . [the deed at issue] would plainly stand . . . out of the influence and operation of the statutes.

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[27] The text of this "act" reads in pertinent part:

> Every conveyance, devise or dedication, shall be valid, which since the first day of January, seventeen hundred and seventy-seven, has been made, and every conveyance shall be valid which hereafter shall be made, of land for the use or benefit of any religious congregation as a place for public worship or as a burial place or a residence for a minister; and the land shall be held for such use or benefit, and for such purpose and not otherwise.

Code of Va. ch. 77, § 8, p. 362 (1849) (emphasis added).

Id. at 314. In other words, the deed would have been void. Brooke was an 1856 case, but the law in effect in 1856 remained essentially unchanged by 1867, as confirmed by a review of Hoskinson v. Pusey, 73 Va. 428 (1879), in which the Court there states that:

> [t]he deed is the same in substance as the deed in *Brooke & others* v. *Shacklett*, 13 Gratt. 301, and the construction must be the same. According to that construction, the conveyance is not for the use of the Methodist Episcopal Church in a general sense. Such a conveyance in this state would be void. But it is a conveyance for the use of a particular congregation of that church, in the limited and local sense of the term--that is, for the members, as such, of the congregation of the Methodist Episcopal Church, who, from their residence at or near the place of public worship, may be expected to use it for that purpose. Such a conveyance is valid under our statutes. See Code of 1873, ch. 76, § 8.

Id. at 431 (emphasis added).

ECUSA/Diocese cite Brooke, Finley v. Brent, 87 Va. 103 (1890) and Hoskinson for the proposition that a denomination or diocese could in fact own, hold, or otherwise acquire an enforceable contractual interest in property in the Commonwealth of Virginia prior to 1867. A close examination of these cases, however, demonstrates that none of these cases support ECUSA/Diocese's position, and in fact cut directly against it. That is because the warring parties in Brooke, Hoskinson, and Finley, were in fact all members of specific local congregations.[28] In none of these cases was the general denomination or diocese an actual party to the dispute. And although ECUSA/Diocese argue that the Court in Brooke, Hoskinson, and Finley "enforced the restrictions and interests that the deed [in each of those cases]

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[28] In Brooke, for example, the dispute was between "factions of the members of the congregations worshipping at two church-houses in Faquier county, Virginia—one faction supported the Methodist Episcopal Church, while the other supported the Methodist Episcopal Church South." "Letter Opinion on the Applicability of Va. Code § 57-9(A)," (April 3, 2008), at 63 (emphasis added). In Hoskinson, "[t]he respective claimants belong[ed] to separate and distinct religious organizations. On the one side, they are members of the Methodist Episcopal Church, on the other, members of the Methodist Episcopal Church South." Hoskinson, 73 Va. at 431 (emphasis added). And in Finley, "the plaintiffs, members of the Methodist Protestant Church, alleged that they had been shut out of their church building by members of the Methodist Episcopal Church South." "Letter Opinion on the Applicability of Va. Code § 57-9(A)," (April 3, 2008), at 68 (emphasis added).

simultaneously granted to the identified denomination,"[29] the Court agrees with CANA's position that

> ECUSA and the Diocese are confusing the question whether a grantor could restrict the use of church property to those members of the congregation adhering to a specific denomination, with the question whether a denomination could itself have an enforceable interest in such property. No 19th century Virginia case finds *any* denomination or diocese—entities that lacked legal standing and the ability to contract—to have had *any* enforceable interest in property.[30]

Finally, the Court would note that ECUSA/Diocese argue that "[t]he General Assembly's restrictions on denominational ownership are unconstitutional and may not be enforced today."[31] But that is not the question that this Court must consider. For the purpose of determining vested rights in a Contracts Clause analysis, the question is whether the Commonwealth's rule prohibiting denominations and dioceses from holding property was unconstitutional in 1867. And the answer to *that* question is a definite "no," since, as of February 18, 1867, the First Amendment to the United States Constitution was not even applicable to the Commonwealth of Virginia, since the Fourteenth Amendment was not even ratified until 1868.[32]

Sincerely,

Randy I. Bellows

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[29] The Episcopal Church's and the Diocese of Virginia's Opening Brief Pursuant to August 11, 2008, Order at 3.

[30] The CANA Congregations' Reply Br. on Supplemental Issue Pursuant to the Court's August 11, 2008, Hr'g at 4. The CANA Congregations further assert that "[n]or do the pre-1867 deeds [of the CANA Congregations] restrict the property here to use for worship under [ECUSA/Diocese's] auspices," Id. at 4, but the Court need not, and does not, reach that factual issue.

[31] The Episcopal Church's and the Diocese of Virginia's Opening Brief Pursuant to August 11, 2008, Order at 9.

[32] Danforth v. Minnesota, 128 S. Ct. 1029, 1034 (2008) (" The ratification of the Fourteenth Amendment radically changed the federal courts' relationship with state courts. That Amendment, one of the post-Civil War Reconstruction Amendments [was] ratified in 1868 . . . .").