Exhibit 13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

The Right Reverend Charles G. vonRosenberg, Individually and in his capacity as Provisional Bishop of the Protestant Episcopal Church in the Diocese of South Carolina, Plaintiff, v. The Right Reverend Mark J. Lawrence and John Does numbers 1-10, being fictitious defendants whose names presently are unknown to Plaintiff and will be added by amendment when ascertained. Defendants.	**CIVIL ACTION NUMBER:** **2:13-cv-00587-CWH** **AFFIDAVIT OF MARK MCCALL**

Personally appeared before me, Mark McCall who, having been duly sworn, deposes and says:

1. I am of sound mind, capable of making this Affidavit, and have personal knowledge of the facts herein stated.
2. I have attached to this Affidavit a statement by me expressing facts and my opinions regarding the history, formation, and governance of The Episcopal Church. I personally reviewed the historical documents cited in that statement. It is my belief that the representations made in the statement are true.
3. My qualifications are set out in the attached statement.

FURTHER, THE AFFIANT SAYETH NOT.

Mark McCall

Mark McCall

Sworn to subscribed before me this 8th day of April, 2013

Nancy Jo Smith

Notary Public for the State of Ohio
My Commission expires: 02/21/2017

NOTARIAL SEAL STATE OF OHIO

NANCY JO SMITH
Notary Public, State of Ohio
My Comm. Expires 02/21/2017

STATEMENT OF MARK McCALL

1. I am a member of the New York bar and am retired from a legal practice with the firm of Sullivan & Cromwell, an international law firm based in New York. I was a partner of Sullivan & Cromwell and later Of Counsel to the firm and was resident in the firm's New York, Paris and Washington offices where I specialized in international litigation and mergers and acquisitions. After my retirement from the practice of law I became a Senior Fellow of the Anglican Communion Institute, Inc., which is an international think tank of bishops, clergy and other scholars based in Dallas, Texas, dedicated to promoting the Anglican Communion through scholarship and education. The Anglican Communion Institute has published numerous articles and sponsored conferences on the polity and theology of The Episcopal Church and the Anglican Communion. I hold graduate degrees in both philosophy (M.A.) and law (J.D.). My *curriculum vitae* is attached to this affidavit as Exhibit 1.

2. As part of my work at the Anglican Communion Institute I have engaged in extensive study and written numerous articles on the polity, legal structure and history of The Episcopal Church. I have also advised, consulted and lectured on polity and canon law, including work with bishops, diocesan bodies and committees, and The Episcopal Church's House of Bishops. My work analyzing the disciplinary canons of The Episcopal Church was responsible in part for the decision at the last General Convention to undertake a study of their constitutionality. The explanation to the resolution as passed stated that "It has been noted by a number of experts on Canon Law throughout The Episcopal Church that there are several clauses within the latest revision of Title IV which appear to be in violation of the provisions of the Constitution of The Episcopal Church." My work on the polity, structure and history of The Episcopal Church has been discussed in published articles both in the United States and abroad and is cited in other expert testimony by witnesses for both parties to this lawsuit.

3. In 2008 the Anglican Communion Institute published my paper "Is The Episcopal Church Hierarchical?" in which I analyzed the structure of The Episcopal Church ("TEC") from a legal perspective in contrast to the theological and political science perspectives that were more common at the time. This paper demonstrated that TEC is indeed hierarchical but that the hierarchy is dispersed among its member dioceses and diocesan bishops and is not concentrated in any central body or office.[1]

3. That paper has been widely read and discussed throughout TEC and the wider Anglican Communion. In March 2009 it was favorably reviewed in the journal *Anglican and Episcopal History* by Robert W. Prichard, who holds an endowed chair at Virginia Theological Seminary,

[1] Mark McCall, *Is The Episcopal Church Hierarchical?, (*Anglican Communion Institute, Sept. 2008), [hereafter "McCall, *Hierarchical*"]
http://anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf

is President of The Historical Society of The Episcopal Church, editor of *The Journal of Episcopal Church Canon Law*, and author of the standard text on the history of The Episcopal Church. Prichard concluded that "McCall's analysis is cogent and based on good historical argument."

4. My 2008 paper was also discussed favorably by Colin Podmore in 2011 in the British journal *Theology*, which is edited at Cambridge University in England. Podmore is the author of a widely read analysis of TEC polity, a Fellow of the Royal Historical Society and at the time was the General Secretary of the House of Clergy of the General Synod of the Church of England.

5. In 2009 I was asked by the Anglican Communion Institute on behalf of several bishops of TEC to prepare an analysis of TEC's governance. This paper, "Bishops' Statement on the Polity of The Episcopal Church," was eventually endorsed by fifteen TEC bishops.

6. In 2010 I was invited by the editor of *The Journal of Episcopal Church Canon Law,* an academic journal published in association with the Virginia Theological Seminary, to publish an article analyzing the right of dioceses to withdraw from TEC. That article, "The Episcopal Church and Association Law: Dioceses' Legal Right to Withdraw," was published in 2011. A true, accurate, genuine and authentic copy of that article is attached as Exhibit 2.

7. In my legal practice at Sullivan & Cromwell I had extensive experience analyzing the legal structures of corporations and partnerships and determining the locus of control of such entities. I was the coordinator at my firm of advice concerning the requirements of the premerger notification rules administered by the federal antitrust authorities. These highly technical rules are heavily dependent on the formal analysis of corporate structures to determine when ownership and control has been transferred to another entity. In the 1980s I litigated a number of cases before an international tribunal in The Hague arising out of the Iranian Revolution and the seizure of the American hostages. One of the jurisdictional requirements of this tribunal was that the claimants demonstrate that they were U.S. citizens. My clients were multi-national corporations and this task required extensive analysis and proof as to their corporate structure and the nature of their ownership and control. One of my clients, the Ford Motor Company, had an especially complex structure due to the continued ownership by Ford family members of special classes of Ford's stock. In these cases I was able to demonstrate through an analysis of the corporate structure and governance that my clients were under the ownership and control of U.S. citizens.

8. In the 1990s I was the primary antitrust and regulatory advisor to British Airways in connection with several acquisitions or potential acquisitions of U.S. airlines. U. S. law requires that all U.S. airlines be owned and controlled by U.S. citizens, making any acquisition by a foreign corporation like British Airways difficult. In 1993 British Airways, acting on my advice concerning the issue of foreign ownership and control, invested several hundred million dollars to purchase half of the equity of USAirways in a highly controversial transaction that was

opposed in a federal administrative proceeding by most of the major airlines in the world. Had the federal government ruled that the effect of this transaction was that USAirways was no longer under the control of U.S. citizens this ruling would have required USAirways to cease operations immediately and my client to lose its substantial investment. The controversy surrounding this transaction became entangled in Presidential election politics in 1992 and a subject of the Presidential debates. The eventual determination that USAirways remained under the control of U.S. citizens was ultimately made by the President on the advice of his cabinet.

9. I also have extensive experience analyzing legal instruments to determine the locus of adjudicative, executive and legislative authority. During the Iranian hostage crisis I concluded after extensive research into the legislative history of various federal statutes and constitutional provisions that the President had the constitutional authority to terminate claims and judicial attachments in U.S. courts against the government of Iran. There were hundreds of such lawsuits pending throughout the United States at the time. Sullivan & Cromwell advised its clients of my analysis, which was contrary to the prevailing advice given at the time by large New York law firms. When Presidents Carter and Reagan in fact subsequently terminated these lawsuits and attachments, their executive actions were upheld by the United States Supreme Court.

10. The settlement of the Iranian hostage crisis permitted U.S. corporations to submit their claims that had been terminated in U.S. courts to an international tribunal established in The Hague provided such claims were not based on a contract that unequivocally gave exclusive jurisdiction to Iranian courts. Most of the claims submitted to that tribunal were based on contracts that arguably disqualified the claimant from meeting this jurisdictional requirement. I litigated two major test cases on this issue, which required a careful analysis of whether the contractual language clearly and unambiguously specified an Iranian court as the final authority for resolving the dispute. The precedents established by these cases were later followed by many other claimants who had virtually identical contractual provisions.

11. In 1989 British Airways joined two U.S. airlines, TWA and Continental, in challenging state statutes and regulations issued by Texas and other states regulating airline advertising. The basis for the challenge was that legislative authority in this area was the exclusive prerogative of the federal government due to preemption pursuant to federal statute and the Supremacy Clause of the United States Constitution. I was counsel for British Airways in this action. The injunction obtained by these airlines was eventually upheld by the United States Supreme Court.

12. In my legal practice I also had extensive experience interpreting, litigating and advising clients concerning treaties and other international agreements. For many years, I advised British Airways and the British government concerning the multinational treaty governing international air transportation as well as bilateral agreements between the U.K. and the U.S. My work for British Airways began in the early 1980s, when it was still wholly owned by the British government, and continued though its privatization in the late 1980s and its acquisitions of and alliances with other airlines throughout the 1990s. In addition, for much of the 1980s I litigated

several cases and advised clients concerning the numerous international agreements that resolved the crisis precipitated by the Iranian revolution and the seizure of the American hostages. Much of this work was done in consultation with the State Department. For three years, I served as secretary (administrator) and legal advisor to an international tribunal based in The Hague that adjudicated a complex dispute between an Arab state and a consortium of European companies concerning petroleum rights. This tribunal held hearings and sessions in The Hague, Doha, Qatar, London, Paris and Washington.

I. Basis for the Opinions Expressed in This Affidavit

13. As outlined above, my legal practice included extensive experience and expertise using the type of analysis and concepts I have employed in my research into the canon law and polity of TEC: analysis of legal structures; determinations as to the locus of control in corporations and other entities; analysis of legal instruments to determine the allocation of executive, legislative or adjudicative authority; and familiarity with the concepts of treaties and other international agreements. In my canon law research and writing I have found that much of the published research has been written from the perspective of theology, church history and political science. Although there was significant commentary on the structure of TEC from a legal perspective in the nineteenth century, this work was done before the major developments in association law and First Amendment jurisprudence in the twentieth century. Much of this earlier work is obsolete for this reason. In addition, work based on theological concepts present issues that the courts cannot adjudicate under the constraints imposed by the First Amendment. In my work I have analyzed the legal structure and governance of TEC using standard legal concepts familiar to all lawyers. These are concepts and an analysis that courts can use without getting impermissibly immersed in theological disputes and controversies.

14. Based on my legal training and experience and my expertise and research in canon law, I have formed the following opinions as to the legal structure and locus of authority in TEC. All opinions expressed in this affidavit and the attached article are made within a reasonable degree of certainty within my areas of expertise. The authorities I have relied upon and sources footnoted in the article are the type reasonably relied upon by experts in my areas of expertise in forming opinions or inferences on the subjects identified.

II. TEC's Legal Structure: a Nonprofit Association with Dioceses as Members

15. As set out more fully in my 2011 article attached as Exhibit 2 and summarized in this affidavit, I believe the following conclusions are true statements about the legal structure of The Episcopal Church.

16. TEC is an unincorporated nonprofit association. Such associations were previously known as "voluntary associations" and that is the terminology used by the founders of TEC to describe the organization they were creating in the 1780s.

17. The primary members of the association comprising TEC are separate legal entities called "dioceses." Some dioceses are themselves organized as associations. Others are corporations. Article V of the Church's constitution makes clear that dioceses, not parishes or individuals, are the primary members of the association since only dioceses can join the association. This requirement that only dioceses, not parishes or individuals can join was established early in the organization process of TEC.

18. The General Convention of TEC is comprised of two legislative chambers. In one, the House of Deputies, the dioceses' representatives vote on important matters as a block by diocese with each diocese getting one vote in the clergy order and one vote in the lay order. This further confirms that dioceses are the primary members of the association. Outside of the General Convention each diocese also elects one or more bishops to serve in the diocese and upon taking office, these bishops become members of the second chamber of General Convention, the House of Bishops. In the House of Bishops, however, the bishops do not vote by diocese but as individuals, and the bishops continue to vote in the House of Bishops after their service to a diocese is completed due to retirement or resignation. Under standard principles of association law, this creates a two-tier membership structure for TEC with dioceses being the primary members and bishops as secondary members upon election by the dioceses.[2]

19. The law of associations is settled that members have a right to withdraw from an association at any time absent provisions in the association's governing constitution restricting withdrawal. There are no such provisions in TEC's constitution prohibiting or restricting withdrawal.

20. The freedom of association is a constitutional right protected by the First Amendment to the United States Constitution. Because association is a constitutionally protected right, the government can neither prohibit nor compel association. Judicial precedents and the opinions of legal experts, including experts on association law, indicate that courts could not enforce a private agreement prohibiting member withdrawal even if one were to be present in the governing constitution of an association. As I previously indicated above, however, there is no such provision in TEC's constitution. These precedents and opinions are discussed more fully in my attached article.

21. In litigation pending in other states agents of the association comprising TEC have taken the position that its member dioceses cannot withdraw despite these settled legal principles. The three primary arguments are (i) that the church was not formed as an association of independent state churches or dioceses, but that instead a national church created the dioceses; (ii) that dioceses give an accession when they join that is deemed to be irrevocable; and (iii) that TEC is a hierarchical church with the supreme hierarchical authority residing in various central bodies and offices. I consider and refute each of these arguments in my attached article.

[2] In the attached canon law journal article I do not discuss the House of Bishops or the second membership class. I was asked by the editor of the journal to discuss the rights of dioceses in that article.

22. It is obvious that the first two of these objections are contradictory. If a diocese is created by the national church, it does not join that church by giving an allegedly irrevocable commitment to membership. In any event, I consider the historical record in detail in my attached article and demonstrate that the first argument has no support in the contemporaneous record of the founding of TEC and has been rejected throughout the church's history by its most prominent historians and the church's own official commentaries.

23. The second argument concerning accession to membership also fails. First, it is basic law of associations that all members give an unqualified agreement to the association and its rules when they join. If this made membership irrevocable no member could ever withdraw from an association. The settled law is otherwise. Second, as already indicated, even if there were an agreement to irrevocable membership, it would not be enforceable under standard First Amendment jurisprudence. Third, TEC itself gave an unqualified accession to the constitution of the Anglican Consultative Council when it joined that body and it does not regard that membership as irrevocable or that council as having legal supremacy over TEC.

24. As to the third argument, I have reviewed the TEC constitution carefully and it does not contain any provision expressing legal supremacy or allocating hierarchical authority to any central body in recognizable legal language. This can easily be confirmed by searching the constitution for standard legal terms expressing hierarchy with any search engine. I have also shown through research into the legislative history of the constitution that this was not an oversight but an intentional rejection of the hierarchical model of church polity in the Church of England with which the founders were familiar. Moreover, when a proposal was made in the late nineteenth century to add an explicit supremacy clause to the TEC constitution, that proposal was rejected.

25. My conclusion is that no contrary argument that has been advanced brings into question the settled law of associations that member dioceses have the legal right to withdraw their membership in the association comprising TEC.

III. Mullin Concedes That TEC's Constitution Does Not Contain Explicit Language Establishing A Central Hierarchy and Claims That This Was an "Assumption" of the Founders That Is Only "Reflected," Not Stated in the Constitution.

26. In the remainder of my affidavit I will examine the account of TEC's structure and history presented by Plaintiff's expert witness, Robert Bruce Mullin. This account is profoundly mistaken and contains numerous errors, misrepresentations and failures to understand relevant legal concepts. But before turning to the detailed analysis it will be useful to present an overview of what that testimony is trying to accomplish.

27. As I will show below, Mullin concedes as he must that TEC's governing document, its Constitution, contains no explicit language giving any central body hierarchical supremacy over its member dioceses in recognizable legal language. He claims instead that such supremacy was

an "assumption" that is only "reflected," not stated, in the church Constitution. Indeed, he goes so far as to claim that while "explicit language of supremacy was necessary" for other churches, for TEC "language of supremacy in the Constitution was unnecessary and, indeed, inappropriate."

28. To justify why TEC alone does not need the standard legal language readily found elsewhere Mullin develops an alternative theory of TEC's structure and legal history that he characterizes at the outset of his testimony as "an extended historical and theological analysis of the development of the Church's hierarchical structure from its earliest days to the present."

29. In this section I will consider carefully what Mullin admits about the lack of standard legal language expressing hierarchy. In the next section I will show that his alternative theory cannot withstand scrutiny.

30. Although I challenge in this affidavit Mullin's interpretations of TEC's legal history, constitution and canons and 200 years of related documents, it is important to reiterate that Mullin characterizes his testimony as "an extended historical and theological analysis." When his testimony is understood as he himself describes it, it is clear that the Plaintiff is asking the Court to go far beyond anything the First Amendment permits. Courts cannot sift through 200 years of ecclesiastical history pursuing "assumptions" that were allegedly made in the 1780s and never stated explicitly but were only "reflected" in an ambiguous historical record. Courts cannot constitutionally enter a theological thicket that requires "immersion in doctrinal issues or extensive inquiry into church polity." *Maryland and Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 370, n. 4 (1970).

31. I have shown in the second section of this affidavit and in Exhibit 2 that TEC's Constitution contains no provision specifying in recognizable legal language a central hierarchy with legal supremacy over its member dioceses. Mullin concedes this fact in his affidavit, stating that "language of supremacy in the Constitution was unnecessary and, indeed, inappropriate" and that such supremacy was merely an "assumption" of the first (and current) TEC Constitution. The key portion of Mullin's affidavit on this issue is found in paragraphs 74-76. In these paragraphs, Mullin acknowledges, as he must, that TEC's Constitution contains no language identifying a supreme authority higher than the diocese in express legal terms. In paragraph 74, in a section bearing the heading "Lack of 'Federal' Language," Mullin acknowledges "the absence of any language of federalism in the Church Constitution." What he means by his carefully chosen formulation, "language of federalism," then becomes clear:

> Thus, the **assumptions** of the Church Constitution of 1789 were that the General Convention was to be the chief legislative authority and that state conventions would possess only that authority which the General Convention chose not to exercise itself, either expressly or implicitly.

> 75. The assertion has been made that the Constitutions of certain other religious bodies appear to use **more intentional language of supremacy** than that found in the Church's Constitution in articulating the superior authority of the national body…." (Emphasis added).

Thus, the "absence" Mullin is acknowledging is the lack of any "language of supremacy" or hierarchical authority for TEC's "national body." This absence forces him to contend that the purported hierarchical authority of the church's General Convention and the subordination of diocesan bodies were nonetheless the unspoken underlying "assumptions" of the church Constitution.

32. Mullin then compares the absence of language of hierarchical authority in TEC's Constitution with the explicit provisions found in the governing instruments of other denominations that have hierarchical bodies specified in recognizable legal language:

> 76. In three often-cited Twentieth-Century church Constitutions, those of what is now the United Methodist Church, the Presbyterian Church USA, and the Evangelical Lutheran Church of America ("ELCA), **explicit language of supremacy was necessary**, because in each case the present church was a union of earlier churches with long traditions of legislative independence. The Methodist merger of 1939 represented the coming together of Southern and Northern branches (among others) that had been separate since 1844. Presbyterians similarly re-joined churches divided by the Civil War, while the ELCA represented the union of three churches (the Lutheran Church of America, the American Lutheran Church, and the Association of Evangelical Lutherans) that had been historically independent. When there have been competing traditions of legislative autonomy, language of supremacy may be necessary to delineate authority. **But in the case of The Episcopal Church in the 1780s, where no such competing authorities existed, language of supremacy in the Constitution was unnecessary and, indeed, inappropriate**. (Emphasis added.)

In other words, TEC's Constitution is totally devoid of "any language" explicitly expressing the hierarchical supremacy of a "national body" such as that readily found in other church constitutions. Given this "absence," Mullin can only claim that while it is "necessary" for other churches, in the case of TEC—and it alone—such language is "unnecessary" and "inappropriate." By the analysis of Plaintiff's own expert, therefore, Plaintiff's case rests on an attempt to prove through detailed historical evidence that the claimed central hierarchy—so clearly expressed in other churches' governing documents—is found in TEC only by implication.

33. Indeed, Mullin's task, which he necessarily is inviting the Court to join, is to scour ambiguous historical evidence to find the missing hierarchical authority somehow "reflected" in

various documents and actions over the 200 year history of the church. The main sections of his affidavit indicate the argument he is putting forward:

> Section II, "The Hierarchical Nature of The Episcopal Church Was **Evident** During the Church's Organizational Period, 1784-1789";
>
> Section III, "The Hierarchical Nature of The Episcopal Church Was **Reflected** in the 1789 Constitution and Canons";
>
> Section IV, "The Supremacy of the General Convention Has Continued to Be **Reflected** in General Convention Actions from 1790 to the Present";
>
> Section V, "Nineteenth Century Commentators Unequivocally **Viewed** the General Convention as the Supreme Authority in The Episcopal Church and Diocesan Accession as Irreversible." (Emphasis added) (these sections account for 50 of the affidavit's 70 pages).[3]

Most significant is the heading of Section III: TEC's own witness claims only that the hierarchical nature he advocates was "reflected," not stated, in the church Constitution. Indeed, while he claims that the supremacy of General Convention is "evident," "reflected" and "viewed," he offers no section headed "The Constitution States that the General Convention Is the Supreme Authority in the Church."

34. Trying to justify TEC's lack of any explicit designation of a central hierarchy, Mullin implies that in other church constitutions explicit hierarchical language was due to church mergers in the late nineteenth and early twentieth centuries: "explicit language of supremacy was necessary, because in each case the present church was a union of earlier churches with long traditions of legislative independence." But that implication is clearly false. The Presbyterian Church's most explicit expression of hierarchy was found in its first constitution, which was adopted in 1789 before TEC was organized: "The General Assembly is the highest judicatory of the presbyterian church."

35. It is noteworthy, moreover, that Mullin compares TEC to the Lutheran, Presbyterian and Methodist churches, citing my own work, but he does not mention the other three churches I have reviewed in this context, the Church of England, the Roman Catholic Church and the Serbian Orthodox Church. These churches were not formed in mergers from "competing traditions of legislative autonomy" yet they have clearly defined hierarchies in the explicit terms

[3]For completeness, the other main sections of the affidavit are: Section I, "The Episcopal Church Is Hierarchical," which the expert characterizes as a "brief discussion of the English roots of The Episcopal Church and an overview of the hierarchical structure of the Church"; and Section VI, "The Case of the Protestant Episcopal Church in the Confederate States of America Does Not Support Present-Day Secessionist Claims."

one expects: "supreme governor"; "supreme authority"; "highest hierarchical body."[4] They are the kind of unitary church Mullin claims TEC to be, but they have the most explicit hierarchical language of any of the churches.

36. An even more profound logical flaw lies behind Mullin's attempt to distinguish TEC from other churches. "Explicit language of supremacy was necessary," to use Mullin's phrase, not because of "long traditions" of independent churches **before** the constitution was adopted, but because there were potentially competing bodies or centers of authority within the church government **after** the constitution was adopted. These churches all have bishops, superintendants, dioceses or synods in addition to the designated supreme authority. And the reason these churches, whether the result of mergers or not, have an explicitly designated hierarchical authority is the various powers of these bodies must be defined and hierarchical authority allocated.

37. TEC also has central bodies and offices, bishops, and dioceses, but lacks the explicit hierarchical specifications found readily in other churches. In TEC, the significance of the independence of the state churches that came together to form TEC is that they continued to exist *under the same state constitutions, canons or acts of association* **after** they adopted the TEC Constitution as they had prior to the adoption of the church Constitution. It is not reasonable merely to posit an "assumption" that their independence was surrendered when they continued to be legally constituted as they were before they joined TEC.

38. Thus, it is apparent on the face of Mullin's affidavit that acceptance of his theory would require the Court to delve deeply into 200 plus years of ecclesiastical history and compare the relative independence of TEC's founding bodies with those of the Methodist, Presbyterian and Lutheran bodies for whom he concedes "explicit language of supremacy was necessary." My analysis does not require the Court to engage in such comparative historical ecclesiology, which is clearly well beyond anything the First Amendment permits.

IV. In the Absence of Clear Legal Language Specifying a Central Hierarchy, Mullin Offers as an Alternative an "Extended Historical and Theological Analysis" that Cannot Withstand Scrutiny.

39. In this section I will examine the major elements of Mullin's theory as to why TEC does not have the standard legal language readily found in the governing instruments of other churches. None of these elements can withstand scrutiny. The major pieces of his theory are the following:

- TEC was not formed as an association created by pre-existing independent state churches but as the "revival" of a unitary or unified national church.
- The state churches that united to form TEC had no history of self-governance and that there was no ecclesiastical legislation in the American colonies.

[4] The explicit language in the governing instruments of these churches is reviewed in detail in my paper "Is The Episcopal Church Hierarchical?" at 12, 23-30.

- TEC's General Convention possesses "inherent" authority that is not derived from its constitution.
- General Convention "ratified its own constitution."
- TEC's constitution "reflected" the supremacy of General Convention.
- The use of standard legislative language such as "shall" demonstrates legal supremacy.
- "Nineteenth Century Commentators Unequivocally Viewed the General Convention as the Supreme Authority in The Episcopal Church and Diocesan Accession as Irreversible."

There are numerous other mistakes, misrepresentations and failures of legal logic, but these are the major elements in Mullin's theory. They are all false.

A. Mullin's Account of TEC's Founding and Structure as the "Revival" of a Unified National Church Rather than an Association of Pre-existing Independent State Churches Is Contradicted by the Historical Record and TEC's Own Official Commentaries.

40. The linchpin of Mullin's theory is that TEC was not formed by the association of independent state churches but was instead the "revival" of a unified national church. By his own analysis, if TEC was formed from independent churches explicit language of supremacy would be necessary. But this fundamental plank in Mullin's theory is contrary to the understanding of the participants at the time and has been rejected by TEC's most prominent historians and own official commentaries. On this issue, Mullin turns TEC history on its head. Virtually all who have considered the question agree that TEC was formed by the union of independent churches.

41. In Maryland, the second largest of the colonial churches, the revolution ended the colonial government, but the church remained under the control of the new sovereign and independent state of Maryland, which itself was part of the confederation united under the Articles of Confederation. In 1783, the clergy requested and received permission from the state legislature to meet in convocation at which they issued a "Declaration of certain fundamental rights and liberties of the Protestant Episcopal Church of Maryland," in which they declared that church to be "an entire church" "independent of every foreign or other jurisdiction, so far as may be consistent with the civil Rights of Society." That last qualification is important since the petition to the legislature requested that their plan for the church be "fixed under the Public Authority of the State, with the Advice and Consent of the Clergy…" In a subsequent letter to William White, the leader of those seeking to unite the various state churches, one of the Maryland clergymen elaborated the meaning of this declaration:

> I think that the Protestant Episcopal Church, in each particular State, is fully entitled to all the Rights and Authority that are essentially necessary to form and complete an Entire Church; and that, as the several States in Confederation have essential Rights and Powers

> independent on each other, so the Church in each State has essential Rights and Powers independent on those in other States.[5]

42. The first historians of the church understood Maryland's "declaration" in precisely this way. Francis Hawks, TEC's official historiographer in the mid-nineteenth century and the authority on whom Mullin relies most heavily at other points, noted that:

> [The Maryland declaration] is important on more accounts than one; but is especially deserving of notice from the conclusive evidence it furnishes that the Church of Maryland, like that of Virginia, claimed to have a distinct, independent existence, without reference to any connection with the Church in any other colony.[6]

43. In the largest of the state churches, Virginia, the independence was even more pronounced. The Virginia church was so controlled by the state legislature that it could not even meet with the other state churches. Upon being invited to the first interstate meeting in 1784, the leader of the Virginia church responded to William White that:

> The Episcopal Church in Virginia is so fettered by Laws, that the Clergy could do no more than petition for a repeal of those laws for liberty to introduce Ordination and Government and to revise and alter the Liturgy. The session is passed over without our being able to accomplish this. The few Clergymen at Richmond to whom your Letter was shown, approved of the Plan and proceedings of the Pennsylvania Convention, and also of the general meeting at New York, but no delegates have been appointed to attend. In the Present State of Ecclesiastical affairs in this State, the Clergy could not, with propriety, and indeed without great danger to the Church, empower any Persons to agree to the least alteration whatever.[7]

In fact, this Virginia clergyman, later to be elected, but never consecrated, the first bishop in Virginia, arranged personal business in New York and observed but did not participate officially in the first meeting. The minutes of that meeting recorded his presence as follows:

> N.B. The Revd. Mr. GRIFFITH from the State of Virginia, was present by permission. The Clergy of that State being restricted by Laws yet in force there, were not at liberty to send Delegates, or consent to any Alterations in the Order Government, Doctrine, or Worship of the Church.[8]

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[5] William Stevens Perry, ed., *Journals of General Conventions of the Protestant Episcopal Church in the United States: Vol. III Historical Notes and Documents,* (Claremont, N.H.: Claremont Mfg. Co., 1874), 3:43-44 [hereafter "Perry, *Documents*"].

[6] Francis L. Hawks, *Contributions to the Ecclesiastical History of the United States*, (New York: John S. Taylor, 1839) 2:294.

[7] Perry, *Documents* 3:46.

[8] Perry, *Documents* 3:3.

44. This meeting articulated the "fundamental principles" of "a general ecclesiastical constitution," one of which contained the language that to this day remains the specification of the authority of the General Convention: "there shall be a general convention."[9] It is simply inconceivable that such a concept of a general convention was intended to include supremacy over the state churches when the largest of those churches was legally prohibited even from meeting and could not agree to the "least alteration whatever" to the government of their state-controlled church.

45. The church's first historians clearly understood the significance of this meeting as demonstrating the independence of the state churches that Mullin now denies. Hawks concluded:

> From Virginia, Dr. Griffith was present by permission. He could not sit as a delegate, because Virginia (a State which, through its whole ecclesiastical history since the Revolution, has always asserted its independent diocesan rights) had forbidden by law her clergy to interfere in making changes in the order, government, worship, or doctrine of the Church. Virginia asserted the entire independence of the Church within her limits of all control but her own.[10]

And Bishop William Stevens Perry, Hawks' colleague and successor, likewise concluded:

> No stronger proof could have been given of the assertion made in this connection by the Rev. Dr. Hawks, that "Virginia asserted the entire independence of the Church within her limits of all control but her own."
>
> This was evidently the judgment of the Convention. The Committee "appointed to essay the fundamental Principles of a general Constitution for this Church" began their report with the recognition of diocesan independency.[11]

46. In summary, there is no doubt at the outset that the fundamental plank in Mullin's whole theory is false. Prior to forming their voluntary association by adopting the TEC constitution, the state churches were independent, autonomous bodies. This general conclusion is unquestionably recognized by the leading historians throughout the church's history.

Hawks:

> It would seem, then, that the churches of the several States came together as independent churches, duly organized, and so considered each other, for the purpose of forming some

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[9] Perry, *Documents* 3:4.

[10] Francis L. Hawks, *The Constitution and Canons of the Protestant Episcopal Church in the United States*, (New York: Swords, Stanford & Co., 1841), 6, reprinted in 1 Journal of Episcopal Church Canon Law 61-117 (2010) [hereafter "Hawks, *Constitution*"].

[11] William Stevens Perry, *The General Ecclesiastical Constitution of the American Church,* (New York: Thomas Whittaker, 1891), 87 [hereafter "Perry, *Constitution*"].

> bond whereby they might be held together as one religious community throughout the whole United States.[12]

Perry:

> In short, the action contemplated and proposed in the Fundamental Principles of 1784, — principles based, as we have seen, on those of The Case of the Episcopal Churches Considered, — proves conclusively that the Church in each independent State of the federal union, where organized agreeably to its own pleasure, deemed itself, and was regarded by each independent Church in the other States respectively, as an independent branch of the Catholic Church of Christ, lacking, indeed, a perfect organization while the Episcopate was wanting, but fully competent to seek that perfecting order and to organize for this purpose and for such other purposes as the present need seemed to require.[13]

47. More recently, this reality of the formation of TEC has been recognized by TEC's own official commentaries. The "Church's Teaching" was a multi-volume series published by TEC in the 1950s and 1960s. One volume, entitled "The Episcopal Church and Its Work" covered the governance of the church. This volume was a joint effort of Dr. Powel Mills Dawley, the long-time professor of church history and sub-dean at General Theological Seminary, "with the assistance of the Authors' Committee of the Department of Christian Education of The Protestant Episcopal Church." This volume was first published in 1955 and a revised edition was issued in 1961. This was the standard teaching of TEC on these matters when many of today's bishops and senior clergy were trained.

48. On the formation of TEC from pre-existing separate and independent dioceses, Dawley's volume is categorical:

> At the time that the American Revolution forced an independent organization upon the Anglican colonial parishes, the first dioceses existed separately from each other before they agreed to the union in 1789 into a national church. That union, like the original federation of our states, was one in which each diocese retained a large amount of autonomy, and still today the dioceses possess an independence far greater than that characteristic of most other Churches with episcopal polity.[14]

Dawley then notes:

> Despite this increase in the number of dioceses there has been little change in the constitutional pattern by which they form our national Church.[15]

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[12] Hawks, *Constitution,* 8.
[13] Perry, *Constitution,* 99.
[14] Powel Mills Dawley, *The Episcopal Church and Its Work,* (Greenwich, CT: Seabury, rev. ed. 1961), 115-16.
[15] Dawley, p. 115.

49. Finally, the pre-existence of separate independent dioceses is also emphasized by White & Dykman, TEC's official commentary on its constitution and canons: "Before their adherence to the Constitution united the Churches in the several states into a national body, each was completely independent." White & Dykman then describes the national body they created as "a federation of equal and independent Churches in the several states."[16]

50. TEC's creation as an association of independent state churches is confirmed by the legal instruments adopted at the time. For example, the state church in Pennsylvania, under the leadership of William White, acted in May 1786 to modify its existing "act of association" to give the state church the power to amend its prayer book:

> WHEREAS, Doubts have arisen whether under the Act of Association, any alterations can be made in the Book of Common Prayer and the Administration of the Sacraments, and other Rites and Ceremonies, of the Church, except such as become necessary in consequence of the late Revolution:
>
> It is, therefore, hereby determined and declared, That further alterations may be made by the Convention, constituted by the said Act, provided only that "the main body and essentials" be preserved, and alterations made in such forms only as the Church of England hath herself acknowledged to be indifferent and alterable.
>
> And it hereby determined and declared, That the power given by this supplement to the Convention of the Protestant Episcopal Church in this State, may, by the said Convention, be conveyed to a convention of the said Church in the United States, or in such States as are willing to unite in a constitution of ecclesiastical government, if the same shall be judged most conducive to charity and uniformity of worship.[17]

51. Several facts are made quite clear by this supplement to the Pennsylvania Act of Association. First, as of May 1786, the Pennsylvania church, already organized, thought TEC was still to be formed. This is further stated unequivocally by the Pennsylvania constitution, adopted in 1814, which refers to the act of association in 1785 as the formation of the state church and then recites "*since that time*, in General Conventions of the Protestant Episcopal Churches (sic) within the United States, a Constitution and Canons were formed for the government and discipline of the same." (Emphasis supplied.)[18]

52. Second, the supplement to the Act of Association shows clearly that the Pennsylvania church and William White thought that Pennsylvania might not join in a national church, but rather join with other "willing" state churches.

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[16] Edwin A. White and Jackson Dykman, ed., A*nnotated Constitution and Canons,* (New York: Seabury, 1982), I:12, 29.
[17] 1814 Pa. J 23.
[18] Id. 23-24.

53. Third, the Pennsylvania church declared by this act that it alone had the power as of May 1786 to alter its prayer book. This was not by permission of General Convention, but a power that Pennsylvania *might* "convey" to another convention of churches.[19]

54. It is appropriate to conclude this section by noting the provision in the first constitution for the admission of additional state churches to the association:

> Art. 5. A Protestant Episcopal Church in any of the United States not now represented, may, at any time hereafter, be admitted, on acceding to this Constitution.[20]

This is an explicit acknowledgement that there were state churches outside of the association that might subsequently be "admitted." They were not to be created by the national church but admitted.

55. It is clear from all these sources that the main tenet in Mullin's theory is false. The creation of TEC was not the "revival" of a unified national church but the association of independent state churches. By Mullin's own logic, therefore, explicit language of supremacy was "necessary."

> B. Mullin Falsely Claims that There Was No Ecclesiastical Legislation in the American Colonies.

56. One of the more extreme positions Mullin is forced to defend by denying that TEC was formed as an association of independent state churches is his claim that there was "no tradition of ecclesiastical legislation at the level of individual colonies." This claim is so obviously false that Mullin himself half retracts it even as he states it. This is an important point since it is the basis for Mullin's key claim that the supremacy of General Convention was an unspoken "assumption" of the founders.

57. Mullin's testimony on this point is in paragraphs 42 and 74:

> 42. During the colonial period there had been no tradition of ecclesiastical legislation at the level of individual colonies; all ecclesiastical legislation had originated from the Church of England….
>
> 74. The absence of any language of federalism in the Church Constitution should not be surprising. In the secular realm, the framers of the U.S. Constitution had to balance

[19] This fact alone refutes Mullin's confused and self-contradictory argument in paragraph 55 that a draft article in a "proposed constitution" in 1786 was an exercise of General Convention's alleged inherent authority. Mullin claims that "This declaration of the right of the General Convention alone to change the Book of Common Prayer was crucial in asserting the national and hierarchical nature of the Church." No less an authority than William White himself refuted Mullin's theory about "the hierarchical nature of the church" when Pennsylvania declared formally that same year that only the state church had the power to change the prayer book, a power it might "convey" to a yet to be organized national church.

[20] William Stevens Perry, ed., *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835,* (Claremont, N.H.: Claremont Mfg. Co., 1874), I:100 [hereafter "JGC"].

> carefully the necessary powers and privileges claimed by the national government and powers of sovereign states, which had exercised considerable, if not unlimited, legislative and judicial authority for well over a century as colonies. Such was not the case in the Church. As discussed above, during the colonial period Church of England congregations did not legislate for themselves but received all their laws from the Church of England, where full authority to legislate lay at the national level. Thus, the assumptions of the Church Constitution of 1789 were that the General Convention was to be the chief legislative authority and that state conventions would possess only that authority which the General Convention chose not to exercise itself, either expressly or implicitly.

58. Mullin immediately undercuts this key argument in a footnote, however, in which he notes that due to "the minimal attention" the colonial congregations received from the Bishop of London these congregations "developed a habit of self-governance." This is the primary premise in Mullin's argument that the lack of hierarchical language in TEC's constitution can be explained as due to an assumption that did not require articulation since there was no history of "legislative independence" in the state churches. Yet even as he makes this argument he is forced to concede that there was a "habit of self governance" in the colonial churches.

59. The historical facts are actually much more destructive of Mullin's theory than his limited concession admits. Most Anglican churches in the colonies were not "self governed" but were governed by the same "sovereign states" and "colonies" whose powers necessitated the Supremacy Clause in the U.S. Constitution. Mullin's claim has two parts: "all ecclesiastical legislation had originated from the Church of England"; and "during the colonial period there had been no tradition of ecclesiastical legislation at the level of individual colonies."

"all ecclesiastical legislation had originated from the Church of England"

60. The extent of the ecclesiastical authority of the Bishop of London was summarized by William White, in his blueprint for what would eventually become TEC, *The Case of the Episcopal Churches in the United States Considered:*

> [The episcopal churches in the united states] have been heretofore subject to the ecclesiastical authority of the Bishop of London. This authority was derived under a commission from the crown; which, though **destitute of legal operation**, found a general **acquiescence** on the part of the churches; being exercised no farther than to the necessary purposes of ordaining and licensing ministers….
>
> The ecclesiastical power over the greater number of the churches, formerly **subsisting in some legislative bodies on this continent**, is also abrogated by the revolution. In the southern states, where the episcopal churches were **maintained by law**, the assemblies might well have been supposed empowered, in conjunction with the other branches of legislation to regulate their external government; but now when the establishments are overturned, it would ill become those bodies…to enact laws for the episcopal churches….

> **All former jurisdiction over the churches being thus withdrawn, and the chain which held them together broken**, it would seem, that their future continuance can be provided for only by voluntary associations for union and good government. (Emphasis added.)[21]

61. Two preliminary observations about White's conclusions are noteworthy: first, the authority of the Bishop of London was not legal, but by consent, and extended only to ordinations. The real authority for most of the churches lay with "legislative bodies on this continent." Second, White was prescient if premature about the continuing authority of the state legislatures over the state churches. In particular, the Protestant Christian religion continued to be established in the state of South Carolina and under state control until 1790, the year after TEC was formed.

62. A half century later, then Presiding Bishop White offered essentially the same analysis in his *Memoirs*:

> For although the bishop of London was considered as the diocesan of the Episcopal churches in America, it is evident, that his authority could not be effectually exerted, at such a distance, for the removing of unworthy clergymen; besides which, there were civil institutions supposed to be in opposition to it, in the provinces where establishments had been provided. In Maryland, in particular, all interference of the bishop of London, except in the single matter of ordination, was held by the proprietary government to be an encroachment on its authorities.[22]

63. So from White it is obvious that the colonial churches had only a limited connection to the Bishop of London and that their primary governance (for the largest of the state churches) was by colonial political authorities. With the revolution, the "chain was broken" and nothing held them together.

64. In his study the nineteenth century commentator Hugh Evans emphasized the limited authority of the Bishop of London:

> But, agreeably to the deep-rooted English notion about the supremacy, this authority was supposed to be derived from a royal commission. It is certain that some of the Bishops of London held such commissions; but it is equally certain, that others had them not. In fact, there is little or no reason for believing, that the designation of the Bishop of London to exercise Episcopal authority in the colonies originated with the crown…. It is necessary for our purpose, to glance at the nature and extent of the authority which the Bishops of London exercised, before the Revolution, in the colonies which are now the United States. It was an Episcopal authority, and consequently a spiritual authority. Moreover, it

[21] William White, *The Case of the Episcopal Churches in the United States Considered* (Philadelphia: Claypoole, 1782), 6-8 [hereafter "White, *Case,"*].
[22] White, *Memoirs of the Protestant Episcopal Church in the United States of America,* 2nd ed. (New York:Swords, Stanford and Co., 1836) 18-19 [hereafter "White, *Memoirs"*].

> had not any real connection with temporal authority. For it was not established by any civil law, which the colonists recognized….His authority was then only over Churchmen; it was the spiritual authority of the Episcopate, and was exercised only over those, who submitted to it upon spiritual grounds.[23]

65. And, finally, as to Mullin's claims that all legislation came from England, once again the conclusion of Evans: "long before the American Revolution, all legislation in the Church of England had, practically, fallen into disuse. The Bishops of London did not, therefore, claim any legislative authority over that Church in the colonies."[24] In fact, ecclesiastical legislation had long come from the colonial governments.

"no tradition of ecclesiastical legislation at the level of individual colonies"

66. The second claim by Mullin is startling: "During the colonial period there had been no tradition of ecclesiastical legislation at the level of individual colonies." This is not an obscure subject; it has been examined often over the last two centuries, not least by Thomas Jefferson. Mullin's claim could hardly be more obviously false.

67. Judge Michael McConnell has recently surveyed the colonial ecclesiastical legislation in a lengthy law review article.[25] The largest of the colonial state churches, Virginia, was governed by the laws of Virginia and had been since the early 1600's. Thomas Jefferson counted a web of 23 laws enacted in Virginia between 1661 and independence that established the Church of England in that state.[26] McConnell describes in detail a comprehensive set of "rules to be observed in the government of the Church" adopted by the colony in 1661. According to McConnell these "Diocesan Canons of 1661" "constitute a catalog of the essential legislative ingredients for an established church as perceived at the time," covering everything from church building, clergy housing and salaries, rules for selecting vestries, approval of ministers by the colonial governor and local vestry, Sabbath observance, sermons, sacraments and much more besides.[27]

68. The real ecclesiastical authorities in Virginia were the local vestries. Until the revolution, the vestries were allied with the legislators in the House of Burgesses, which is not surprising given that they were largely the same individuals. Scholars have characterized the situation variously as "semi-feudal," the vestry as the "cornerstone in the structure...their status had long-range

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[23] Hugh Davey Evans, *An Essay on the Episcopate of the Protestant Episcopal Church in the United States of America,* (Philadelphia: Herman Hooker, 1855), 109-12.
[24] Evans, 112.
[25] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. and Mary L. Rev. 2105 (2003).
[26] McConnell, p. 2111.
[27] McConnell 2118. The name of the colonial legislation is significant: "Diocesan Canons." Mullin states in paragraph 46, n. 17 that "one sees no discussion of dioceses, which was an independent ecclesiastical category and not present in early America." Yet in paragraph 92 Mullin himself quotes a 1789 canon that uses the term "diocese."

implications," "the local vestries assumed direction and control of the Virginia Church," and the ambition of the vestries as "a disturbing influence in the bosom of the Church itself."[28] The foremost historian of the early Virginia church concludes: "the church had no healthy government. It was neither Episcopal, Presbyterian nor Congregational; it was peculiar and colonial.... Vestrymen were usually politicians and frequently burgesses. The church was thoroughly subordinated to the state."[29] I noted previously that the Virginia church was "so fettered by Laws" that it could not even meet with other state churches in 1784.

69. The church in Maryland, established since the early 1700's, was under the control of the proprietary governor. As William White notes, the Maryland governors disputed the authority of the Bishop of London even to license clergy in that state. And in his extensive study of this issue, Evans noted that "In fact, the proprietors of Maryland maintained that all the churches, within their province, were donatives, and so totally independent of all Episcopal jurisdiction whatever."[30] As noted above, after American independence the clergy in Maryland had to petition the state legislature even to meet.

70. McConnell notes that in 1704 the South Carolina colonial assembly enacted provisions that "replicated the basic elements of the establishment already seen in Virginia's Diocesan Canons of 1661."[31] Underwood concludes that from that date the church in South Carolina was "caught in a regulatory web" of colonial legislation pursuant to which it paid for its privileges as the established church by "forfeiting much of its freedom of decision making for a dense maze of regulations." This legislative control over the church was reduced after the American Revolution, but the Protestant religion remained established and under the control of the state government in South Carolina until 1790, after TEC was formed.[32] This fact alone removes any possible theory that the founding state churches, including South Carolina, assumed that supremacy resided in a general convention. Such supremacy was not theirs to surrender.

C. Mullin Misrepresents the Historical Facts in Claiming the General Convention Asserted the Inherent Authority to Legislate Prior to the Adoption of the Constitution.

71. The importance of this point to Mullin's theory is reflected in the fact that he asserts it repeatedly throughout his affidavit. At the outset in paragraph 7 he characterizes this issue as one of the chief differences between his theory and views expressed by others, including me:

[28] McConnell, p. 2139; Frederick V. Mills, *Bishops By Ballot: An Eighteenth Century Ecclesiastical Revolution* (New York: Oxford U. Press, 1978) 92-94; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford U. Press, 1986) 30; Cobb, Sanford H., *The Rise of Religious Liberty in America* (New York: Macmillan 1902) 87.
[29] H.J. Eckenrode, *Separation of Church and State in Virginia* (Va. State Lib., 1910) 14.
[30] Evans, 116.
[31] McConnell 2127-28.
[32] James L. Underwood and William Lewis Burke, eds., *The Dawn of Religious Freedom in South Carolina* (Columbia, S.C.: Univ. of S. C. Press, 2006) 11, 61-66.

> In this view [of others], the Constitution preceded, defines and limits the authority of General Convention.

Later he states that

> McCall dismisses this evidence entirely, on the erroneous premise that these canons are "unconstitutional" efforts by the General Convention to legislate beyond its constitutionally-defined authority (as we have seen above, the General Convention's authority to adopt canons is inherent and does not derive from the Constitution).[33]

72. Mullin expounds this theory of inherent, extra-constitutional authority in the following paragraphs:

> 21. After several more meetings, in 1789, clergy and laity from the former colonial congregations met again, this time with two of three newly-ordained bishops in attendance, as an entity that they called "the General Convention of the Protestant Episcopal Church in the United States of America"; in August, the entity adopted bylaws, called "canons," and in October it adopted a Constitution for the entity.
>
> 78. This concept of the inherent legislative authority of the General Convention was evident from the very beginning. As early as August of 1789, the General Convention asserted the right to legislate, not from constitutional mandate, but out of its very nature as representing the wider Church. At that meeting, the General Convention adopted a series of canons, even though the Constitution had not yet been finally ratified! [*sic*]
>
> 79. This action of legislating before there was a Constitution would be unusual from the perspective of contemporary secular politics. Yet, it was in keeping with understandings about the nature of the Church discussed in Sections I and II above. The authority to adopt canons was seen not as a privilege derived from a written Constitution, but rather as part of the fundamental nature of the Church. Since the early centuries, ecumenical councils had claimed the right to issue canons binding on the Church, and national churches had claimed the same right. As we have seen, the Church of England did so in 1603-1604 without possessing any written Constitution. Similarly, the General Convention of The Episcopal Church in August of 1789 was claiming this authority by adopting canons before the Constitution was in place.

73. This is one of the cornerstones of Mullin's theory. He repeats this point in paragraphs 69 and 90. Yet Mullin's account on this point is profoundly misleading, and, in fact his analysis of the

[33] Par. 76, n. 40. Mullin's failure to understand legal concepts causes him to misrepresent my position on the proper legislative authority of General Convention. I will consider this below in Section IV.F. But this shows that he sees the question of whether General Convention possesses inherent or constitutional authority as one of the primary distinguishing features of his theory.

General Convention's actions in 1789 was *rejected* by the Convention itself at the time. None of this is disclosed by Mullin.

74. The facts are complex: on the *same day,* August 7, 1789, the deputies to the General Convention adopted a set of ten canons and, after five years of drafting and revision, also passed the complete text of the Constitution by approving two final articles. But prior to the vote on the canons, all but two of the Constitution articles (those relating to the Book of Common Prayer and amendments to the Constitution) had *already* been approved on August 1 pursuant to a resolution that specified "that they [the seven approved articles] be a rule of conduct for this convention."[34] The state churches, in effect, had already adopted a provisional constitution prior to the time the canons were even considered. Different interpretations can be offered as to the legal effect of the August 1 resolution, but none of this, either the August 1 vote or the August 7 final approval, is disclosed in Mullin's repeated references to this issue. He leaves the impression instead that no constitution was adopted until October.

75. In any event, the *final text* of the Constitution was passed on the *same day* as the canons. While it is true that the canons were literally adopted first, without recorded debate, the Constitution was then immediately considered and passed. The approval of the canons and the Constitution could have been only minutes apart; the journal does not tell us the time between the two votes. Nor are we told when the canons were signed, as required, by the President and Secretary of the convention. They are dated simply as "agreed on and ratified in [not "by"] the General Convention" held "from the 28th day of July to the 8th day of August, 1789, inclusive." The Constitution had to be printed for signature, and although voted on the same day, August 7, as the canons, it was not signed and dated until the next day, August 8.

76. This is all readily apparent from the journal of the General Convention for August 7, 1789 (omitting from the convention's consideration of the Constitution and canons only the text of the two documents):

> The Convention then took up the Report of the Committee of the whole upon the canons, which were read and engrossed.
>
> The said Canons were then adopted, and ordered to be signed by the President and Secretary. They are as follow.
>
> [Ten canons are then printed in the journal bearing no date other than the date of the convention, "from the 28th Day of July to the 8th Day of August, 1789, inclusive."]
>
> Mr. Andrews moved the following resolve:
>
> Whereas, it appears that sundry other Canons are necessary for the good government of the Church,

[34] JGC, I:72.

> Resolved,--that the Rt. Rev. Dr. White, the Rev. Dr. Smith, Rev. Dr. Magaw, Rev. Mr. Smith, Mr. Hopkinson, Dr. Clarkson, and Mr. T. Coxe, be a Committee to prepare and report to the next meeting of this Convention, such additional Canons as to them shall seem necessary.
>
> Which was agreed to.
>
> The Convention took into consideration the two Articles of the Constitution, which had been postponed, and which they amended and agreed to.
>
> Ordered that the Constitution be engrossed for signing.[35]

77. The next day, August 8, 1789, the first order of business was as follows:

> The engrossed Constitution of the Protestant Episcopal Church was then read and signed by the Convention; and is as follows.
>
> [There follows the text of the Constitution, which was dated:]
>
> In General Convention, in Christ Church, Philadelphia, August the 8th, One thousand seven hundred and eighty-nine.
>
> [The signatures follow.][36]

78. Lest there be any doubt that those present at the convention considered themselves to be operating, from August 8, 1789 on, under an effective constitution, they made this fact clear beyond question in a letter sent the same day to the Archbishops of Canterbury and York, dated August 8, 1789, requesting their assistance in a further episcopal consecration:

> We…are *now* assembled, through the blessing of God, as a Church *duly constituted and organized…under an ecclesiastical constitution*, and a form of worship, which we believe to be truly apostolical. (Emphasis added.)[37]

79. On these facts alone, it is clear that Mullin makes much too much of the order in which the Constitution and canons were adopted. And it is hardly the picture he gives in his affidavit of canons adopted in August followed by a constitution adopted only in October. Indeed, not one time in his repeated presentations of this argument does he mention that the Constitution was passed at all in August 1789, much less the same day as the canons were adopted. This is hardly the assertion of an inherent right to legislate without constitutional mandate as Mullin's theory

[35] JGC, I: 79-82.
[36] JGC, I: 82-85.
[37] JGC, I: 134.

seems to require. In fact, one of the authorities on whom Mullin relies calls the order in which they were passed a "mere oversight."[38]

80. But there is much more to the sequence of events. The Constitution as ratified in August contained the following Article 9:

> This constitution shall be unalterable, unless in General Convention by the Church in a majority of the States which may have adopted the same; and all alterations shall be first proposed in one General Convention and then made known to the several State Conventions, before they shall be finally agreed to, or ratified, in the ensuing General Convention.[39]

Notwithstanding this provision and the letter to the English archbishops stating that the American church was "now" duly constituted under its Constitution, this Constitution was amended six weeks later without following the steps required by Article 9 and without any recorded debate on this fact.[40] More importantly for present purposes, the canons previously adopted were then *re-enacted* by the convention under the provisions of the new Constitution.[41]

81. It is difficult to analyze properly what the convention understood the legal effect of these actions to be. The best analysis is probably that the first Constitution was simply abrogated by the parties shortly after being implemented. A less satisfactory analysis, but perhaps one accepted for reasons of necessity by the convention at the time, is that the legislative actions during the convention were never intended to take effect until the conclusion of the convention, which meant that neither the canons nor the first constitution were ever effective until after the second constitution had been adopted. On this second analysis, even the slight temporal priority of the canons that Mullin relies upon becomes meaningless.

82. This may have been the position taken by the convention at the time. Upon resuming their session in late September 1789 after adjourning on August 8, the convention promptly resolved without explanation "That for the better promotion of an union of this Church with the Eastern Churches, the General Constitution **established** at the last session of this Convention is yet open to amendment and alterations, by virtue of the powers **delegated** to this Convention." (Emphasis added.)[42] Although not directly germane to the present discussion of the relation of the canons to the Constitution, this resolution very concisely disproves the whole point of Mullin's argument: prior to agreeing to the Constitution, which had already been "established" at the August session, the state "churches" were separate *churches* (plural) that "delegated" the "powers" exercised by General Convention. In other words, the General Convention explicitly viewed itself as

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[38] John W. Andrews, *Church Law: Suggestions on the Law of the Protestant Episcopal Church in the United States of America, Its Sources and Scope* , (New York: T. Whittaker, 1883) 58.
[39] JGC, I: 84.
[40] JGC, I: 100.
[41] JGC, I: 110.
[42] JGC, I: 94-95.

exercising not the *inherent* powers Dr. Mullin claims for it some 200 years later, but powers *delegated* by state *churches.*

83. But to return to the adoption of the canons, it is clear on any account of what happened in October 1789 that, contrary to Mullin's theory, the convention in fact recognized the necessity to "ratify" under the new Constitution the canons previously passed. This is readily apparent from the journal of the House of Clerical and Lay Deputies for October 16:

> The Canons now passed, together with those passed at the last session, being collected into one body, and **ratified by both houses**, were directed to be entered in the Book of Records and printed with the journal of this Convention. (Emphasis added.)[43]

And it is also reflected in the journal of the House of Bishops for October 16:

> This House received from the House of Clerical and Lay Deputies, by Dr. Blackwell, Canons, **as reported by a Committee appointed at the former session**.
>
> This House acceded to the Canons proposed, except the amendment of one, in consequence of which it was proposed to withdraw the Canon, which being acceded to, this house passed the Canons. (Emphasis added.)[44]

And the entire set of canons was re-published in the journal with the caption "agreed and ratified in the General Convention of said Church, held in the City of Philadelphia, from the 29th day of September to the 16th day of October, 1789, inclusive" and dated "Passed, October 16th, 1789."[45]

84. William White later summarized what the adjourned convention did on this issue as follows: "Some canons had been passed in the preceding session; but they were reconsidered and passed with sundry others…."[46]

85. This shows that the convention at the time concluded that all the canons, including those previously adopted, required ratification "by both houses" under the new Constitution. This now refutes entirely Mullin's strained theory of the inherent authority of a body that had not yet been duly constituted. The very body itself did not assert or recognize this authority.

86. The understanding that General Convention would exercise delegated powers pursuant to a constitution, not inherent power, is also stated explicitly in various legal instruments and resolutions adopted in the 1780s. I discussed above the revision to the Pennsylvania church's act of association in 1786 that gave exclusive authority to amend the prayer book to the state convention and provided that this authority might later "be conveyed" to a general convention.

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[43] JGC, I: 110.
[44] JGC, I: 121.
[45] JGC, I: 125-30.
[46] White, *Memoirs,* 30.

This demonstrates that William White himself rejected the notion of General Convention's inherent authority.

87. That same year, the state church in South Carolina adopted a constitution that made explicit that any authority to be given to a general convention would be delegated. Article IV of the 1786 constitution provided "that no power be delegated to a General Ecclesiastical Government, except such, as cannot be exercised by the Clergy and Vestries, in their respective Congregations."[47]

88. Mullin himself quotes a proposed article in the 1786 draft of the TEC constitution recognizing the authority of the state churches over their prayer books until "further provision is made, in that case by the first General Convention which shall assemble with sufficient power to ratify a Book of Common Prayer for the Church in these States." (Par. 55.) Another resolution in 1786 addressed communications received from the state churches "relative to the business of this Convention" and resolved that "the said Memorial and communications be referred to the first General Convention **which shall assemble with sufficient powers to determine on the same**; and that, in the mean time, they be lodged with the Secretary." (Emphasis added.)[48] It is clear, therefore, that those meeting in the organizing conventions that drafted over several years the TEC constitution recognized that they did not have "sufficient power" to take action until the constitution was adopted.

89. Finally, Mullin acknowledges the extreme implication his theory of inherent power has: General Convention's actions cannot be unconstitutional. He states in paragraph 67:

> Judges and others speak of certain legislative acts as being "unconstitutional," *i.e.*, not authorized by the Constitution. This has not been the case with the Church: The Church's Constitution was a product of the General Convention and was never intended to limit the power of the General Convention.

He then adds:

> This is one of the fundamental errors of McCall's reading of the Church's Constitution and canons, and his claim that certain canonical actions should be seen as unconstitutional. (Par. 67, n. 34.)

But Mullin's extreme theory that not even the constitution limits the authority of General Convention has been rejected by the General Convention itself, most recently in resolutions passed less than a year ago at the 2012 convention. General Convention repeated my "fundamental error" by calling for a review of the "Constitutionality of Certain Provisions of

[47] 1786 S. C. J reprinted in Frederick Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina* (Charleston: E. Thayer, 1820) 473-74.
[48] JGC, p. 38.

Title IV," (a major part of the church canons) due to "their possible conflict with the Constitution of the Episcopal Church." (2012 Resolutions C049 and C116.)[49]

90. To summarize the material on the supposed "inherent" powers of General Convention:

- The August 1789 session of the convention provisionally adopted all but two articles of the constitution as "a rule of conduct for this convention" prior to consideration of the canons;
- The August session passed the final text of the constitution the same day as it passed the first set of canons;
- After the amended or second constitution was ratified in October, all canons, including those previously passed, were ratified under the new constitution.
- General Convention itself resolved that it exercised "delegated" powers.
- The legal instruments of state churches stated that powers given to a general convention would be delegated by them.
- The 1786 General Convention meeting before the adoption of a constitution concluded it lacked the power to ratify a prayer book or take other actions.
- The most recent General Convention acknowledged some of its actions might be in conflict with the constitution.

D. Mullin Misrepresents the Way in which the First Constitution Was Ratified.

91. Mullin expands his argument about the inherent power of the General Convention to include ratification of the first constitution:

> 57. The General Convention meeting in Philadelphia in 1786 also rewrote Article XI of the proposed constitution to state that the Constitution would be ratified not by the individual state conventions, but by the General Convention itself. The 1785 wording had stated that "This General Ecclesiastical Constitution, when ratified by the Church in the

[49] It is characteristic of Mullin's testimony that what he states categorically "has not been the case with the Church" happened less than a year ago. Elsewhere he states "I have found almost no evidence of any language of the Episcopal churches or of the Episcopal Church of a given state. A unified national model was clearly presupposed." (Par. 49, noting Maryland as "the exception".) In fact the evidence of these usages is readily apparent and too numerous to cite fully. Even a cursory glance at the journals of the Virginia church will demonstrate the repeated use of the name "The Protestant Episcopal Church of Virginia." For starters, one need only look at the cover page of the journal of the first convention of the Virginia church held in May 1785. And the journal of General Convention for Oct. 2, 1789, the most important day in TEC's long formative processs, refers at a key moment to the "Churches of New Hampshire, Massachusetts, and Connecticut." JGC I: 95. There are also numerous instances of the use of the plural "churches" to describe the state churches. In addition to the example just cited in the journal for Oct. 2, 1789, TEC's *first constitution* referred in Article 2 to "the Churches which shall have adopted, or may hereafter adopt this Constitution." Mullin quotes this very sentence in paragraph 83 of his affidavit, but omits the language referring to "churches." These are not obscure references.

different States, shall be considered fundamental, and shall be unalterable by the convention of the Church in any State." JGC 1785 at 1: 23. After rewriting, it provided:

> "This Constitution of the Protestant Episcopal Church in the United States of America, when ratified by the Church in a majority of the States assembled in General Convention, with sufficient power for the purpose of such ratification, shall be unalterable by the Convention of any particular State, which hath been represented at the time of said ratification." Id. at 1:40 (emphasis added).

58. Significantly, just as under White's Case in 1782, no ultimate rights were reserved for the states or the dioceses. This decision was remarkable in that it flew in the face of the overwhelming political sentiment of the time. Whereas other organizations regularly expressed a fear of centralization and emphasized that power should be kept at the lowest level possible, Episcopalians chose a different course. As a cardinal example, the General Convention would ratify its own Constitution! [sic]

Mullin then adds in note 27:

> The authors of the "Bishops' Statement" (p 6) thus err in claiming that "our first Constitution was ratified by the preexisting state (diocesan) churches."

92. With these claims about the drafting and ratification of the TEC constitution, Mullin again misrepresents the legislative history of the constitution. What he finds "remarkable" was a process that was identical to and used the very same language as that used for the ratification of the Articles of Confederation, the constitution in effect among the thirteen states when the TEC constitution was drafted. It is hardly surprising that TEC's constitution would be modeled on the Articles of Confederation. Not only was it the national constitution at the time, but one of the primary draftsmen of the TEC constitution was James Duane, the mayor of New York, noted judge and signatory to the Articles of Confederation on behalf of New York.

93. A comparison of TEC's constitution and ratification process with that of the Articles of Confederation will show that they are same, both in terms of language used and procedures followed. Consider the draft article quoted by Mullin in paragraph 57 of his affidavit:

> when ratified by the Church in a majority of the States assembled in General Convention, with sufficient power for the purpose of such ratification….(Emphasis by Mullin.)

Although this article was later substantially revised, the 1786 draft language is very instructive in identifying the ratification process for TEC's constitution. But this provision must also be read in conjunction with the resolution on ratification passed at that same convention in 1786:

> Resolved, that it be recommended to the Conventions of this Church in the several States represented in this Convention, that they authorize and empower their Deputies to the next General Convention, after we shall have obtained a Bishop or Bishops in our

> Church, to *confirm and ratify a General Constitution*, respecting both the doctrine and discipline of the Protestant Episcopal Church in the United States of America. (Emphasis added.)[50]

Note that the authorized deputies from the state churches will be the ones to confirm and ratify. The resolution does not contemplate that General Convention as a body will do so. This is also reflected from the draft article quoted by Mullin that ratification was to be by a majority of the state churches *assembled* in General Convention, not by a majority of deputies present.

94. When the next General Convention was convened in July 1789, one of the first items of business was "The Deputies of the several States being called upon to declare their powers relative to [the resolution quoted above] gave information that they came fully authorized...."[51] And when the deputies then ratified the Constitution, it was dated on the date of its ratification by the deputies of the state churches not the previous day when the text had been passed by the convention: "In General Convention, in Christ Church, Philadelphia, August the 8th, One thousand seven hundred and eighty-nine."

95. This tracks closely the language and procedures used to ratify the Articles of Confederation. First, the Articles repeatedly use the phrase "the united states in congress assembled" to denote the basic principle of governance of that constitution that it was the sovereign and independent states that acted when they *assembled in* Congress. This understanding of which entities were acting was reflected when the Articles themselves were ratified by the states through their delegates *in Congress.* Article XIII of the Articles of Confederation recites in language later paralleled by TEC's founders that "we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union…." They then signed the Articles "In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the state of Pennsylvania the ninth Day of July in the Year of our Lord one Thousand seven Hundred and Seventy-eight, and in the third year of the independence of America."

[50] JGC, I: 42.
[51] JGC, I: 69.

96. Note the striking similarities in language:

	Articles of Confederation	TEC Constitution
Process	"ratify and confirm"	"confirm and ratify"
Parties	"united states **in congress assembled"**	"the Church in a majority of the States **assembled in General Convention"**
Agents of parties	"we the undersigned delegates, by virtue of the **power and authority** to us given for that purpose"	"The Deputies of the several States being called upon to declare their **powers** … gave information that they came fully **authorized**"
Date of document	Date of ratification by delegates—note that subsequent signatories inserted later dates	Date of ratification by signing, not (for first constitution) the previous day when actually passed in General Convention
How signed	By state delegations; number of individual signatories per state varies from two to six.	By state deputations; number of signatories per state varies from one to eight. Note that the canons were not signed by state deputations, but by officers of the body.

Contrary to Mullin, the ratification of TEC's constitution did not "fly in the face" of anything; it tracked the primary example before it.

E. Nothing in TEC's Constitution "Reflects" an "Assumption" of Supremacy of General Convention.

97. The preceding four sections of this affidavit have examined the main components of Mullin's theory to explain why TEC's constitution lacks the explicit designation of legal supremacy found readily in the governing instruments of other churches. Although Mullin concedes that the language of supremacy is not found in TEC's constitution—going so far as to say it would be "inappropriate"—he nonetheless claims that supremacy is "reflected" in the constitution. (Section heading, p. 25.) Given the First Amendment constraints on what the courts can adjudicate in this area it bears repeating that Mullin is claiming that supremacy is "reflected" implicitly in the constitution, not stated explicitly in cognizable legal language. This section of my affidavit examines the claim that supremacy is "reflected" in the constitution.

1. Lack of "Federal" Language and Lack of Enumerated Powers

98. Mullin begins his argument that the alleged supremacy of General Convention is reflected though not stated in the constitution by pointing not to the actual language of the constitution but to silence. The supremacy is shown, he argues, by the lack of federal language and by the lack of enumerated powers for General Convention. These are two separate points, but both demonstrate profound confusion by Mullin as to the relevant legal concepts.

Lack of Federal Language

99. Mullin claims in paragraph 71 that the TEC constitution "lacks any language suggesting that the Church exists as a result of the union of independent, autonomous dioceses or that any governmental authority is reserved to the dioceses to the exclusion of the General Convention." The second point is plainly false: General Convention's authority is in fact limited by several constitutional provisions. One of these, giving dioceses the right to choose their own bishops "agreeably" to their own rules, is quoted by Mullin himself.[52] Other constitutional limitations on General Convention's authority include: the deputies are to be chosen by state conventions (i.e., General Convention is itself a creature of the state conventions and is constitutionally precluded from circumventing this); bishops cannot act in another diocese without permission (General Convention is constitutionally prohibited from authorizing a bishop to act in another diocese, which is relevant to attempts to expand the authority of the Presiding Bishop by canon); clergy discipline is reserved to the diocese, not General Convention; and the procedures for amending the Book of Common Prayer and the Constitution reserve a special role for diocesan conventions.

100. More profoundly, however, Mullin misunderstands the function of the general constitution, which is to constitute the association as a legal entity and define the association bodies and offices. The member dioceses existed prior to the formation of the association and their authority derived from their own pre-existing legal instruments. The significance of silence in the general constitution is that nothing in that document changed the legal autonomy the state churches enjoyed independent of the constitution pursuant to their own governing instruments. They continued to operate under the same governing instruments *after* adopting the general constitution as they had before, thereby maintaining their prior legal status. The church in

[52] Mullin quotes the constitution article committing election of bishops to the dioceses and notes "Here, the Convention gave to the state conventions a new power—the authority to select their own bishops (by means of election). That this was not understood as an inherent right in the state conventions is evident from the fact that it had not been so exercised in Anglicanism for over 700 years." But: at the time the constitution was ratified and adopted in 1789 and supposedly "gave" the state churches this "new power" there were already three sitting bishops who had been elected by state conventions over the previous five years—and two others who had been elected but never consecrated. If the "Church Constitution" is the "mechanism" through which this power was "granted" to the state churches, where did these bishops come from?

Pennsylvania continued to operate under the same "act of association" after 1789 as it had before. The church in Virginia continued to be governed by the same "fundamental canons" that it had adopted before joining the General Convention. The church in South Carolina continued to be governed by the same constitution it had first adopted in 1786. Had the state churches surrendered their legal personalities and autonomy when adopting the general constitution, there would have been a need to define dioceses in the constitution just as other association bodies are defined. But there is no such article, indicating that dioceses remain defined by their own governing instruments.

101. In this respect, the TEC constitution does in fact resemble the United States Constitution. It has long been recognized that "dual sovereignty" is inherent in the very structure of the Constitution and the federal institutions it creates. The states may have "entered the federal system with their sovereignty intact," as the Supreme Court has repeatedly stated, but the federal government was created from scratch. It has been recognized from the outset that the primary indicators of the states' sovereignty were *structural,* not power derived from a particular constitutional provision. This was emphasized by James Madison in Federalist 45 in 1788, before the United States Constitution (or TEC's) was even ratified; "The State Governments will have the advantage of the federal Government….The State Governments may be regarded as constituent and essential parts of the federal Government; whilst the latter is nowise essential to the operation or organization of the former." Madison then identifies several structural components to illustrate his point.

102. The Supreme Court has often given the same analysis over the years, hence the repeated references to the "constitutional structure," the "framework," and "principles of federalism." Over half a century ago, these structural features were cataloged by law professor Herbert Wechsler in one of the most oft cited law review articles ever written, "The Political Safeguards of Federalism."[53] Wechsler included Madison's structural components along with others, and the Supreme Court and other scholars have since raised additional points. But the most important structural components of federalism have been obvious for over 200 years:

- The President is elected by "electors" "appointed" by the state legislatures. This important structural role for the states remains constitutionally intact although the electors are now themselves elected by popular vote.
- Article I, section 3, originally provided that Senators shall be "chosen" by the state legislatures. This power, considered by some the most important of the states' original powers, was eliminated by the Seventeenth Amendment.
- All states have equal representation in the Senate.
- State legislatures create the districts that elect Representatives to the House of Representatives, and control the voter qualifications for the elections.

[53] Herbert Wechsler, *The Political Safeguards of Federalism*, 54 Colum. L. Rev. 543 (1954).

- Congressional districts are confined to a single state so that no Representative represents people of more than one state.
- States cannot be joined or divided without their consent.
- Constitutional amendments typically are ratified by the state legislatures, although Congress has the option of bypassing the legislatures by convening, as was done at the outset, "the People" in state conventions.

103. It is apparent that TEC's constitution contains similar structural features that give dioceses even more profound structural authority than that possessed by the states under the Unites States Constitution. All dioceses have the same number of deputies in the House of Deputies. There is no body with proportional representation in General Convention similar to the House of Representatives. Not only is there equal representation, moreover, they vote *by diocese* on all important votes (not just the election of officers) when they vote by orders. Explaining General Convention's voting procedures, TEC's official commentary on its constitution and canons notes the description in the first constitution ("suffrages by states") and concludes "still today a vote by orders is also a vote by dioceses."[54] There is no provision in the United States Constitution, not even the Senate, that gives this much power to the states. There is equal representation in the Senate, but they vote as individuals. TEC's representation concept is taken directly from the Articles of Confederation.

104. Similarly, all deputies (and bishops) are elected by diocesan conventions. No one is elected directly "by the people" as are the House of Representatives (and now the Senate). Dioceses cannot be joined or divided without the consent of the diocesan convention(s) and bishop(s). Proposed constitutional amendments and changes to the Book of Common Prayer must be sent to the diocesan conventions and then adopted at the next General Convention by a vote by orders of "a majority of the *Dioceses* entitled to representation." (Emphasis added.) And unlike the United States Constitution, there is no option to bypass the dioceses' role in considering amendments by a ratification or adoption by conventions of "the people."

105. And since the Supreme Court looks both to the "structure and history" of the constitution in its jurisprudence, it should be noted that TEC reflects not only a structure of federalism similar to but stronger than that found in the United States Constitution, it reflects a similar history as well. As we have already seen, the description "the States entered the federal system with their "sovereignty intact" applies equally to the state churches. The "sovereignty" of the state churches both pre-existed and survived the adoption of the general constitution.

[54] White & Dykman, I: 12.

106. Mullin argues that there is no counterpart to the Tenth Amendment in the TEC constitution and that this shows that no powers were reserved to the dioceses.[55] But the legislative history of the TEC constitution demonstrates that the founding state churches built such a reservation into the constitution structurally. Just as the powers not delegated to the federal government were reserved to the states before the Tenth Amendment was added, the same is true in the TEC constitution.

107. The proof of the founders intention in this regard is a set of fundamental principles adopted by several of the state churches, including Pennsylvania in 1784 and later by other churches, including South Carolina. These principles were incorporated into the governing instruments of the state churches prior to their beginning work on a proposed general constitution. One of these principles was the following: "Sixth, That no powers be delegated to a general ecclesiastical government, except such as cannot conveniently be exercised by the clergy and laity, in their respective congregations."[56] This was one of six "instructions or fundamental principles" adopted by the state church in Pennsylvania for its own organization and for its representatives in wider discussions. Not surprisingly since William White chaired both the meeting at which these principles were adopted and the standing committee this initial gathering elected, this principle was taken directly from White's blueprint for the organization of TEC, *The Case,* which had proposed "to retain in each church every power that need not be delegated for the good of the whole." These six principles were subsequently endorsed or adopted by other state churches, including South Carolina, which placed these principles in its constitution.

108. Mullin claims this principle of reserving power to the local level was never incorporated into the constitution, but this misconceives the purpose of these principles. They were enacted as instructions for the drafters, not as proposed articles. This can best be seen from the fact that other "fundamental principles" were not included *in express terms* in TEC's constitution, yet there can be no doubt that they were incorporated into the structure of the constitutional framework. For example, the first of the principles was "that the episcopal church in these states is, and ought to be, independent of all foreign authority, ecclesiastical or civil." There is no provision to that effect in the constitution, but no one would deny it is built into the constitutional framework.

109. The importance of these principles to the founders is not a matter of speculation. After these principles had been adopted, representatives of several of the state churches, including Pennsylvania, Massachusetts and Maryland, met in the first interstate convention in New York

[55] He also argues that there is no counterpart to the Ninth Amendment, but this reflects his confusion as to what the amendment does. It specifies that the enumeration of rights in the Bill of Rights is not exhaustive; there are others that are not enumerated. It is the constitutional equivalent of the common drafting language used by lawyers ("including but not limited to") to designate a list as non-exclusive. There is no enumeration in the TEC constitution so there is no occasion to have a provision like the Ninth Amendment.

[56] *Pennsylvania Journals (1790)*, 6.

and adopted another set of "fundamental principles": these being an outline for the "general ecclesiastical constitution" itself (as opposed to principles or instructions for representatives in the drafting). In his *Memoirs* White says that these second constitutional principles, including the one about General Convention, "were in substance, what had been determined on in Pennsylvania…."[57] In other words, the man who drafted both the constitution and the initial set of fundamental principles or instructions stated in effect that they were "in substance" the same.

110. The events of the following year provide convincing proof of this fact. In May 1785 the church in Pennsylvania was formally organized as an association pursuant to an "act of association." This act incorporated both sets of fundamental principles and then authorized the state convention to act for the Pennsylvania church, subject to the following proviso: "provided always, that the same shall be consistent with the fundamental principles agreed on at the two aforesaid meetings in Philadelphia and New York." This act was then signed by the deputies, including White and several others who had been present at one or both of the previous meetings.[58] Not only were these two sets of principles incorporated into the Pennsylvania charter, they were formally declared to be consistent. This shows that the founders understood their constitution to comply with their original intention of limiting the delegation of authority to a general convention and reserving authority to the local church.

Lack of Enumerated Powers

111. Mullin's contention that the "lack of enumerated power" somehow reflects supremacy demonstrates his confusion about the relevant legal concepts. Typically, supreme power is in fact enumerated, not general. The most obvious example is the power of the federal government under the United States Constitution. Other examples include:

- the Articles of Confederation, the primary legal model for TEC, which established a confederation of sovereign and independent states but also delegated certain enumerated "sole and exclusive" powers to the Congress and thereby established a limited central hierarchy not found in TEC;
- the Roman Pontiff, who possesses both general and enumerated powers that are explicitly designated as "supreme";
- the Serbian Orthodox Holy Assembly of Bishops, which the United States Supreme Court noted had enumerated powers, including express authority over the very issues disputed in that case, and which was explicitly designated "the highest hierarchical body" and the "highest church juridical authority"; and
- the Supremacy Act in England, which made the British monarch the "the only supreme head in earth of the Church of England," and also enumerated the powers of the "supreme governor":

[57] White, *Memoirs*, 81.
[58] Perry, *Documents*, 40-43.

> all honors, dignities, preeminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity of the supreme head of the same Church belonging and appertaining; and that our said sovereign lord, his heirs and successors, kings of this realm, shall have full power and authority from time to time to visit, repress, redress, record, order, correct, restrain, and amend all such errors, heresies, abuses, offenses, contempts and enormities, whatsoever they be, which by any manner of spiritual authority or jurisdiction ought or may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended, most to the pleasure of Almighty God, the increase of virtue in Christ's religion, and for the conservation of the peace, unity, and tranquility of this realm; any usage, foreign land, foreign authority, prescription, or any other thing or things to the contrary hereof notwithstanding. [59]

112. Moreover, it is commonplace under agency law that a general authorization or power of attorney does *not* convey all powers of the principal to the agent. For example, the Uniform Power of Attorney Act designates several powers that must be *enumerated* in order to be conveyed. A general power of attorney without this enumeration leaves the agent without these powers.[60] Thus, to the extent anything is reflected by the lack of enumerated powers, it is that General Convention's power is neither supreme nor unlimited.

2. Vows

113. As supposed "evidence" of the "supremacy of General Convention" Mullin cites the ordination vows required of TEC clergy. In paragraph 82, he quotes and then interprets the oath required in 1789:

> I do believe the holy scriptures of the Old and New Testament to be the word of God, and to contain all things necessary to salvation: And I do solemnly engage to conform to the doctrines and worship of the Protestant Episcopal Church in these United States.

Thus, all clergy were held to a mandatory national standard and were required to promise conformity with the larger Church.

114. The first point to note is that this argument is a complete *non sequitur.* A vow to conform to the doctrines and worship of TEC does not prove or even evidence the "supremacy" of General Convention, especially when that body is not mentioned at all in the vows. On its face, this oath suggests that the doctrines of TEC to which the ordinand vows conformity are those of the Scriptures, which are in fact explicitly cited. This argument then is merely question begging: it

[59] 26 Hen. 8, c.1 (1534).
[60] Uniform Power of Attorney Act, sec. 201, http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm

assumes what must be proved. If General Convention is indeed the body that has supremacy in the matter of doctrine and worship, that fact would not derive from this oath but from a stipulation of that supremacy elsewhere. If on the other hand, the doctrines and worship are determined by Scripture, tradition, the bishops as "guardians of the faith," ecclesiastical common law or diocesan bodies, this oath promises conformity to the doctrines and worship as established by those sources. As quoted by Mullin, therefore, the vows add nothing.

115. But the wider context of the ordination vows is instructive in ways Mullin does not acknowledge. In particular, it is helpful both to compare TEC's vows with those of churches that have clearly defined central hierarchies, and then to look more broadly at TEC's ordination rites. The TEC ordination vows actually point quite clearly to the General Convention's lack of supremacy.

116. First, consider the vows taken by bishops in other episcopally led churches. The Church of England, for example, required in the 1780s and still does today oaths from its bishops of allegiance and supremacy recognizing the supremacy of the monarch as "supreme governor" of the church and another oath of "due obedience" to the archbishop and provincial church in which the bishop will serve. These oaths are models of hierarchical oaths. For example, before a prospective bishop can be installed in his see, he must pay personal homage to the monarch in these words:

> "I, N. [*degrees*], lately [*former appointment*], having been elected Bishop of [*new appointment*], and such election having been duly confirmed, do hereby declare that Your Majesty is the only Supreme Governor of this Your realm in spiritual and ecclesiastical things as well as in temporal; and that no foreign prelate or potentate has any jurisdiction within this realm; and I acknowledge that I hold the said Bishopric, as well the spiritualities as the temporalities thereof, only of Your Majesty, and for the same temporalities I do my Homage presently to Your Majesty. So help me God. God save Queen Elizabeth."[61]

And the oath of due obedience is as follows:

> In the Name of God, Amen. I, *N.*, chosen Bishop of the Church and See of *N.* do profess and promise all due reverence and obedience to the Archbishop and to the Metropolitical Church of *N.* and to their Successors : So help me God, through Jesus Christ.[62]

117. The primary imperative driving the Anglican churches in America to break formally with the Church of England were these oaths. They the paradigm of legal language recognizing a hierarchical body: allegiance is pledged to the British monarch as the "only supreme governor"

[61] Declaration of Colin John Podmore, April 6, 2013.
[62] Book of Common Prayer (1662), Cambridge Univ. Press, 1987.

of the church, and obedience is pledged not only to an archbishop, but also to a "metropolitical church." American clergy were both unwilling and unable to give these oaths. One of the main tasks of the early general conventions was to obtain the agreement of the Church of England bishops to consecrate American bishops without these oaths. Between October 1785 and October 1786, no fewer than six letters were exchanged between the General Convention and the English bishops on this topic.[63] The agreement reached was that these oaths would be replaced for American bishops by the recital quoted by Mullin, "I do solemnly engage to conform to the doctrine and worship of the Protestant Episcopal Church…."[64] Submission to a *hierarchy*, the monarch, the archbishop and the metropolitical church, was explicitly replaced not by submission to a different hierarchy, but by a pledge of *doctrinal* conformity. On this basis, after much negotiation as to what that doctrine really was, the British Parliament passed an act expressly exempting "for the time being" American bishops from the Oaths of Supremacy and Due Obedience.

118. If Mullin's analysis of General Convention's authority were correct, it would have been a very simple thing to modify these vows from the Church of England only slightly and require the ordinand to recognize General Convention as the supreme governor of the church and promise "due obedience" to the "metropolitical church of the Protestant Episcopal Church in the United States." But they did not do that, and it is obvious that this omission was intentional given the precedent from which they were explicitly deviating.

119. Indeed, the model for the TEC vows was that in the pre-existing canons of the state church in Virginia, which prior to the first meeting of any "general convention" had a canon requiring the following:

> Every person hereafter to officiate in this church as a bishop…shall take the oath of allegiance to the commonwealth, and subscribe to conform to the doctrine, discipline and worship of the Protestant Episcopal Church of Virginia.[65]

At this time, the "Church of Virginia" was still controlled by the Virginia legislature, and when TEC adapted this vow for general use it would have been a simple matter to require "allegiance" to a central governing body if the founders had thought such a hierarchy existed.

120. The episcopal vows in other churches also reflect clearly both the hierarchical nature of the church and the identity of the hierarchical body or office. For example, Serbian Orthodox bishops swear an "Episcopal-Hierarchical Oath" that they will "always be obedient to the Most Holy Assembly," the very body identified in that church's constitution as "the highest

[63] JGC, I: 14-62.
[64] JGC, I: 23, 53.
[65] 1785 Va. Journal, canon 10 reprinted in Francis. L. Hawks, *Contributions to the Ecclesiastical History of the United States of America* (New York: Harper& Bros., 1836) I: App. p. 8 [hereafter "Hawks, *Contributions*"].

hierarchical body."[66] Similarly, Roman Catholic bishops are required to answer in the affirmative the following questions:

> Are you resolved to build up the Church as the body of Christ and to remain united to it within the order of bishops under the authority of the successor of the apostle Peter?
>
> Are you resolved to be faithful in your obedience to the successor of the apostle Peter?[67]

121. Second, in addition to comparing TEC's vows to those in other churches, it is also instructive to look at TEC's ordination rites as a whole. One can see at a glance that TEC's vows are the exact opposite of these hierarchical oaths in other churches. In the Examination of the TEC episcopal candidate there is no mention of General Convention, the Presiding Bishop or the Executive Council. The Presiding Bishop is mentioned in the rubrics only as presider, but this role can be and often is assigned to another bishop. Indeed, the TEC candidate is presented for consecration as "bishop in the one, holy catholic, and apostolic Church" and later as "bishop of the Church of God to serve in the Diocese of N." The Examination of the candidate begins by emphasizing that "with your fellow bishops you will share in the leadership of the Church throughout the world." There is no mention of General Convention; instead the emphasis is on "fellow bishops" and "the Church throughout the world." There is no vow of obedience to a metropolitical church or the Presiding Bishop as there is to the Archbishops or Pope or Holy Assembly in the oaths of the other churches.

122. So, what is the discipline or polity to which the bishops vow to conform? The Examination points to it: to share with "fellow bishops" in the government of the "Church throughout the world," the "Church of God," the "one, holy, catholic, and apostolic Church". These vows thus suggest a truly episcopal church, not one in which a provincial convention is the supreme or metropolitical authority. Indeed, it would be surprising if the General Convention were to be the highest authority when the episcopal ordination vows do not mention General Convention at all.

123. As a final comparison, the TEC ordination rite for priests is instructive because it *does* contain a promise of obedience. The candidate is presented to the bishop, who is identified as "Bishop in the Church of God." The candidate then gives the oath of conformity, but there is this significant addition:

> Will you in accordance with the canons of this Church obey your bishop and other ministers who may have authority over you?

Later in the Examination, the candidate is asked:

> Will you respect and be guided by the pastoral direction and leadership of your bishop?[68]

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[66] *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 716-18 (1976).

[67] Catholic Church, *Rites of Ordination of a Bishop, of Priests, and of Deacons,* United States Conference of Catholic Bishops, 2003.

124. Two things are striking about these vows. First, there is no reference to General Convention or any central body. Obedience is pledged to the bishop. Second, the inclusion of a vow of obedience in the rite for the ordination of priests only confirms further the intentional omission of any such vow in the ordination of bishops. Priests make the same declaration of conformity as do bishops, but added to this is a promise of obedience to a hierarchical authority. And that authority is the bishop, not General Convention.

3. Lack of a Judiciary

125. In paragraph 85 Mullin cites as further "evidence" of the "supremacy of the General Convention" the fact that TEC lacks a judiciary:

> The absence of any judiciary in the Church Constitution demonstrated that the General Convention was the final interpreter of the Constitution (as well as of the canons and the doctrine, discipline and worship of the Church).

126. Mullin's reasoning here is another *non sequitur*. The "lack of a judiciary" does not mean that General Convention is the body to perform this function. To the contrary, the "lack of a judiciary" in fact means that there is no central body in TEC granted the authority to act as a "highest judicatory." The "highest judicatory" need not be something labeled a "Supreme Court." Indeed, the highest judicial body typically is a synodical or legislative body, as in the Serbian Orthodox Church or the Presbyterian Church USA. But that authority must be specified in the governing instrument, as it explicitly is in these other churches (e.g., the Serbian Holy Assembly of Bishops is made "the highest church juridical authority").

127. But the absence of a designated body with final interpretive or judicatory authority does not mean: "there must be one somewhere, what is it"? It means there is none. For example, the union formed by the Articles of Confederation also lacked a central judiciary specified in the Articles. That did not mean that Congress possessed that function (and supreme hierarchical power). It meant that the only judiciary was that found in the several sovereign states comprising that union.

128. The nineteenth century commentator on whom Mullin relies elsewhere, Francis Hawks, clearly recognized this problem, but the conclusions he drew were the opposite of Mullin's:

> In the government of the United States an ultimate arbiter in interpretation is provided in the Supreme Court. In the Church, however, we possess no such advantage; for we have no tribunal that can authoritatively declare to the whole Church what the meaning of the constitution is. The House of Bishops may, indeed, express an opinion, if it pleases, and

[68] *Book of Common Prayer (1979)*, 525-32.

> the churches generally respect it, as they should do; but such opinion is neither law, nor authorized judicial exposition of law.[69]

No judiciary means that "no tribunal that can authoritatively declare to the whole Church what the meaning of the constitution is." And the only near equivalent that occurred to Hawks was not General Convention, but the House of Bishops.

129. Another commentator on whom Mullin relies agrees there is no highest judicatory in TEC. In his doctoral dissertation, the political scientist James Dator concluded: "There is no body, established by constitution or subsequently by canon, whose duty it is to render an authoritative opinion on the meaning of the constitution and canons of the Episcopal Church." Dator naively suggested that the civil courts can perform this function: "civil courts may sometimes serve, as it were, as the 'Supreme Court' of the Church on all but purely doctrinal matters."[70]

130. Other commentators would undoubtedly fill in the blanks with other candidates for "highest judicatory." But the undeniable fact is that the Constitution itself does not specify one. Hence, the constituent dioceses retain in their respective areas this authority that they clearly had before uniting to form TEC and that they just as clearly have not given up. This was the very conclusion reached by Bishop Thomas Vail in the nineteenth century:

> Moreover, in the Protestant Episcopal Church there is nothing analogous to the Supreme Court of the United States; for each diocese is, in respect of all judiciary concerns, independent in itself.[71]

4. Amendments to the Constitution

131. Mullin also includes as "evidence" of the "supremacy of General Convention" the procedures by which TEC's Constitution is amended. In paragraph 86 he helpfully points out that the procedures for amending are substantially identical to the original procedures for ratification of the first constitution. Indeed, the similarity of language is striking. The original ratification process as described in 1786 is as follows:

> The Constitution of the Protestant Episcopal Church in the United States of America, when **ratified** by the **Church in a majority of the States** assembled **in General Convention**, with sufficient power for the purpose of such ratification, shall be

[69] Hawks, *Constitution,* 9-10.

[70] James A. Dator, *The Government of the Protestant Episcopal Church in the United States of America: Confederal, Federal, or Unitary*' (Ph.D. dissertation, American University, 1959) 180, 238. Mullin's reliance on Dator is surprising. Dator also concludes that "the church has not made an official and final decision concerning the question of the source of governing authority." Id. at 244. And although Dator does say TEC is unitary, he admits that his thesis may have an "air of unreality" and concludes that TEC is "highly decentralized, both the dioceses and the parishes participating fully and extensively in the confederal-like decentralization" Id. at 245.

[71] Thomas H. Vail, *The Comprehensive Church or, Christian Unity and Ecclesiastical Union* (Hartford: H. Huntington, 1st ed. 1841, New York: D. Appleton, 2nd ed. 1879), 117-18. As noted below, Bishop Vail states that his conclusions were read and affirmed by two other bishops.

> unalterable by the Convention of any particular State, which hath been represented at the time of such ratification.[72] (Emphasis added.)

And the article (9) on amendments as adopted in 1789 was as follows:

> This Constitution shall be unalterable, unless **in General Convention** by the **Church in a majority of the States** which may have adopted the same; and all alterations shall be first proposed in one General Convention, and made known to the several State Conventions, before they shall be finally agreed to, or **ratified**, **in** the ensuing **General Convention**.[73] (Emphasis added.)

When compared in this fashion, one can see that the procedures for ratification of the original constitution and of amendments were the same, including the understanding of those procedures as "ratification" by the state churches.

132. I considered above Mullin's claim that these ratification procedures were unusual. Instead, this process was identical to and used the very same language as the Articles of Confederation, the constitution in effect among the thirteen states when the TEC constitution was drafted. TEC's first constitution was ratified as were the Articles of Confederation "by" the state bodies (churches or states) not in state conventions, but "in" the General Convention or Congress. That it tracks so completely the Articles' process removes any doubt—and the language itself ("by the Church in…the States") is quite clear—that ratification was by the state churches.

133. Nor can there be any doubt that these same procedures and same language required ratification of amendments by the state churches. The failure to recognize that the founders intended that ratification of amendments would follow the same procedures as ratification of the original constitution and that these procedures in turn were modeled after the ratification procedures for the Articles of Confederation has led to much unnecessary debate over the years as to what was intended.

134. The preeminent nineteenth century historians, Hawks and Perry, understood perfectly the substance of what was required: approval by a majority of dioceses. They based this conclusion not only on the clear language of the provision, but also on the fact that formal notice of proposed amendments had to be transmitted to the dioceses. For example, Perry reasoned as follows:

> the Churches in the States respectively, quasi States or dioceses, are alone competent to alter the Constitution. That this is the proper interpretation of the article is evident from the fact that Title III., Canon 1, §iii., makes it "the duty of the Secretary of the House of Deputies, whenever any alteration of the Constitution is proposed, or any other subject submitted to the consideration of the several Diocesan Conventions, to give a particular

[72] JGC, I: 42.
[73] JGC, I: 100. Mullin drops the words "by the Church" in his quotation of Article 9 in paragraph 86.

> notice thereof to the Ecclesiastical Authority in every Diocese;" and this canon, with but slight and merely verbal changes, has been in force since 1808.
>
> Certainly matter thus formally communicated to the Church in each State or diocese "for the consideration of the several Diocesan Conventions," presupposes that the Church in a majority of dioceses is to consider and furnish that action with regard to the proposed alteration which, in the ensuing General Convention, is to be finally agreed to or ratified.[74]

135. In recognizing the substance of the diocesan role in ratifying amendments, Hawks and Perry failed to recognize the significance of the Articles of Confederation model and went beyond the text to conclude that action by the diocesan conventions was mandated. But in keeping with the principle found throughout the constitution of recognizing the unconstrained authority of diocesan conventions to act "agreeably" to their own rules the dioceses are free to consider the proposed amendments in whatever fashion they choose.

136. Others, like Mullin, focus on the fact that the final vote of ratification occurs at the next General Convention, but fail to grasp the significance of the Articles of Confederation model, the formal notice to the dioceses and the vote by orders by dioceses at the second General Convention. For example, the 1982 revision to White & Dykman argues that Hawks was wrong about diocesan conventions because the founders "had before them a model in the Constitution of the United States with its clause requiring the consent of the legislatures of three-fourths of the states to effect an amendment."[75] But this perspective compounds historical error with a failure to understand the significance of the final vote at General Convention. When these procedures were first devised in 1786, the founders did not, in fact, have "before them" as a model the United States Constitution because that document had not yet been drafted. What they had before them was the Articles of Confederation, which was the model they followed on procedures for ratification. Thus, when the second vote occurs—in the words of the current Constitution, by "affirmative vote in each order by a majority of **Dioceses entitled to representation**"—this is a vote of the dioceses every bit as much as the ratification of the Articles was a vote of the states. That this vote does not occur by resolution at a diocesan convention but by the diocese's elected representatives at the General Convention (following whatever instructions the diocesan convention chooses to give) does not change the fact that it is a vote by the diocese. Indeed, White & Dykman itself acknowledges that "still today a vote by orders is also a vote by dioceses."[76]

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[74] Perry, *Constitution*, pp. 287-88. Hawks view was similar. See White & Dykman, I: 144-45.
[75] White & Dykman, I: 144-45.
[76] White & Dykman, I: 12.

5. Accession to the Constitution

137. "Finally, and perhaps most fundamentally" Mullin identifies as evidence of the "supremacy of General Convention" the requirement in Article 5 of the original Constitution that:

> A Protestant Episcopal Church in any of the United States not now represented may, at any time hereafter, be admitted on acceding to this Constitution.

138. Mullin states in paragraph 87 of his affidavit that this accession is "to acknowledge the powers of the General Convention." But the accession is not to the "powers of General Convention," but to the constitution. This requirement on its face means only that a "Church" or diocese joining TEC agrees to the system of governance contained in TEC's constitution. The circular nature of Mullin's argument on accession is like the matter of the ordination vows addressed above. Those who argue that TEC's constitution specifies a central hierarchy will say that new dioceses accede irrevocably to that hierarchy. But those who argue that TEC's constitution specifies a voluntary association of autonomous dioceses will say that the newly joining dioceses accede to that form of governance. The concept of accession, in other words, adds nothing. What matters is the language of the constitution elsewhere, which Mullin concedes lacks explicit language of supremacy.

139. But there is more when one looks deeper. There is substantial evidence that the concept of accession has never been used to indicate the kind of irrevocable submission to a central hierarchy that TEC now claims.

140. First, the term "accede" itself is an unusual technical term from international law that is used to describe the act of a sovereign state becoming a party to a treaty already signed by others. A treaty, of course, is a compact among sovereign and independent states. "Acceding" was the term used in the Articles of Confederation, which established a "league of friendship" of states retaining their "sovereignty, freedom and independence." That term is not used in the United States Constitution, which established a hierarchical central government. This use of treaty language could not have been accidental. James Duane, one of the primary draftsmen of TEC's first Constitution, was a signatory to the Articles of Confederation; John Jay, also active in the organizing conventions, besides being the nation's Foreign Secretary and Chief Justice, negotiated the second treaty with Great Britain, known to this day as the "Jay Treaty." These men clearly knew what the term "acceding" signified.[77]

141. Treaties are typically subject to termination. The vast majority of them are explicitly terminable, and the ones foremost in the minds of TEC's founders, the Treaty of Peace with Great Britain and the Articles of Confederation, were being abrogated or nullified just as TEC's constitution was being drafted and ratified. If TEC's founders had intended to signal by this terminology irrevocable submission to a central hierarchy, they would not have borrowed a term

[77] McCall, *Hierarchical*, 11-14; 20-23.

from the Articles of Confederation that *lacked* such a hierarchy and that had just been *abrogated* by the thirteen states.

142. Second, many dioceses do not have an accession clause at all in their diocesan constitutions and those that do have accessions that vary widely in their terms. These absent and sundry accessions thus actually work against TEC's claims to hierarchical authority because they are exactly the kind of variety one would expect of voluntary submission by autonomous dioceses. If this were the indication of submission to a central hierarchy, TEC's constitution would mandate both the inclusion and the precise wording of such a clause in the diocesan constitutions and would require prior approval by the hierarchy before such a diocesan clause could be amended. This is precisely what is found in hierarchical churches.[78]

143. Third, and most importantly, TEC itself used this very same language of "accession" when it "acceded and subscribed to the Proposed Constitution of the said Anglican Consultative Council" by resolution in 1969**.** In paragraph 39, Mullin states categorically that "while The Episcopal Church is a hierarchical church, the Anglican Communion is not." Each member church within the Anglican Communion is, he says, "self-governing and autonomous." Yet when TEC agreed to become a member of the ACC it used the same language as was then found in the relevant article of TEC's Constitution for accession by TEC's dioceses, language that Mullin claims in paragraph 87 to be a "reflection" of supremacy.[79]

144. If Mullin is correct and the simple act of accession is evidence of submission to a supreme central hierarchy, then by his own argument that hierarchy must be the Anglican Consultative Council, not the General Convention. But the correct answer, of course, is that accession does not indicate hierarchical governance, but the mere voluntary act of an autonomous body agreeing to join an association of which it is not yet a member. Nothing in such an act indicates hierarchy; it indicates admission as a member.

F. The Mere Enactment of Association Rules (Canons) Does Not Demonstrate the "Supremacy of the General Convention".

145. Much of Mullin's affidavit is devoted to a recitation of various canons General Convention has passed over 200 years. (Paragraphs 89-144.) He argues that these canons use "the mandatory language of supremacy" and therefore reflect the supremacy of General Convention. Mullin's repeated use of this phrase (paragraphs 76, n. 40, 90, 101) to describe the standard legislative term "shall" shows Mullin is profoundly confused about the legal concepts he is discussing. This section looks at two related formulations of this contention that legislative authority means legislative supremacy.

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[78] E.g., the Evangelical Lutheran Church of America. See McCall, *Hierarchical*, 26-27.

[79] Robert W. Prichard, *The Making and Re-Making of Episcopal Canon Law*, (Anglican Communion Institute, 2010) 15, http://www.anglicancommunioninstitute.com/wp-content/uploads/2010/02/conferencetalk2010.pdf,

Legislative Authority Does Not Mean Legislative Supremacy

146. First, Mullin argues that because General Convention has authority to enact canons and does so using "mandatory language" ("shall"), this establishes the supremacy of the General Convention. But this argument misses the point. Legislative authority is not the same as legislative supremacy. Dioceses also have legislative authority and enact canons using mandatory language. Some of these diocesan canons existed before the first general canons were enacted.[80] Establishing the legislative *authority* of General Convention sheds no light on its legislative *supremacy* or lack thereof. Legislative supremacy becomes an issue when there are competing bodies each with legislative authority, such as the federal government and the states or the dioceses and General Convention. When both legislative authorities use mandatory language such as "shall" it is obvious that the mandatory language itself does not establish supremacy. That is the legal role of a supremacy clause or other rule of priority. When Mullin speaks of "the mandatory language of supremacy" he demonstrates that he does not understand at all the legal concepts he is grappling with.

Binding Canons

147. Mullin's argument that the possession of legislative authority proves the existence of supreme legislative authority—so obviously false when stated baldly—is inextricably connected with another argument he makes: that language in the first constitution stating that General Convention actions were binding—the provision has long since been removed—proves that General Convention is supreme. (Paragraph 83.) When the relevant legal concepts are properly understood, however, it will be seen that this argument is nothing more than a variant of the argument stated baldly above. And when the historical facts are examined, they demonstrate how purposefully the founders of TEC rejected supremacy for General Convention.

148. Article 2 of the first Constitution provided that:

> And if, through the neglect of the Convention of any of the Churches which shall have adopted, or may hereafter adopt this Constitution, no Deputies, either Lay or Clerical, should attend at any General Convention, the Church in such State shall nevertheless be bound by the acts of such Convention.[81]

The place to start in considering this provision is to note that it applies by its own terms only to those state churches that did not send representatives to General Convention. This apparent oddity signals right away that the purpose of this provision is something other than to serve as a half-baked supremacy clause for a church whose draftsmen did not know how to formulate a proper one. What this provision seems to be addressing is one possible understanding of General Convention actions: that they did not apply to a state church until they were ratified in some

[80] See, *e.g.,* the 1785 Virginia canons in Hawks, *Contributions*, I App. 8-11.
[81] JGC, I: 99. Mullin, par. 83.

fashion, either by the state's representatives to the General Convention (as the constitution itself was ratified) or by action of the state convention.[82]

149. This issue paralleled the debate over the legal effect of acts of Congress under the Articles of Confederation. A widely held view was that they had to be enacted by the state legislatures in order to become binding law. Until so enacted, they were only requests; Congress was in effect a consultative, not a legislative, body. In the case of TEC, because the ratification by the state churches of the initial constitution took the form of ratification by their duly authorized representatives at the General Convention, it was a reasonable interpretation that the actions of General Convention would require similar ratification. This would not have been given by a state church that sent no representatives, and General Convention actions would have no legal effect in such a state *if the General Convention were purely a consultative body like some thought the Congress of the Confederation was.* The Article 2 language answered this question by indicating that General Convention was a legislative, not a consultative, body.

150. But this language says nothing at all about supremacy. Those who argue the contrary fail to understand the legal meaning of the term "bound," particularly the technical legal usage of that term in the eighteenth century. It is significant that this language, used in its precise sense, is found in a resolution passed by Congress during the Articles of Confederation period, then later in the Supremacy Clause of the United States Constitution, and finally in TEC's first Constitution. The resolution passed by the Confederation Congress on the legal effect of the peace treaty with Great Britain was authored by John Jay, an influential deputy to one of TEC's organizing conventions.[83] Jay's language did not signal supremacy since Congress in the Confederation was not supreme. This resolution became the basis for similar language in the Supremacy Clause, where the "binding" concept comes immediately *after* the language of "supremacy." That the concept of "binding" did not signal supremacy in the new United States Constitution is shown both from the meaning it had in the Confederation and the fact that explicit language of supremacy was added to the "Supremacy Clause."

151. The legal meaning of the terms "bound" and "supreme" has been the subject of an influential law review article by Caleb Nelson that examines the origins of the Supremacy Clause in detail. He begins with an analysis of the language in the Supremacy Clause that federal law is the "Law of the Land" and that "the Judges in every State shall be bound thereby" and notes that the same language was used in Jay's resolution about Congress' authority in the Confederation. Nelson explains that the text of the Articles of Confederation by itself:

> did not necessarily mean that Congress's acts automatically became part of the law applied in state courts; it could be read to mean only that each state legislature was

[82] This was one of two possible theories of General Convention's authority considered by Murray Hoffman as late as 1850. Murray Hoffman, *A Treatise on the Law of the Protestant Episcopal Church in the United States,* (New York: Stanford and Swords, 1850), 108.

[83] Caleb Nelson, *Preemption,* 86 Va. L. Rev. 225, 256-57 (2000); McCall," Hierarchical," 9-12.

> supposed to pass laws implementing Congress's directives. If a state legislature failed to do so, and if Congress's acts had the status of another sovereign's laws, then Congress's acts might have no effect in the courts of that state.[84]

152. Congress addressed this problem by adopting Jay's resolution that the peace treaty was the "Law of the Land" and "binding and obligatory." Nelson concludes that "Law of the Land" and "binding" signal a "rule of applicability." What is described by these terms is a self-executing law that does not require ratification or enactment by another body. He then continues:

> It was not enough, however, simply to declare that federal laws take effect of their own force within each state. If federal laws were merely on a par with state laws, then they would supersede whatever preexisting state laws they contradicted, but they might themselves be superseded by subsequent acts of the state legislatures. When two statutes contradicted each other and courts had to decide which one to follow, the established rule of priority was that the later statute prevailed.
>
> Not surprisingly, the second part of the Supremacy Clause substitutes a federal rule of priority for the traditional *temporal* rule of priority. The Supremacy Clause not only makes valid federal law part of the same body of jurisprudence as state law, but also declares that within that body of jurisprudence federal law is "supreme"—a word that both Samuel Johnson and Chief Justice Marshall defined to mean "highest in authority." (Emphasis in the original.)[85]

153. Thus, to make a law "binding" signals a rule of applicability. What is described by this term is legislative authority. But without more, such a law has no hierarchical priority; it is simply on a par with all the laws of other legislatures. What signals hierarchy is not "binding," but "supreme." With "supremacy" one encounters a rule of priority, not merely a rule of applicability.

154. Thus, in the jurisprudence of the time, the language in the first TEC Constitution that dioceses not present were "bound by" acts of the General Convention simply established General Convention as a legislative rather than a consultative body. It made General Convention canons directly applicable ("binding") in the dioceses without having to be adopted by state conventions. But absent a rule of priority using recognizable language of hierarchy, General Convention legislation was not supreme. It was on a par with diocesan legislation, *which was also binding*, and was subject to nullification by the diocesan conventions under the traditional last in time rule.

155. It is significant that the highly competent lawyers drafting and reviewing TEC's first Constitution tracked part of the Supremacy Clause and expressly included its rule of

[84] Nelson, *Preemption,* 247.
[85] Nelson, *Preemption,* 250.

applicability, but omitted the language of "supremacy" that would have provided a rule of priority. Indeed, it is instructive to compare the precise language in TEC's Constitution to that in its precedents, the Supremacy Clause and the Jay resolution:

- October 1786: Jay resolution contains no language of supremacy but makes peace treaty the "Law of the Land" and "binding and obligatory";
- March 1789: New United States Constitution contains Supremacy Clause: federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."
- August 1789: TEC Constitution adds "the Church in such State [not present] shall nevertheless be bound by the acts of such Convention."

156. It is apparent from this chronology that TEC's initial constitutional language was patterned after the legal language used by Jay and the similar language later used in the United States Constitution. This concept was not incorporated into TEC's Constitution until after it had been used in these other documents. But it is also apparent from a careful examination that the TEC language was directly modeled on the new United States Constitution not on the Jay resolution; it tracks the language from the Supremacy Clause, but only insofar as the use of the concept of "bound by." In fact, one can see that TEC's founders took the Supremacy Clause and *rejected* the language "shall be the supreme Law of the Land," keeping only the language of applicability, "bound by." Thus: far from evidencing supremacy, this language actually proves the opposite. Supremacy was intentionally rejected by TEC's founders.

157. The provision making canons "binding" on non-participating churches was deleted in the major revision to the constitution that passed in 1901. This would be difficult to explain if this provision were a key indication of General Convention's supremacy as Mullin claims. It would be a routine and uncontroversial change, however, if as I maintain this language simply indicated that General Convention is a legislative not a consultative body. When that was no longer an issue, there was no need for this language.

158. There was, however, a more important legislative development in the course of the 1901 constitutional revision. In the 1890s a Joint Commission on the Revision of the Constitution and Canons was established by TEC to propose revisions to the constitution. Among its proposals were those to (i) add a supremacy clause making General Convention (which was to be renamed "General Synod") the "supreme legislative authority in this church"; (ii) give General Convention "exclusive power to legislate" in certain broad areas of church life, including ordinations and the creation of dioceses; and (iii) require that no diocesan legislation "contravene this Constitution or any Canon of the General Synod enacted in conformity therewith." This proposal was reported to the General Convention in 1895 and then overwhelmingly *rejected* in

1898 after the dioceses had studied it. These provisions were never added to the constitution.[86] This rejection puts in context Mullin's claim that nineteenth century commentators were "unequivocal and unanimous" in viewing General Convention as supreme.

G. Mullin's Selective Citation of Nineteenth Century Commentators Does Not Support His Argument.

159. Starting with paragraph 145, Mullin devotes several pages to the argument that certain nineteenth century "commentators" "viewed the General Convention as the supreme authority" in TEC. Mullin states that:

> it is not surprising that a survey of Nineteenth-Century commentators on the ecclesiastical law of the Church reveals an unequivocal and unanimous view of the hierarchical nature of the Church and the lack of independence of its dioceses.

These "views," as well as those of other commentators Mullin omits, are worth careful consideration because they demonstrate the insurmountable flaws in the theory Mullin presents to the Court. In particular, their views are anything but "unequivocal and unanimous."

160. To start, it should be noted that these commentaries begin in the mid-nineteenth century just after the last of TEC's founding generation had died. The earliest work cited by Mullin is that of Hawks in 1841. One can actually see in these works the dawning realization that TEC's constitution does not say what these commentators thought it ought to have said; it does not express the polity they "viewed" as best. This they try to remedy through commentary and argumentation, but one can see very explicitly in their writings that they themselves struggle to define the relationship between the dioceses and the General Convention that they wish to promote. Indeed, they cannot agree among themselves on why the General Convention should have the authority they would give it. But two things their commentaries clearly manifest are the recognition of the legal concepts that they think *should have been expressed* in the constitution ("supreme legislature" and "superior ultimate jurisdiction") and the fact that *they are not found* in the constitution and therefore must be argued for and supplied after the fact in commentary.

161. It is significant that these arguments did not arise during the lifetimes of the founders. It is not as if the concept of legal supremacy was unknown. As we have already seen, the founders intentionally rejected the English oath of supremacy and went so far as to borrow some technical legal language from the Supremacy Clause in the United States Constitution while omitting altogether the concept of supremacy. The conclusion is inescapable that these arguments did not arise during the founders' lives because the founders understood that they had not made General Convention legally supreme. It would have been a simple matter for the draftsmen to use in the operative provisions of the constitution the same legal language Mullin's sources thought necessary to supply by commentary a few decades later. But they did not do so.

[86] See Exhibit 2, 241-42.

162. The nature of these analyses is best demonstrated by the first two—and most prominent—of the writers Mullin cites. The first of these was Francis Hawks, who recognized the absolute independence of the state churches prior to the formation of TEC, but struggled to figure out how much independence they retained and how much they gave up by joining TEC:

> But a union between parties perfectly independent may be formed upon various terms and conditions. Every independent right may be surrendered, or some only may be given up; so, too, a greater or less equivalent may be given for such surrender; we next ask, therefore, what were the terms of the union agreed on? In other words, what is the true meaning of the constitution? The instrument itself can, of course, be expected to do no more than present certain great general principles. It cannot provide by express declaration for each case specifically; for this would make it rather a statute-book than a constitution; whereas, its true purpose is to furnish certain guides to action in the future formation of a statute-book. Its interpretation, therefore, should be liberal, and rather according to its general spirit, than to its strict letter, when the rigor of literal interpretation would tend to defeat the great end of *union*, contemplated by its framers. Let it never be lost sight of, that in all such matters as fairly arise under this general constitution, the polar star in interpretation is, that it was made for the purpose of binding us all to "walk by the same rule." And yet it must also be remembered that no liberality of interpretation should so stretch its powers as virtually to destroy those diocesan rights that are as essential to our well-being as union itself. The experience of our civil history shows that few points are more difficult of adjustment, than the respective rights and powers of the State and general governments. A similar difficulty, to some extent, exists in the system of polity adopted by the Protestant Episcopal Church in the United States; for the analogy between the two forms of government is in some particulars very close, and was made so intentionally. **In the government of the United States an ultimate arbiter in interpretation is provided in the Supreme Court. In the Church, however, we possess no such advantage; for we have no tribunal that can authoritatively declare to the whole Church what the meaning of the constitution is.** The House of Bishops may, indeed, express an opinion, if it pleases, and the churches generally respect it, as they should do; but such opinion is neither law, nor authorized judicial exposition of law. Hitherto there has been practically but little difficulty; but it is easy to foresee, as our numbers increase, the certainty of future conflict. **It is difficult to lay down a general principle on this delicate subject, of the respective rights of the Church at large, and the churches in the several dioceses.** What is desirable is, on the one hand, to promote such a union as is compatible with diocesan independency; and on the other, so to uphold the just rights of the latter as to prevent their merger in the former.[87] (Italics in the original; bolded emphasis added.)

[87] Hawks, *Constitution,* 9-10.

Hawks then outlined several principles for drawing the "difficult" line on "this delicate subject," including that the dioceses "retained" the "rights," *inter alia,* "To elect their own ecclesiastical head" and "To have their respective bishops subject to no other prelate, and to be interfered with in the discharge of their duty by no other bishop"; and "surrendered," *inter alia,* "Such an exercise of independency as would permit them to withdraw from the union at their own pleasure, and without the assent of the other dioceses." Hawks' view was that "[t]hese things, as it seems to us" were done in the constitution.[88]

163. Hawks' position is quoted at length not only because he is the first and greatest of TEC's historians and the first to be cited by Mullin, but also because his views when spelled out are most unhelpful to the theory developed by Mullin:

- Dioceses "retained" rights they did not "surrender", i.e., General Convention does not possess inherent authority but delegated authority.
- "we have no tribunal that can authoritatively declare to the whole Church what the meaning of the constitution is"
- "Its interpretation, therefore, should be liberal, and rather according to its general spirit, than to its strict letter, when the rigor of literal interpretation would tend to defeat the great end of *union*, contemplated by its framers."
- "It is difficult to lay down a general principle on this delicate subject, of the respective rights of the Church at large, and the churches in the several dioceses."
- "What is desirable is, on the one hand, to promote such a union as is compatible with diocesan independency…."

164. Hawks' explicit guiding principle was to preserve TEC as one entity—to keep all the independent dioceses within the church. That was his "polar star" of interpretation that he would have override the "strict letter" and the "rigor of literal interpretation." It is remarkable that in this passage that struggles explicitly with the issue of the locus of authority in the church Hawks does not one time mention General Convention. Indeed, he concedes that there is "no tribunal" that can interpret the constitution for the "whole Church." If there is no such tribunal and if, as Hawks acknowledges, interpreting the Constitution is "difficult" and a "delicate subject" on which he opines only with the qualifications "I apprehend" and "it seems to us," then it is difficult to see how this analysis is helpful to courts that must determine whether such a tribunal exists without getting embroiled in difficult questions of church doctrine and polity. Yet this is the authority to whom Mullin turns first in his search for a supremacy for General Convention that is nowhere stated in the constitution. And it is surprising that Mullin contends that Hawks was "unequivocal" on "the lack of independence of [TEC] dioceses."

165. Ironically, the very year, 1841, that Hawks published his treatise on which Mullin relies so heavily, Thomas Vail (later bishop of the church) published an analysis that reached a very

[88] Hawks, *Constitution,* 10-11.

different conclusion. When Bishop Vail published the second edition of his book many years later, he noted that his manuscript had been reviewed and concurred in by two other bishops (or future bishops) of TEC.[89] These bishops reached the opposite conclusion of Hawks:

> Furthermore, each Diocese is absolutely independent, except in certain particulars, wherein, by its own voluntary union with the others, it transfers its own authority to the General Convention. The connection or union of each Diocese with the others, through the General Convention, is perfectly voluntary; and any diocese has a right to withdraw from that connection for absolute urgent cause morally justifying the annulling of its pledge. The Church has never anticipated such a case in her legislation, nor had occasion to fear it. The only penalty for so doing exists in nature — the inconveniences attendant upon such a withdrawal, and the sense of having departed from the most perfect unity of the Church in our country.[90]

166. Even before going any further, therefore, when we read three nineteenth century bishops reaching the opposite conclusions of Mullin and Hawks we can only regard with suspicion Mullin's claim of some "unequivocal and unanimous view of the hierarchical nature of the Church and the lack of independence of its dioceses."

167. The second writer cited by Mullin is Murray Hoffman, a lawyer who wrote on canon law issues. Along with Hawks and Bishop William Stevens Perry, whom Mullin does not mention for reasons that will soon be apparent, Hoffman was one of the preeminent commentators on TEC's Constitution in the nineteenth century. Hoffman indeed advocated, as Mullin quotes, that General Convention was a body of "superior ultimate jurisdiction." But his reasons for this conclusion are instructive for the legal questions before the Court.

168. Hoffman begins his argument for this point by noting that:

> Upon this question of the force of the canons of the General Convention of 1789, and the power of that body to pass them there are two theories. One is, that the convention had as ample power to pass these canons, as it had to adopt a constitution; the other, that the authority was assumed, and the canons became the law in the several states only when actually ratified, or from long acquiescence and submission.[91]

He rejects the latter, not based on textual evidence or legal principles, but because it entails results he dislikes, such as the right of dioceses to nullify actions by General Convention:

> From such difficulties, contradictions, and discordancies, what refuge have we except in that other and more comprehensive theory of the power of the General Convention of 1789? It may thus be stated. That convention, under the powers given to its delegates,

[89] Vail, 17.
[90] Vail, 95-96.
[91] Hoffman, 108.

> strengthened by the ratifications of the dioceses, (even if strictly needless,) was constituted and approved as a body of supreme absolute power, to establish an ecclesiastical government for the whole Church of the United States.[92]

He then went on to articulate his reasons for advocating this other "theory":

> There is another and a higher view of the question. From the foundation of Christianity, there never has been a Church without a body in which resided the ultimate and absolute power of government. In its earliest age, even two apostles would not assume the office of deciding the question raised at Antioch as to the circumcision of the Gentiles, but referred it to the judgment of the Council at Jerusalem. Passing by the great representation of the Church universal in the four first Councils, what national or provincial Church has ever been known without such a predominant body? It is anomalous and contradictory to speak of such a Church without it. When then, in 1789, the whole Church of the United States, through its competent representatives, declared, "there shall be a General Convention of the Protestant Episcopal Church in the United States," it enunciated the great principle that this was a national Church, and that such a Convention was to be its highest Council. The mere act of establishing this Council involved and attached to it every power inherent in such a body, and not expressly refused to it. Such powers are to be ascertained from the laws and practice of the apostles, the voice of ancient witnesses, the uninterrupted descent from age to age, from council to council, of known, and exercised, and unquestioned sway.
>
> Now, what could possibly achieve the object of maintaining uniformity in discipline and worship, but this principle of ultimate authority in some constitutional body? What else could fulfill the primitive law of unity and perfection in a national Church — what else could have met the difficulties and exigencies of those days? Nothing saved us then, nothing but this can save us now, from being the dissevered members of separate congregations, and not the compact body of a national Church.
>
> Thus we have a theory of the power of the General Convention, adequate, consistent, and practical. There is neither safety, union, nor progress in any other; but there is every element of discord, and every omen of decay.[93]

169. Hoffman is explicit that this authority necessary to "save" the church from congregationalism is not found in the text of the constitution itself but must be inferred from other sources.

> Looking to the source of the power of the delegates, by whom the constitution and canons were formed, we might be led to the supposition that the analogies of the Constitution of

[92] Hoffman, 109.
[93] Hoffman, 110-11.

> the United States would prevail; and that the question upon any law of the convention would be, whether the power to make it had been expressly granted, or by a necessary implication was vested in it under some clause of the constitution.
>
> But this rule of construction will be found inapplicable. **It is impossible to find in that instrument, either in express language, or by any warrantable inference, any provisions on which to rest the validity of the greater part of the canons.** Every power rightfully exercised by the Government of the United States in any of its branches, has its source and its bounds in some clause of the Constitution of the United States; but it would be vain to seek for such a sanction for most of our canons.[94] (Emphasis added.)

He then reviews the authority given to General Convention in the Constitution and concludes:

> We have here a very limited foundation for the legislation of the convention over the whole Church. **In truth upon the doctrine of deriving authority from the constitution, there would be no power in it, except to regulate its own organization, to govern all changes in the Prayer Book, and to direct the trial of Bishops.**
>
> And from the view we have now taken, two classes of powers exist in this body — **those conferred by the constitution and those possessed without being so conferred.** I have before stated what fall under the first head.
>
> And as to the other powers, they vest in the General Convention by reason of its inherent sovereignty, and from their very nature cannot receive a strict definition or circumscription.[95] (Emphasis added.)

170. Hoffman concludes his discussion of the inherent authority of General Convention, which he acknowledges is not "conferred by the constitution," with this caution:

> I submit, (with much deference, upon a point almost untouched,) that upon every question of jurisdiction, the inquiry is not, whether the power has been conferred, but whether it has been denied or restricted.[96]

So, to summarize Hoffman's views: the supremacy of General Convention, which is necessary to "save" the church, is *not* "conferred by the constitution" but is inherent and ascertained from the practices of the apostles and the ancient councils of the church. He concedes "with deference" that this is a point "almost untouched."

171. When fully spelled out Hoffman's position demonstrates why his and Mullin's position cannot assist the Court in determining the locus of ecclesiastical authority in TEC. It is not the constitutionally permitted role of the courts to choose between competing theories based on

[94] Hoffman, 115.
[95] Hoffman, 116.
[96] Hoffman, 127.

unwanted consequences or to conclude that "the mere act of establishing this Council involved and attached to it" "such powers [that] are to be ascertained from the laws and practice of the apostles, the voice of ancient witnesses, the uninterrupted descent from age to age, from council to council, of known, and exercised, and unquestioned sway." Courts cannot "ascertain" authority not found in governing instruments by looking to the practice of the apostles. Courts know that there are churches with congregational and other polities and are unlikely to be persuaded by the argument "what national or provincial Church has ever been known without such a predominant body?" The role of the courts is to ascertain the powers that *are* "conferred by the constitution," not those that are not but should have been. And on this point, Hoffman's conclusions are clear: "In truth upon the doctrine of deriving authority from the constitution, there would be no power in it, except to regulate its own organization, to govern all changes in the Prayer Book, and to direct the trial of Bishops."

172. Indeed, one of the other nineteenth century commentators cited by Mullin takes Hoffman to task on this very point. Inexplicably, Mullin claims to be quoting (in paragraph 150) the Ohio judge, John Andrews, when in fact Mullin is quoting from an appendix in Andrews' treatise in which Andrews is simply excerpting a passage from Hoffman that was by that time out of print. Andrews noted in his preface "that it has been deemed proper to quote in the Appendix such parts of it as bear directly upon the points under discussion, and *especially in cases in which the author is constrained to differ from so eminent an authority."*[97] Anyone reading the whole of Andrews' work will realize that his book is an extended argument *against* Hoffman, including on the issue of the inherent authority of General Convention, which is a major tenet in Mullin's theory. It is surprising that Mullin does not realize it is Hoffman, not Andrews, he is quoting in paragraph 150 since he quotes the same passage himself in paragraph 54 of his affidavit and correctly ascribes it to Hoffman. It is difficult to give much weight to Mullin's review of nineteenth century commentators when he has not read them carefully enough even to know who he is quoting.

173. If one looks not to the appendix containing an excerpt of Hoffman, but to the text of Andrew's own analysis, one reads the following:

> If Judge Hoffman is right in his conclusions, then the dioceses, under whose auspices, and by whose deputies the Constitution was framed, instead of conferring by that instrument upon the General Convention a limited authority to enact canons, lost thereby their own independence and became subordinate to the General Convention as to all powers, legislative or otherwise, that were not carefully reserved to them in that instrument, and shall not be taken from them by amendment of the same. Surely this could not have been the understanding of the framers of the Constitution, or the meaning of the resolution of June 24, 1786, under the terms of which they acted.

[97] Andrews, preface, p. iii.

> It is submitted with confidence, that the proceedings of the Convention of 1786, which substantially framed the Constitution, in connection with those of the Convention of 1789, which finally adopted it, **show conclusively, that the legal effect of that instrument must be, as its terms indicate, to confer certain limited powers essential to a National Church, upon the new organization created by it**, and that the General Convention is bound to confine its action within the prescribed limits, and to those matters which concern the whole body of members of the union collectively, **leaving the respective dioceses independent as to all matters which concern dioceses only.**[98] (Emphasis added.)

174. Indeed, one sees clearly in Andrews both the recognition of what legal language was necessary to create what he thought was the role of General Convention (the "supreme legislative power of the church") and the difficulty of ever determining exactly what the respective jurisdictions of the general body and the dioceses were:

> No confederation of dioceses, in which all are not represented, would be admissible under the Constitution, which is a union of all the dioceses for all purposes that are not strictly local, and therefore within diocesan control.
>
> **The line of demarcation between the jurisdiction of the Church, as thus organized, and that of the respective dioceses, may not in all cases be clear, but there is undoubtedly such a line,** and it is sufficiently distinct for practical purposes, as is seen from the fact, that no serious difficulty has ever arisen between the General Convention and any diocese in the matter of jurisdiction, although it has always been taken for granted that the Constitution contemplates **a federal union of, and not a central government over, dioceses.** Whatever differences of opinion may, at any time, have existed, they have been found gradually to yield to the fair, manly, Christian sentiment and treatment of the Church at large. Her dioceses and members are loyal to her, for the reason that their judgments are always appealed to, and a fair consideration is given to every honest suggestion; and her conclusions therefore being reached in good faith, as to matters which she believes to come fairly within her jurisdiction, are usually, sooner or later, **cheerfully acquiesced in**.[99]

Again, this analysis does not assist the Court in determining the locus of ecclesiastical authority: the line of demarcation is not clear, but surely there somewhere.

175. These, the most prominent of the commentators cited by Mullin, have been considered at length, and there is no need to belabor this point by similar treatment of the others. From the foregoing, it can be seen even in the excerpts provided by Mullin that these commentators are trying to supply the polity they wish had been adopted for the one actually stipulated in the

[98] Andrews, 59-60.
[99] Andrews, 56-57.

Constitution. (E.g., Francis Vinton (par. 148) (under the constitution, general canons "either overrule or sanction the Canons of the several Diocesan Conventions"; in fact the Constitution says nothing on this most elementary of legal relationships that other church constitutions, including even that of the United Church of Christ, make explicit); Francis Wharton (par. 149) ("After a careful and anxious scrutiny…seems to me).)

176. And there are other commentators unmentioned by Mullin for obvious reasons, both in the nineteenth century and since, that take a different view:

Bishop William Stevens Perry, after Hawks, the preeminent historian of the nineteenth century, offered this commentary on the accession article of the constitution in 1890:

> By this simple provision our fathers proposed to secure the perpetuation of Diocesan independence. As they had come into the union, surrendering only those rights and powers to the central or national organization specifically stated in the Constitution or bond of union, so were other State or Diocesan Churches to come in for all time. Whatever may be the action of the future, at our organization and for the first century of our existence, Diocesan independence has been the acknowledged law and rule of our Church life and being.[100]

177. Bishop Alexander Charles Garrett, the first bishop of Dallas and later Presiding Bishop:

> Every Diocese is an independent and sovereign state, held in the unity of the Catholic Church by its Episcopate, according to the rule of St. Cyprian….The Diocese thus becomes the ecclesiastical unit, a full and perfect integer sufficient of itself for all purposes of growth and development.[101]

178. Dr. Powel Mills Dawley, in the widely-distributed official series, "The Church's Teaching" (1961):

> Diocesan participation in any national program or effort, for example, must be voluntarily given; it cannot be forced. Again, while the bishop's exercise of independent power within the diocese is restricted by the share in church government possessed by the Diocesan Convention or the Standing Committee, his independence in respect to the rest of the Church is almost complete.[102]

179. Daniel B. Stevick, a long-time faculty member at the Philadelphia Divinity School and its successor institution, the Episcopal Divinity School, in "Canon Law: A Handbook" (1965):

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[100] Perry, *Constitution,* 262.

[101] James M. Stanton, *Diocese and Covenant: Reflections on Dallas, Its History and Future,* Anglican Communion Institute, October 2009 http://www.anglicancommunioninstitute.com/2009/10/diocese-and-covenant-reflections-on-dallas-its-history-and-future/

[102] Dawley 116.

> The Episcopal Church is not, strictly speaking, a single jurisdiction. A diocese is free to accept or reject or qualify its national responsibilities.[103]

180. Dr. Robert Prichard, professor of church history and canon law at TEC's largest seminary and author of the standard text on TEC history, writing in the church's official history journal (2009):

> Stevick did not regard this as a positive situation. On the contrary, he thought that the ''decentralized polity'' of the Episcopal Church was inadequate for addressing ''national and world-wide affairs in our interrelated, rapidly changing society.'' He believed, nevertheless, that the constitutional structures governing the relationship of dioceses and General Convention that were in place in 1965 allowed ''an entire group [to], in effect, contract out of responsible participation in the life of the larger body.'' Those structures have not significantly changed in the intervening years….[104]

181. Finally, in 2001 Louis Weil, like Mullin a professor at a TEC seminary, submitted expert testimony on the hierarchical structure of TEC to the United States District Court for the District of Maryland in *Dixon v. Edwards*, 172 F. Supp. 2d 702 (D. Md. 2001). Among Weil's conclusions were the following (emphasis added):

> I am qualified to explain **the hierarchical structure of the Episcopal Church**, and the diocesan bishop's position at **the apex of that hierarchy** as the apostle, chief priest, pastor and ecclesiastical authority of the diocese….
>
> The polity of the Episcopal Church is hierarchical. In fact, the name of the Episcopal Church itself denotes the **authoritative framework** of the Church, and direction in which authority flows. The concept of episcope," from which episcopal is derived, means oversight. Oversight, within the polity of the Episcopal Church, is the **responsibility of a bishop within his or her diocese.**
>
> The diocese is **the jurisdictional unit** of the Episcopal Church….
>
> Taken together, **the role of the bishop** as apostle, chief priest and pastor of a diocese, and the ordination vows taken by every priest **signify the hierarchical nature of the Episcopal Church**. Within this framework, it is the bishop who is **the ultimate authority** on issues of ministry within his or her diocese….
>
> In summary, the bishop is the cornerstone of the diocese. The history and liturgy of the Episcopal Church support the notion that the bishop is **the ultimate authority over ecclesiastical matters within his or her diocese.**

[103] Daniel B. Stevick, *Canon Law: A Handbook* (New York: Seabury Press, 1965), 88-89.
[104] Robert W. Prichard, *Courts, Covenants and Canon Law*, 78 Anglican and Episcopal History 1 (2009).

Weil's expert declaration from the court's public records is attached as Exhibit 3.

182. The district court relied heavily on Weil's expert testimony in its decision:

> Ultimately, however, Defendants' suggestion that the Bishop is not the highest ecclesiastical authority is contradicted by every fundamental aspect of the faith, beginning with the very word "bishop," which is derived from the Late Latin "episcopus" meaning "bishop" or "overseer," through the Greek "episcopus," comprised of "epi," meaning "on or over" and "skopos," meaning "watches"….Professor Lewis Weil, Professor of Liturgics at the Church Divinity School of the Pacific in Berkeley, California, has stated on affidavit that the diocesan bishop is at the "apex" of the Episcopal Church hierarchy "as the apostle, chief priest, pastor and ecclesiastical authority of the diocese"…. "The history and liturgy of the Episcopal Church," Professor Weil concludes, "support the notion that the bishop is the ultimate authority over ecclesiastical matters within his or her diocese"…. All of this, in the Court's view, gives a conclusive quietus to any argument about the role of review panels within the Church or whether Bishop Dixon may have had certain ecclesiastical remedies that she declined to pursue before coming to court. She is the highest ecclesiastical authority of the Washington Diocese of the Episcopal Church.

172 F. Supp. 2d at 717.

183. When this decision was appealed to the Fourth Circuit, two TEC bishops filed an amicus brief supporting reversal of the district court decision in a brief that argued the two bishops "strongly disagree[] with the lower court's position on the authority of an Episcopal bishop." This in turn prompted a second amicus brief by 26 TEC bishops in support of the trial court's interpretation of TEC polity. They stated that their purpose was to respond to the arguments of the other amicus brief "because they believe that acceptance of those arguments would undermine and, indeed, would drastically alter the authority and the role of bishops in the Episcopal Church." These amici concluded that "Episcopal Church governance is hierarchical and governed by canon law, **as found by the District Court**." (Emphasis added.) Among the 26 bishops signing the second amicus brief was the current Presiding Bishop, on behalf of whom Mullin prepared his testimony in this case. (See paragraph 3.)

184. The Fourth Circuit affirmed the decision by the district court, concluding that "Bishop Dixon is the highest ecclesiastical tribunal of the Church for the purposes of this dispute." *Dixon v. Edwards*, 290 F. 3d 699 (4th Cir. 2002).

CONCLUSION

185. Nothing in Mullin's testimony causes me to reconsider or change any opinion I have formed about the structure and legal history of TEC. He concedes that TEC's constitution lacks the kind of explicit and legally cognizable supremacy language readily apparent in the governing

instruments of other churches. The alternative theory of TEC's structure and history he develops to compensate for this undeniable fact is demonstrably false, contains serious misrepresentations about the historical record and reflects profound confusion about the relevant legal concepts. Significantly, it does not assist the Court in determining the locus of ecclesiastical authority in TEC. Courts look to the explicit provisions of the relevant governing instrument. They cannot ascertain church polity by trying to discern the practice of the apostles, church councils or other theological doctrines.

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PUBLICATIONS (primary author unless otherwise indicated)

"The Catastrophe of Defeat," *Philosophical Studies,* 28:147 (1975) (co-authored with William G. Lycan, William Rand Kenan Professor, University of North Carolina).

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Editor's Preface

This is the second issue of the *Journal of Episcopal Church Canon Law*. The journal is intended to be a resource for all with interest in canon law and particularly for those with concern for the canonical tradition of The Episcopal Church.

This issue contains articles about two subjects. The first pair of articles deals with the revisions to Title IV of the Constitution and Canons of The Episcopal Church, which were adopted at the 2009 General Convention and come into effect on July 1, 2011. Les Alvis has written an article in which he focuses on the theory of reconciliation that underlies this revision of the canons. His article is followed by the minutes of the Committee on Canons of the 76th General Convention, which held hearings and made revisions in the Title IV proposal before it came to the floor of the two house of General Convention for adoption. The minutes provide some indication of the intent and concerns of members of a committee that played a key role in the adoption of the revised section of the Canons.

The second pair of articles concerns a matter that is currently before the secular courts in several jurisdictions: Does a diocese have the right to withdraw from The Episcopal Church without permission of General Convention? Two authors—James Dator and Mark McCall—reach opposite conclusions on the question. They do, however, agree on three matters of importance: that hierarchical governments can take a number of different forms, that The Episcopal Church does *not* have a federal form of government that closely parallels the secular government of the United States,

and that the exact character of the government that The Episcopal Church does have has long been a matter of disagreement.

Robert W. Prichard
Editor

The Episcopal Church and Association Law: Dioceses' Legal Right to Withdraw

Mark McCall[1]

Last November a California court of appeals reversed a decision by the trial court that had given a decisive victory to those within The Episcopal Church (TEC) who had sued the departing diocese of San Joaquin.[2] The appellate court sent the case back to the trial court with instructions to keep distinct two different kinds of issues. One, labeled "ecclesiastical facts" by the appellate court, involves matters that are purely ecclesiastical, such as the nature and identity of ecclesiastical officers and relationships. The other, which could be called "justiciable facts" or facts courts are competent to adjudicate under Supreme Court decisions about separation of church and state, involves matters having to do with the legal entities involved and their corporate governance and relationships. The courts have no role to play in the former, but are required to decide the latter using neutral principles of law.

Given this understanding of the role of the civil courts, the analysis of whether a diocese can withdraw from TEC is straightforward. We first determine what form of legal entity TEC is and then analyze that entity using "neutral principles" of law to decide whether

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[1] Mark McCall is a member of the New York bar and former partner of an international law firm based in New York and resident in the firm's New York, Washington and Paris offices. He is a member of the Advisory Committee of the Anglican Communion Institute, Inc.

[2] *Schofield v. Superior Court*, F058298 (Cal. Ct. App. 5th Dist.), slip op. at 8-10.

withdrawal is permitted. In the case of TEC and its dioceses, this is a very simple analysis because the law is settled and unambiguous. The first section of this article outlines this analysis and demonstrates why withdrawal is permitted under the relevant law. The second section examines the objections made to the conclusion reached under this neutral principles analysis by those arguing that dioceses cannot withdraw. It will be seen that these objections depend on transforming the question from one decided under a neutral principles analysis of justiciable or legal facts into one consisting solely of "ecclesiastical facts" and that this contravenes the constitutional principles of justiciability articulated by the Supreme Court and recently reiterated by the decision in the San Joaquin litigation.

I
Neutral Principles: TEC is Organized as a Voluntary Association of Dioceses from which Member Dioceses Have a Right to Withdraw

A neutral principles analysis consists of three parts: first, what is the legal form of TEC; second, what are the constituent members of that legal entity; and third, what are the withdrawal rights of those members.

TEC Is an Association

To begin, all sides of the current disputes agree that TEC is what the law has traditionally called a "voluntary association," although the terminology typically used today is "unincorporated nonprofit association." From a neutral principles perspective, therefore, the relevant legal category is association law, which is different in important ways from that governing other forms of

organization. It is surprising how often uninformed commentators dispute that TEC is a voluntary association, but the complaints filed in court purportedly on behalf of "The Episcopal Church" (and the caution indicated by "purportedly" is because this is disputed) acknowledge in their opening paragraphs that TEC is an unincorporated association.[3] This is not controversial.

The legal nature of associations has undergone significant development since TEC was organized in the late eighteenth century. Indeed, until fairly recently the law did *not* recognize a voluntary association as a legal entity distinct from its members. The legal status of associations at the time TEC was organized is reflected in a case brought by an association of English Freemasons in 1802 to recover property. The court would not hear its claim, concluding it was "singular that this Court should sit upon the concerns of an association, which *in law has no existence*." (Emphasis added.) The suit could only be brought by the members of the association.[4]

The rule that a voluntary association lacked a legal personality distinct from its members began to change in the twentieth century. Most states now recognize voluntary associations as legal entities and allow them to own property, enter into contracts, sue in their own names and otherwise enjoy rights and responsibilities of legal personality. This is reflected in the recommended uniform state statute on associations,

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[3] *See, e.g., The Episcopal Church v. Salazar*, No. 141-237105-09 (Dist. Ct. Tarrant County. Tex.), Plaintiff The Episcopal Church's Third Amended Original Petition, par. 1 (TEC is "a non-profit association").

[4] *Lloyd v. Loaring*, 31 Eng. Rep. 1302, 1305 (1802). *See* Harold A.J. Ford, *Unincorporated Non-Profit Associations* (Oxford: Clarendon Press, 1959).

the Revised Uniform Unincorporated Nonprofit Association Act prepared by the Uniform Law Commission.[5] But that was not formerly the case, and the conscious decision by TEC's founders to organize it as an association reflects their understanding of the nature of the organization they created. The crucial difference between an association and a corporation at that time was that a corporation had a legal personality distinct from its member shareholders; an association did not.

The traditional understanding of voluntary associations demonstrates the importance of the concept of membership. A frequent misconception is that all members of associations are individuals. The Revised Uniform Act provides to the contrary that members of an association can be individuals, corporations, other associations or any legal entity and that membership for legal purposes may be different that the non-legal understanding of membership: "Simply because an association calls a person a member does not make the person a member under this Act."[6] For example, churches such as TEC often regard communicants as

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[5] Revised Uniform Unincorporated Nonprofit Association Act (2008), sec. 5-9 ["Revised Uniform Act"]. The Commission, also known as the National Conference of Commissioners on Uniform State Laws, consists of practicing lawyers, judges, legislators, legislative staff, and law professors, appointed primarily by state governments to draft and promote enactment of uniform state laws. I am indebted to Mike Watson for bringing the Revised Uniform Act to my attention. *See* Michael Watson, "Litigation Against Disaffiliating Dioceses," Anglican Communion Institute (Sept. 2009) http://www.anglicancommunioninstitute.com/2009/09/litigation-against-disaffiliating-dioceses-is-it-authorized-and-what-does-fiduciary-duty-require/ (accessed Dec. 7, 2010).

[6] Revised Uniform Act, sec. 2(4)-(5) and comment.

members for ecclesiastical purposes, but they may not be the members of the legal entity under the applicable law. Many associations, e.g., trade associations, have corporations or other entities as their members. One association that has been the subject of much litigation is the National Collegiate Athletic Association, an association of colleges and universities.[7] Some associations are in fact associations of associations. One example is the United Church of Christ.[8]

Another well-known association is the National Association for the Advancement of Colored People, which is actually a corporation at the national level that acts in states and local communities through voluntary associations. The NAACP was involved in the most important legal case on associations ever decided. During the 1950s, the NAACP had a prolonged legal battle with the state of Alabama over its right to operate as a voluntary association in that state. This single case went to the United States Supreme Court four times. In the most important of these decisions, the Supreme Court ruled that there is a right to associate that is protected by the First Amendment.[9] Freedom of association is not explicitly mentioned in the First Amendment, but the Supreme Court ruled that the freedom of association is inherent in the other First Amendment freedoms because they cannot be realized without the freedom of association.

The NAACP case recognized a constitutional foundation to the law of associations. All associations, whether religious organizations or not, are protected by the First Amendment. Of particular importance to

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7. *NCAA v. Univ. of Oklahoma*, 468 U.S. 85 (1984).

8 *Constitution of the United Church of Christ*, (n.d.), par. 5.

9 *NAACP v.Alabama*, 357 U.S. 449 (1958).

member withdrawal is the constitutional right to associate and its corollary, the right to disassociate. This leads to the next step in the neutral principles analysis of the voluntary association comprising TEC: identifying the members of that association.

Dioceses Are the Members of the Association

This question is answered by the legal document that established TEC as an association, its Constitution. Article V of the Constitution specifies quite clearly that the parties that join—it has always used a technical term from international law, "accede"—are dioceses.[10] A parish cannot join General Convention nor can an individual. Since dioceses are the ones that join the association, they are its members.

This structure is also reflected elsewhere in TEC's Constitution. There is no provision in the Constitution that defines a diocese. The dioceses are the undefined constituent elements out of which TEC is formed. In contrast, General Convention is created and defined in Article I, which still provides in language virtually unchanged from the original that "The Church in each diocese which has been admitted to union with the General Convention...shall be entitled to representation...." As this current language makes clear, dioceses are not created by General Convention. They are "admitted" to union with the General Convention. Dioceses are both historically and legally prior to the Constitution and the General Convention. And upon admission, it is the diocese, not any other body or group,

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[10] *Constitution and Canons* (2009). Unless otherwise noted, all references to TEC's Constitution are to this edition.

that is "entitled to representation" at General Convention.

This fundamental concept of dioceses as equal constituent members of TEC is manifest in the mechanisms of governance created by the Constitution, including the provisions for representation and voting at General Convention and the means by which the Book of Common Prayer and Constitution are amended.

All dioceses have equal representation. This representation, in conjunction with the voting mechanism constitutionally required in the House of Deputies, gives the dioceses collective control over the General Convention. The House of Deputies does not decide important matters by majority vote, but by a vote "by orders."[11] This is a vote in which the diocesan deputations vote by diocese separately by their clergy and lay deputies. Each diocese gets one vote in each order. This procedure of voting by diocese has been the hallmark of TEC Conventions from the outset and reflects the fact that the dioceses meet in such Conventions as equal members. The first Convention in 1785 that began the organizing process and produced the first draft Constitution made explicit in its very first resolution that the states were its constituent members: the resolution was that "each State have one vote."[12] The next year the Convention of 1786 passed a resolution asking "the several States" to "ratify" the constitution at the next convention.[13] When eventually

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[11] Constitution, Article I.5.

[12] William Stevens Perry, ed., *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835,* (Claremont, N.H.: Claremont Mfg. Co., 1874), I:17 [hereafter "JGC"].

[13] *JGC,* I:42.

adopted, the first Constitution called for "suffrages by states" in the General Convention.[14]

All of this, of course, simply confirms the point already noted from Article I.4 that it is the *diocese,* not the individual communicant, that is represented in General Convention. Explaining General Convention's voting procedures, the Church's official commentary notes the provision in the first Constitution ("suffrages by states") and concludes "still today a vote by orders is also a vote by dioceses."[15]

The essential role of dioceses as the constituent members of TEC is further reflected in the procedures for dealing with the most important decisions made by the General Convention, which are amendments to the *Book of Common Prayer* and Constitution. Both require the same basic procedure. For example, Article XII, the provision governing constitutional amendments, requires that an amendment be "proposed" at one General Convention, that the proposal then be "sent to the Secretary of the Convention of every Diocese, to be *made known to the Diocesan Convention* at its next meeting," and then that the amendment be "adopted" at a second General Convention by "affirmative vote in each order by a majority of *Dioceses entitled to representation....*" (Emphasis added.) It could not be clearer that it is the dioceses that join the association and that are entitled to representation at General Convention.

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[14] *JGC,* I:83.

[15] Edwin A. White and Jackson Dykman, ed., *Annotated Constitution and Canons,* (New York: Seabury, 1982), I:12.

Association Law: Members May Withdraw

Given that TEC is an association and dioceses are the members, the answer to the question whether dioceses can withdraw is straightforward under settled association law. It has long been the rule of association law that a member is free to withdraw at any time absent an agreement to the contrary, what the Supreme Court has called "the law which normally is reflected in our free institutions -- the right of the individual to join or resign from associations, as he sees fit 'subject to any financial obligations due and owing' the group with which he was associated."[16] This "often cited rule" applies equally to members in religious and nonreligious associations.[17] This rule is reflected in the Revised Uniform Act:

> A member may resign as a member in accordance with the governing principles. In the absence of applicable governing principles, a member may resign at any time.[18]

Thus, in the absence of any restrictions on withdrawal in the Constitution—and no one has yet identified any—a diocese can withdraw at any time under the settled law governing associations. But the law is even stronger on this point. Even if TEC could persuade a court that its Constitution bars withdrawal, such a prohibition would not be judicially enforceable on constitutional and public policy grounds.

Although TEC is a church and protected under the First Amendment's guarantee of the free exercise of

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[16] *N.L.R.B. v. Granite State Jt. Bd.*, 409 U.S. 213, 216 (1972); *Booster Lodge v. Int. Assoc. of Machinists and Aerospace Workers*, 412 U.S. 84, 88 (1973).

[17] *Okla. Bar Assoc. v. Gasaway*, 863 P. 2d 1189, 1193 (Okla. 1993); *Guinn v. Church of Christ*, 775 P. 2d 766,776 (Okla. 1989).

[18] Revised Uniform Act, *supra*, n.5, sec. 20.

religion—a protection that is every bit as applicable to dioceses as to other bodies in the church—TEC is also organized legally as a voluntary association and is therefore subject to the standard law governing associations. As already noted, one of the important First Amendment cases of the twentieth century was *NAACP v. Alabama*, which established a constitutional right to associate that cannot be thwarted by the government. But the right to associate is also the right to associate with others than those with whom one is currently associated. In other words, there is a right to disassociate; the government cannot compel association any more than it can prevent it. This constitutional debarment applies to the courts as well as to other branches or agencies of the government.

It has long been the law that private contracts contrary to public policy are unenforceable in the courts. For example, a contract to commit a crime or to engage in price-fixing would never be enforced by a court even if it were otherwise a valid agreement. But this rule was substantially developed in the twentieth century by extending it to include interference by private parties with rights protected by the constitution. The landmark case on this subject was *Shelley v. Kraemer*, in which the Supreme Court ruled that it is unconstitutional for the courts, as agencies of the government, to enforce racially restrictive covenants in property deeds.[19] Thus, even if the private conduct is itself lawful—as was the case in 1948 when *Shelley* was decided—the courts cannot constitutionally enforce such private agreements.

The relevance of this twentieth century development in constitutional jurisprudence to the

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[19] *Shelley v. Kraemer*, 334 U.S. 1 (1948).

question of diocesan withdrawal is obvious. The right to associate or disassociate is a constitutionally protected right. Courts cannot interfere with this right, even if only by enforcing private agreements containing restrictions on disassociation. This precise point is made clear by the Law Commissioners in their commentary on the Uniform Act on associations: "Preventing a member from voluntarily withdrawing from [an unincorporated nonprofit association] would be unconstitutional and void on public policy grounds."[20]

This is why ultimately it would not be decisive even if TEC's Constitution did contain a restriction on diocesan withdrawal or "de-accession." TEC dioceses are distinct legal entities, constituted by their own governing instruments. They are, therefore, doubly entitled to protection from judicial interference in the exercise of their religious and association rights, including the right to withdraw.

II
Response to Objections

The argument presented in part one is succinct: (i) TEC is an association formed by its Constitution; (ii) the members of that association as defined in the Constitution are the dioceses; and (iii) association law is settled that members of associations can withdraw. The first and third premises are beyond dispute, and the second is supported by overwhelming historical evidence and careful analysis of TEC's governing legal instrument. What objections can be made to this argument by those who maintain that dioceses cannot withdraw?

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[20] Revised Uniform Act, comment to sec. 20.

A review of the objections presented in court and published essays indicates that the contrary arguments fall into three main categories: assertions that TEC is not an association of dioceses but a unitary organization; assertions that dioceses joining TEC agree irrevocably not to withdraw; and assertions that courts cannot decide these questions but must defer to TEC's highest judicatory because TEC is hierarchical. Part two will examine these objections carefully, but it is worth noting that the first and second objections are contradictory. If a diocese joins TEC by giving an unqualified accession, it is not created by a unitary organization. And the third depends on showing that TEC's governing instrument, its Constitution, designates a highest judicatory.

Objection One: TEC Is a Unitary Organization

The objection that TEC is not an association of dioceses but a unitary organization challenges the second premise of the argument presented in part one.[21] The flaw in this objection is that it is demonstrably false and has been repudiated repeatedly by TEC historians and legal commentators.[22]

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[21] James Allen Dator first advanced the unitary argument in his 1959 American University dissertation ("The Government of the Protestant Episcopal Church in the United States of America: Confederal, Federal or Unitary"). See his article in this issue. [Editor's note].

[22] For a critique of the unitary theory, *see* Mark McCall, *Is The Episcopal Church Hierarchical?*, (Anglican Communion Institute, Sept. 2008), App. B. [hereafter "McCall Hierarchical"] http://anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf (accessed Dec. 8, 2010).

Because TEC has had the same legal structure since its creation in 1789, the argument that TEC is unitary necessarily has two parts. First, it must be established that as originally constituted TEC was not a union of preexisting legal entities. If TEC is a unitary organization, the original dioceses must have been created by the unitary body. Second, it must be demonstrated that under TEC's Constitution as it now exists new dioceses are created by the unitary body not by the diocese's own legal process.

On the historical issue, TEC relies heavily in its court submissions on arguments attempting to show that the formation of TEC was not the union of independent state churches but a "revival" of a national church.[23] Few things indicate the weakness in TEC's case so clearly as the need to make this argument for it is incompatible with the overwhelming historical record.

In Maryland, the second largest of the colonial churches, the revolution ended a colonial government that had jealously guarded its control of the state church, but the church remained under the control of the new sovereign and independent state of Maryland, itself part of the confederation formed by the Articles of Confederation. In 1783, the clergy had to request and receive permission from the state legislature even to meet in a convocation, at which they issued a declaration that the Maryland church was "an entire church" "independent of every foreign or other jurisdiction, so far as may be consistent with the civil

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[23] *The Episcopal Church v. Salazar*, No. 141-237105-09 (Dist. Ct. Tarrant County. Tex.), Third Affidavit of Dr. Robert Bruce Mullin, (sworn to Oct. 13, 2010) par. 20 ff. [hereafter "Mullin Affidavit"].

Rights of Society [i.e., state government]."[24] In a letter to William White, one of the Maryland clergy elaborated the meaning of this declaration:

> I think that the Protestant Episcopal Church, in each particular State, is fully entitled to all the Rights and Authority that are essentially necessary to form and compleat an Entire Church; and that, as the several States in Confederation have essential Rights and Powers independent on each other, so the Church in each State has essential Rights and Powers independent on those in other States.[25]

The first historians of the church understood Maryland's "declaration" in precisely this way. Francis Hawks, TEC's first conservator and later its historiographer, noted that:

> [The Maryland declaration] is important on more accounts than one; but is especially deserving of notice from the conclusive evidence it furnishes that the Church of Maryland, like that of Virginia, claimed to have a distinct, independent existence, without reference to any connexion with the Church in any other colony.[26]

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[24] William Stevens Perry, ed., *Journals of General Conventions of the Protestant Episcopal Church in the United States: Vol. III Historical Notes and Documents,* (Claremont, N.H.: Claremont Mfg. Co., 1874), 3:22-25 [hereafter "Perry, *Documents*"].

[25] *Perry, Documents,* 3:43-44.

[26] Francis L. Hawks, *Contributions to the Ecclesiastical History of the United States,* (New York: John S. Taylor, 1839) 2:294.

In the largest of the state churches, Virginia, the independence was even more pronounced. The Virginia church was so controlled by the state legislature that it could not even meet with the other state churches. Upon being invited to the first interstate meeting in 1784, the leader of the Virginia church responded to William White that:

> The Episcopal Church in Virginia is so fettered by Laws, that the Clergy could do no more than petition for a repeal of those laws for liberty to introduce Ordination and Government and to revise and alter the Liturgy. The session is passed over without our being able to accomplish this.... In the Present State of Ecclesiastical affairs in this State, the Clergy could not, with propriety, and indeed without great danger to the Church, empower any Persons to agree to the least alteration whatever.[27]

In fact, this Virginia clergyman arranged personal business in New York and observed but did not participate officially in the first meeting. The minutes of that meeting recorded his presence as follows:

> N.B. The Revd. Mr. GRIFFITH from the State of Virginia, was present by permission. The Clergy of that State being restricted by Laws yet in force there, were not at liberty to send Delegates, or consent to any Alterations in the

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[27] Perry, *Documents*, 3:46.

> Order Government, Doctrine, or Worship of the Church.[28]

This meeting articulated the "fundamental principles" of "a general ecclesiastical constitution," one of which contained the language that to this day remains the specification of the authority of the General Convention: "there shall be a general convention."[29] It is simply inconceivable that such a concept of a general convention was perceived as a unitary body or as exercising supremacy over the state churches when the largest of those churches was legally prohibited even from meeting and could not agree to the "least alteration whatever" to the government of their state-controlled church. If the Virginia church was part of any larger body at that time it was the state government in Virginia, not a "national" Episcopal Church.

The church's first historians clearly understood the significance of this initial meeting. Hawks concluded:

> From Virginia, Dr. Griffith was present by permission. He could not sit as a delegate, because Virginia (a State which, through its whole ecclesiastical history since the Revolution, has always asserted its independent diocesan rights) had forbidden by law her clergy to interfere in making changes in the order, government, worship, or doctrine of the Church. Virginia asserted the entire independence of the

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[28] Perry, *Documents*, 3:3.

[29] Perry, *Documents*, 3:4.

> Church within her limits of all control but her own.[30]

And Bishop William Stevens Perry, Hawks' colleague and successor, likewise noted:

> No stronger proof could have been given of the assertion made in this connection by the Rev. Dr. Hawks, that "Virginia asserted the entire independence of the Church within her limits of all control but her own."
>
> This was evidently the judgment of the Convention. The Committee "appointed to essay the fundamental Principles of a general Constitution for this Church" began their report with the recognition of diocesan independency.[31]

In summary, there is no doubt at the outset that the starting premise in the unitary organization argument is false. Prior to adopting the TEC Constitution, the state churches were independent, autonomous bodies. This general conclusion is unquestionably recognized by the leading historians throughout the church's history.

Hawks, for example, made precisely this point:

> It would seem, then, that the churches of the several States came together as independent

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[30] Francis L. Hawks, *The Constitution and Canons of the Protestant Episcopal Church in the United States,* (New York: Swords, Stanford & Co., 1841), 6, reprinted in 1 Journal of Episcopal Church Canon Law 61-117 (2010) [hereafter "Hawks, *Constitution*"].

[31] William Stevens Perry, *The General Ecclesiastical Constitution of the American Church,* (New York: Thomas Whittaker, 1891), 87 [hereafter "Perry, *Constitution*"].

> churches, duly organized, and so considered each other, for the purpose of forming some bond whereby they might be held together as one religious community throughout the whole United States.[32]

Later, Perry reached the same conclusion:

> In short, the action contemplated and proposed in the Fundamental Principles of 1784, — principles based, as we have seen, on those of The Case of the Episcopal Churches Considered, — proves conclusively that the Church in each independent State of the federal union, where organized agreeably to its own pleasure, deemed itself, and was regarded by each independent Church in the other States respectively, as an independent branch of the Catholic Church of Christ, lacking, indeed, a perfect organization while the Episcopate was wanting, but fully competent to seek that perfecting order and to organize for this purpose and for such other purposes as the present need seemed to require.[33]

And still today this inescapable fact about the formation of TEC is recognized by TEC's own official commentaries.

Canon Powel Mills Dawley (in "The Church's Teaching Series"):

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[32] Hawks, *Constitution*, 8.

[33] Perry, *Constitution*, 99.

> At the time that the American Revolution forced an independent organization upon the Anglican colonial parishes, the first dioceses existed separately from each other before they agreed to the union in 1789 into a national church. That union, like the original federation of our states, was one in which each diocese retained a large amount of autonomy, and still today the dioceses possess an independence far greater than that characteristic of most other Churches with episcopal polity.[34]

Similarly, White & Dykman, the official commentary on TEC's Constitution and Canons: "Before their adherence to the Constitution united the Churches in the several states into a national body, each was completely independent." White & Dykman then describes the national body they created as "a federation of equal and independent Churches in the several states."[35]

A final note about the founding dioceses: they continued to operate under the same governing instruments *after* adopting the general Constitution as they had before, thereby maintaining their prior legal status. The church in Pennsylvania continued to operate under the same "act of association" after 1789 as it had before.[36] The church in Virginia continued to be governed by the same "fundamental canons" that it had

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[34] Powel Mills Dawley, *The Episcopal Church and Its Work,* (Greenwich, CT: Seabury, rev. ed. 1961), 115-16.

[35] White & Dykman, *Annotated Constitution and Canons,* 1:12, 29.

[36] *Constitution and Canons for the Government of the Diocese of Pennsylvania,* Preamble (Philadelphia: 2008).

adopted before joining the General Convention.[37] This effectively ends the unitary organization argument from a legal perspective. The independent founding dioceses associated to form the General Convention while maintaining their prior legal identities. They were not created by General Convention.

Leaving aside the historical fact that the General Convention had nothing whatsoever to do with the creation of the founding dioceses -- it was the dioceses that created the General Convention and not *vice versa* -- the General Convention does play a role in the admission of new dioceses under the current Constitution. There is considerable misunderstanding about this process, so the procedure must be examined carefully. It should be noted at the outset that the relevant constitutional provision, Article V, is captioned "Admission of New Dioceses" not "Creation of New Dioceses." This reflects the language, already noted, in Article I that dioceses are "admitted" to union with General Convention. Those who continue to claim that dioceses are "created" by General Convention ignore the legal precision of Article V.

The first sentence of that Article specifies General Convention's role in this process. It is to give "consent." This wording indicates that the role of General Convention is secondary, not primary. It consents to actions initiated elsewhere. The subsequent sentences in Article V specify the process by which dioceses are admitted to TEC. The proceedings "originate" with a convention of "the unorganized

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[37] Francis. L. Hawks, *Contributions to the Ecclesiastical History of the United States of America* (New York: Harper& Bros., 1836) 1: App. pp. 32-36, [hereafter "Hawks, *Contributions*"].

area," not with General Convention. It is the unorganized area that "duly adopts" its own constitution. *This creates a legal entity distinct from General Convention.* Article V then describes the legal entity created by the duly adopted constitution not, as before, as an "unorganized area," but as a "diocese." *But it is not yet part of General Convention.* Then the "new diocese" submits its constitution to the General Convention for consent; and upon receipt of this consent, it enters into "union with the General Convention."

In this articulation of the steps involved in the creation and then admission of a new diocese, Article V reflects the civil law. When an unorganized area adopts its own constitution, it is by definition no longer "unorganized." It is a legal entity having its own legal personality. In the terminology of Article V, this entity is called a "new diocese." This step, furthermore, occurs *before* the constitutional involvement of General Convention. What happens when the "new diocese" obtains the consent of General Convention to its application is that it is "admitted" into union with the other dioceses in General Convention. The transformation from "unorganized area" to "new diocese" occurs when the diocesan constitution is duly adopted. When General Convention gives its consent, another change occurs, but it is not the creation of a "new diocese." It is the acceptance of an unaffiliated "new diocese" as a member diocese of General Convention.

An objection often heard is that the duly constituted new entity is not a "TEC diocese" until the General Convention consents and it is admitted to union, but this misses the point. It is merely tautological to observe that the new diocese is not a member of TEC until it joins TEC. The legal issue is whether TEC is a

unitary organization or an association of dioceses. The fact that new dioceses are duly constituted *as legal entities* before being admitted to union establishes conclusively that they enjoy a separate legal personality distinct from TEC and the other dioceses. Article V thus mirrors the process by which TEC was originally created as an association of distinct legal entities, the state churches.

Objection Two: Dioceses Give an Unqualified Accession when They Join

A second objection made by opponents of diocesan withdrawal in fact contradicts the unitary organization objection. It acknowledges that dioceses join TEC but argues that they do so irrevocably because they give an unqualified accession to TEC's Constitution. This latter objection should ultimately be irrelevant legally for the reason noted by the Uniform Law Commissioners in their commentary on the Revised Uniform Act: any restriction on member withdrawal would be unenforceable as unconstitutional and against public policy. In addition to this legal defect, this objection also presents factual issues. Is the accession provision an attempt, whether enforceable or not, to restrict member withdrawal by making accession irrevocable? Basic legal principles indicate that there is little merit to the argument that this provision acts as a restriction on member withdrawal.

First, the term "accede" itself is a specialized term used in international law to describe the act of a sovereign state becoming a party to a treaty already

signed by others.[38] A treaty, of course, is a compact among sovereign and independent states. "Acceding" was the term used in the Articles of Confederation, which established a "league of friendship" of states retaining their "sovereignty, freedom and independence." That term is not used in the United States Constitution, which established a hierarchical central government. This use of treaty language could not have been accidental. James Duane, one of the primary draftsmen of TEC's first Constitution, was a signatory to the Articles of Confederation; John Jay, also active in the organizing conventions, besides being the nation's Foreign Secretary and Chief Justice, negotiated the second treaty with Great Britain, known to this day as the "Jay Treaty." These men clearly knew what the term "acceding" signified.[39] This further confirms that TEC was created as an association of sovereign or autonomous dioceses.

Treaties are typically subject to termination. The vast majority of them are explicitly terminable, and the ones foremost in the minds of TEC's founders, the Treaty of Peace with Great Britain and the Articles of Confederation, were being abrogated and nullified as TEC's constitution was being drafted.[40] If TEC's founders had intended to signal by the use of "accede" irrevocable submission to a central body, they would not have borrowed a term from the Articles of Confederation that *lacked* a central hierarchy and that had just been *abrogated* by the thirteen states.

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[38] *Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 79, n. 7 (2nd Cir. 2005).

[39] McCall, *Hierarchical*, 11-14, 20-23.

[40] Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1593 ff. (2005) ("denunciations and withdrawals are a regularized component of modern treaty practice"). *See* McCall, Hierarchical, 20-21.

Second, as a matter of contract law (and the constitution of a voluntary association is a legal contract) the traditional rule is all acceptances must be unqualified or unconditional. Unlike the law of treaties, in which qualified accession (with "reservations") is often permitted, contract law generally regards a qualified acceptance as a rejection, although this rule was relaxed somewhat in the twentieth century in certain codifications, such as the Uniform Commercial Code. The revised rule, more akin to treaty law, would allow some qualifications to become part of the contract unless objection is made.

Given these basic principles, it is obvious that "unqualified accession" simply requires that the joining diocese attach no conditions or qualifications to its accession. But this has nothing to do with revocability. Under contract law, the standard rule is that unless expressly agreed otherwise, a contract without a stated duration is terminable at will or upon reasonable notice.[41] If an unqualified acceptance made a contract irrevocable, a contract without a term of duration could never be terminated. The law is otherwise. "Unqualified accession" pertains to the formation of the contract, not its duration. "Unqualified" with "irrevocable" are distinct legal concepts.

Third, the meaning of "unqualified accession" must be interpreted in light of *TEC's own unqualified accession to the constitution of the Anglican Consultative Council, when it "acceded and subscribed to the Proposed Constitution of the said Anglican Consultative Council" by*

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[41] E. Allan Farnsworth, *Contracts* (New York: Aspen Publishers, 3rd ed. 1999), 511-13.

resolution in 1969.[42] It is agreed by all that the Anglican Communion is not a hierarchical organization and that accession to the constitution of the ACC is not irrevocable. This reflects the proper interpretation of an unqualified accession, both for TEC and its member dioceses.

Objection Three: Courts Must Defer to TEC's Highest Judicatory

A final objection to the legal argument in part one is broader than either of the two just examined. It does not address directly any of the premises in the legal argument, but maintains instead that this is a question that must be decided by "TEC" not the courts. TEC is a hierarchical church, according to this objection, and the courts must defer to the determination of its highest judicatory on this question, right or wrong.

The point of departure for this objection is a line of Supreme Court cases on the First Amendment, particularly two cases decided in the 1970s. Before examining these cases, two preliminary observations are in order. First, this objection ignores the distinction drawn by the California appeals court and others between "ecclesiastical facts" and "justiciable facts." This objection is based on the assumption, rejected by the California court, that the question of diocesan withdrawal is solely an ecclesiastical issue. As shown in part one, however, the matter of diocesan withdrawal can be decided under settled association law using the same neutral principles courts use to decide

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[42] Robert W. Prichard, "The Making and Re-making of Episcopal Canon Law," (Anglican Communion Institute, Feb. 2010), 15 http://www.anglicancommunioninstitute.com/2010/02/the-making-and-re-making-of-episcopal-canon-law/ (accessed Dec. 8, 2010).

membership disputes in other association contexts. No issue requiring deference to a church body is relevant to that analysis.

Second, when invoking this argument that deference is required, it is obviously necessary to identify precisely the body within the church to which the courts must defer and to allege that this body has decided the issue before the courts. Church litigation by definition involves two parties from the church that disagree. Courts can only resolve such a dispute by deferring to a church body if they can determine to which body they must defer. In the cases of diocesan withdrawal, the governing body of the diocese has voted to withdraw pursuant to the diocesan constitution and canons. Other parties in TEC, both within and outside the diocese, have claimed that these votes were *ultra vires*. The first question for the courts if they are to defer to a church body on this issue is whether there is any "higher judicatory" in TEC than the diocesan convention. A court must defer to a church's highest judicatory in determining matters of ecclesiastical doctrine and discipline, but it cannot defer to one of the parties in a lawsuit in determining the identity of the highest judicatory.

Two Supreme Court cases addressing this complex question indicate the analysis required of the courts before they can constitutionally defer to a church body. The primary case on this subject is *Serbian Eastern Orthodox Diocese v. Milivojevich*,[43] which involved the removal of a bishop in an American diocese by the "Holy Assembly of Bishops," the council of bishops of

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[43] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 716-18 (1976).

the Serbian church, and the subsequent reorganization and division of that diocese. The determination of the "highest judicatory" in that case was easy, and indeed was agreed by all parties:

> Indeed, final authority with respect to the promulgation and interpretation of all matters of church discipline and internal organization rests with the Holy Assembly, and even the written constitution of the Mother Church expressly provides:
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> "The Holy Assembly of Bishops, as the highest hierarchical body, is legislative authority in the matters of faith, officiation, church order (discipline) and internal organization of the Church, as well as the highest church juridical authority within its jurisdiction (Article 69 sec. 28)." Art. 57.
>
> "All the decisions of the Holy Assembly of Bishops and of the Holy Synod of Bishops of canonical and church nature, in regard to faith, officiation, church order and internal organization of the church, are valid and final." Art. 64.[44]

Thus, the very questions at issue in that case were committed to a body explicitly identified in the church's constitution as the "highest hierarchical body" and "final" arbiter. These provisions of the general constitution were the basis for the Court's conclusion that the Holy Assembly was the highest judicatory. It went on to note that this conclusion was "confirmed" by the following additional factors: the local diocese was

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[44] *Serbian Eastern Orthodox Diocese v. Milivojevich* at 716-18.

organized under an Illinois statute for a body that was subordinate to a higher body; proposed diocesan constitutional changes, bylaws and adjudications were sent to the Holy Assembly for prior approval; the bishops swore an "Episcopal-Hierarchical Oath" that they would "always be obedient to the Most Holy Assembly," the very body identified in the constitution as "the highest hierarchical body"; and the diocesan constitution confirmed its subordinate status.[45]

What permitted the Supreme Court to defer to a church body in the *Serbian* case was that it could easily determine without becoming embroiled in church doctrine which body was the highest judicatory in that church. Indeed, the litigants agreed that the Holy Assembly was the highest judicatory in the Serbian church.

What happens if the parties do *not* agree on which body is the highest judicatory and the church polity is ambiguous? When each side claims to be the highest judicatory? The Supreme Court addressed these questions three years later in *Jones v. Wolf.*[46] In that case, the Court ruled that it was constitutionally permissible, but not mandatory, for courts to apply the deference approach to disputes concerning church property. Responding to the dissent, which argued that deference was constitutionally required, the majority summarized both the analysis the courts must undertake before applying the deference approach and the problems that analysis could present:

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[45] *Serbian Eastern Orthodox Diocese v. Milivojevich* at 715.

[46] *Jones v. Wolf*, 443 U.S. 595 (1979).

The dissent would require the States to abandon the neutral principles method, and instead would insist as a matter of constitutional law that, whenever a dispute arises over the ownership of church property, civil courts must defer to the "authoritative resolution of the dispute within the church itself." *It would require, first, that civil courts review ecclesiastical doctrine and polity to determine where the church has "placed ultimate authority over the use of the church property." After answering this question, the courts would be required to "determine whether the dispute has been resolved within that structure of government and, if so, what decision has been made."* They would then be required to enforce that decision. We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.

The dissent suggests that a rule of compulsory deference would somehow involve less entanglement of civil courts in matters of religious doctrine, practice, and administration. *Under its approach, however, civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the*

> *members of the religious association."* In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity." The neutral principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes. (Emphasis added; internal citations omitted.)[47]

Thus, before the deference approach can be used "civil courts would always be required" to examine the "constitutions of the general and local church, as well as other relevant documents" to determine what the highest judicatory is, whether it has acted, and what its decision was. The courts cannot defer to a party to a lawsuit merely because it appears claiming to speak for "TEC." They must make a "careful examination" aware that the "locus of control" could be so "ambiguous" as to make deference constitutionally impermissible.

In the diocese litigation, no court has yet undertaken this careful examination of the governing legal instruments, the constitutions of TEC and the dioceses. Do they plainly identify a highest judicatory to which the courts can constitutionally defer? The "necessary" careful examination would in fact demonstrate that there is no body designated in TEC's constitution as having hierarchical priority or supremacy over the dioceses.

No Body Is Designated as Highest, Supreme or Final in the Constitution. As already noted, TEC is comprised of

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[47] *Jones v. Wolf* at 604-05.

member dioceses that join together to create various central bodies and offices, including a General Convention, Executive Council, and Presiding Bishop. What is not defined in TEC's Constitution is any legal or hierarchical relationship among these various bodies. Indeed, the Constitution is devoid of the legal terminology normally used to express hierarchies in legal documents.[48] On the one hand, a General Convention is created and given legislative authority to enact general canons, but the preexistent diocesan conventions are also recognized as having legislative authority, and there is no provision making the General Convention "supreme" or "highest" or providing that general canons supersede diocesan ones. Indeed, none of the following terms routinely used in legal documents to indicate hierarchical priority is found at all in TEC's Constitution: "supreme"; "supremacy"; "highest"; "hierarchical"; "subordinate"; "sole"; "preempt"; "final"; and "contrary."[49] This lack of hierarchical concepts in the Constitution confirms the traditional understanding of TEC's structure that was previously quoted from the official commentary: TEC is a federation (or confederation) of independent or autonomous dioceses.

Omission of a Central Hierarchy Was Intentional. That the omission of a central hierarchy was not inadvertent but intentional is demonstrated by a review of the historical context in which TEC was organized: first, TEC was organized and its Constitution adopted just as the American states were changing their government from a "league of friendship" of sovereign and independent

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[48] McCall, "Hierarchical," 10-11.

[49] McCall, "Hierarchical," 10-11.

states under the Articles of Confederation to the hierarchically-structured federation specified in the United States Constitution; and second, the American Revolution separated the churches in the United States from the Church of England, the Supreme Governor of which was the British monarch.

Two of the most active participants in the General Conventions that organized TEC and drafted its first Constitution were two prominent lawyers, James Duane and John Jay, who are noted to this day among legal scholars for their roles in developing the jurisprudence of hierarchy used in the United States Constitution.[50] Duane was a signatory to the Articles of Confederation on behalf of New York and was the mayor and first federal judge in New York. Sitting as judge in 1784, Duane ruled in a well-known case still studied by legal scholars that the lack of a routine technical term indicating hierarchical priority substantially eviscerated a New York statute purporting to nullify part of the peace treaty ending the Revolutionary War.[51] Six weeks later Duane was a delegate to the first interstate convention that established the fundamental principles of what was to become the Constitution of The Episcopal Church.[52] The first of these principles was the very language, that "there be a general convention," that remains to this day the only specification of the authority of General

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[50] Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 242-44, 256-57 (2000); Julian G. Ku, *Treaties As Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 Ind. L.J. 319, 363-69 (2005).

[51] *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), reprinted in Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton* (New York: Columbia U. Press, 1964) 1:392-419.

[52] Perry, *Documents*, 3-4.

Convention. Duane was again a delegate to the General Convention in 1785 and served on the committee that drafted the first Constitution.[53] That Constitution, the key language of which remains virtually unchanged in the current Constitution, contained no language giving hierarchical priority to the General Convention. Duane was also made a member of the executive committee selected to correspond with the churches in the United States and the Archbishop of Canterbury to obtain consecrations for American bishops.[54] He was also a delegate to the 1786 Convention.[55]

John Jay was the Secretary for Foreign Affairs during the Confederation and was later the first Chief Justice of the United States Supreme Court. He is also known among legal scholars for his work in drafting the hierarchical legal language that resolved the treaty nullification controversy with Great Britain and that became the prototype for the Supremacy Clause in the United States Constitution, the primary provision establishing the hierarchy of the federal government in our federal system.[56] Right in the middle of his work on the treaty controversy, Jay was a delegate to the General Convention in June 1786.[57] This Convention revised the proposed Constitution drafted the year before and continued to omit any language giving hierarchical priority to the General Convention or any central body. Although Jay arrived late, after the draft Constitution had been approved, he must have been aware of the terms of the Constitution since the draft was a primary

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[53] *JGC*, I:15, 18.
[54] *JGC*, 25, 57.
[55] *JGC*, 49.
[56] Nelson, *Preemption*, 256-57; McCall," Hierarchical," 9-12.
[57] *JGC*, I:33.

item on the agenda. After his arrival, Jay took a leading role in drafting a key letter to the Archbishop of Canterbury from the Convention.[58] He did not attend the adjourned session of the Convention in October 1786, which occurred just as he was delivering his report to Congress with his proposed solution to the treaty crisis, including the resolutions containing the legal language that would later be incorporated into the Supremacy Clause of the United States Constitution.

It is inconceivable that these two knowledgeable lawyers, known to this day for their role in developing our jurisprudence concerning legal hierarchies, would have inadvertently drafted a Constitution devoid of hierarchical language.

Indeed, there is conclusive proof that this omission of a central hierarchy was intentional, not inadvertent. The primary imperative driving the Anglican churches in America to break formally with the Church of England was the Oaths of Supremacy, Allegiance and Due Obedience that prospective bishops and clergy were required to swear.[59] They are the paradigm of legal language recognizing and submitting to a hierarchical body: allegiance is pledged to the British monarch as the "only supreme governor" of the church, and obedience is pledged not only to an archbishop, but also to the "metropolitical church" of the province in which the bishop was consecrated.[60]

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[58] JGC, 43. For the role of Jay, *see* Paul Marshall, *One Catholic and Apostolic: Samuel Seabury and the Early Episcopal Church,* (New York: Church Publishing, 2004), 237-38.

[59] William White, *The Case of the Episcopal Churches in the United States Considered* (Philadelphia: Claypoole, 1782), 6-7.

[60] Jonathan Michael Gray, "The Sixteenth-Century Background to the Current 'Oath' of Conformity of the Episcopal Church," *Journal of*

American clergy were both unwilling and unable to give this oath. One of the main tasks of the early General Conventions was to obtain the agreement of the Church of England bishops to consecrate American bishops without this oath. James Duane was on the committee that developed a plan to achieve this objective, and he was the one who presented it to the General Convention.[61] Both Duane and Jay played major roles in drafting the correspondence with the English bishops on this topic.[62] The agreement reached was that these oaths would be replaced for American bishops by the declaration–"I do solemnly engage to conform to the doctrine and worship of the Protestant Episcopal Church...."[63] Submission to a *hierarchy*, the monarch, the archbishop and the metropolitical church, was explicitly replaced not by submission to a *different* hierarchy, but by a pledge of doctrinal conformity.

Indeed, the model for this ordination Declaration for TEC was the oath specified in the pre-existing canons of the state church in Virginia, which prior to the first meeting of any "general convention" already had a canon requiring the following:

> Every person hereafter to officiate in this church as a bishop...shall take the oath of allegiance to the commonwealth, and subscribe to conform to the doctrine, discipline and worship of the Protestant Episcopal Church of Virginia.[64]

Episcopal Church Canon Law 1 (June 2010): 33, 40; *The Canons of the Church of England* (2008), C 14.

[61] *JGC*, I: 23-25.

[62] *JGC*, 14-62.

[63] *JGC*, I: 23,53.

[64] Hawks, *Contributions*, App. 9.

Had TEC's founders intended to create a metropolitical church or central hierarchy it would have been a simple matter to adapt this Declaration or the English oath of due obedience to require "allegiance" or "due obedience" to a central governing body. They chose not to do so.[65]

TEC Has No Supreme Court. Article IX of TEC's Constitution provides that General Convention may establish "an ultimate Court of Appeal" to review determinations of other courts on matters of "doctrine, faith or worship." This "ultimate" court has never been established.

Two consequences follow from this provision. First, it confirms that General Convention is not constitutionally the "ultimate" authority on these matters. If it were, the Constitution would not provide for a different body. Second, on other questions, such as the interpretation of the Constitution and general and diocesan canon law, there is no ultimate authority. Authority on these matters rests with the various bodies that share jurisdiction, including diocesan and other courts and the various conventions and other bodies of TEC, without any "highest judicatory."

The absence of a designated body with final interpretive or judicatory authority does not mean that there must be one somewhere and that courts should

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[65] Gray, "Sixteenth-Century Background," 42-43 ("These [Church of England] oaths delineated the hierarchy of the church and bound the swearer to remain loyal to his superior. By contrast, the modern declaration of conformity is not an oath of submission; the ordinand is not bound to be obedient to a specific superior or general body (such as General Convention)").

select the best candidate. It means there is none. For example, the union formed by the Articles of Confederation also lacked a central judiciary. That did not mean that Congress exercised that function (and supreme hierarchical power). It meant that the only judiciary was that found in the several sovereign states comprising that union.

This absence of an ultimate judicatory has long been recognized. Hawks concluded in 1841:

> In the government of the United States an ultimate arbiter in interpretation is provided in the Supreme Court. In the Church, however, we possess no such advantage; for we have no tribunal that can authoritatively declare to the whole Church what the meaning of the constitution is. The House of Bishops may, indeed, express an opinion, if it pleases, and the churches generally respect it, as they should do; but such opinion is neither law, nor authorized judicial exposition of law.[66]

The only candidate for "ultimate arbiter" that occurred to Hawks was not General Convention, but the House of Bishops. Other commentators would undoubtedly propose different candidates for "highest judicatory." But the undeniable fact (as Hawks recognized) is that the Constitution itself does not specify one. Hence, the constituent dioceses retain this authority that they clearly had before uniting to form TEC and that they have not surrendered. This was the very conclusion reached by Bishop Vail in the nineteenth century:

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[66] Hawks, *Constitution*, 9-10.

> Moreover, in the Protestant Episcopal Church there is nothing analogous to the Supreme Court of the United States; for each diocese is, in respect of all judiciary concerns, independent in itself.[67]

That is essentially ends the argument that there is any agreed central body in TEC to which the civil courts must defer in matters of church disputes.

Legislative Authority Does Not Mean Legislative Supremacy. Proponents of a central hierarchy often argue that because General Convention has authority to enact canons and does so using "mandatory language" ("shall"), this establishes the supremacy of the General Convention.[68] But this argument profoundly misses the point. Legislative authority is not the same as legislative supremacy. Dioceses also have legislative authority and enact canons using mandatory language. Some of these diocesan canons existed before the first general canons were enacted.[69] Establishing the legislative *authority* of General Convention sheds no light on its legislative *supremacy* or lack thereof.

This argument that the possession of legislative authority proves the existence of supreme legislative authority—so obviously false when stated baldly—is inextricably connected with another argument made by proponents of a central hierarchy: that language in the

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[67] Thomas H. Vail, *The Comprehensive Church or, Christian Unity and Ecclesiastical Union* (Hartford: H. Huntington, 1st ed. 1841, New York: D. Appleton, 2nd ed. 1879), 117-18. I am indebted to George Conger for bringing Vail's work to my attention.

[68] See, *e.g.*, "Mullin Affidavit" at par. 101ff.

[69] See, *e.g.*, the 1785 Virginia canons in Hawks, *Contributions*, 8-11.

first Constitution stating that General Convention actions were binding—the provision has long since been removed—proves that General Convention is supreme.[70] When the legal concepts are properly understood, it will be seen that this argument is nothing more than an elaboration of the argument stated baldly above. And when the historical facts are examined, they demonstrate how purposefully the founders of TEC rejected supremacy for General Convention.

Article 2 of the first Constitution provided that:

> And if, through the neglect of the Convention of any of the Churches which shall have adopted, or may hereafter adopt this Constitution, no Deputies, either Lay or Clerical, should attend at any General Convention, the Church in such State shall nevertheless be bound by the acts of such Convention.[71]

The place to start in considering this provision is to note that it applies by its own terms only to those state churches that did not send representatives to General Convention. This apparent oddity signals right away that the purpose of this provision is something other than to serve as a half-baked supremacy clause for a church whose draftsmen did not know how to formulate

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[70] See, *e.g.*, "Mullin Affidavit" at par. 83; Joan R. Gundersen, "A Response to Mark McCall's 'Is the Episcopal Church Hierarchical?'" (Progressive Episcopalians of Pittsburgh, Sept. 2008) http://progressiveepiscopalians.org/html/mccall.pdf (accessed Dec. 8, 2010); Mark McCall, "Fatal Flaws: A Response to Dr. Joan Gundersen," (Anglican Communion Institute, Sept. 2008) http://www.anglicancommunioninstitute.com/2008/09/fatal-flaws-a-response-to-dr-joan-gundersen/ (accessed Dec. 8, 2010).

[71] JGC, 99.

a proper one. What this provision seems to be addressing is one possible understanding of General Convention actions: that they did not apply to a state church until they were ratified in some fashion, either by the state's representatives to the General Convention (as the Constitution itself was ratified) or by action of the state convention.[72]

This issue paralleled the debate over the legal effect of acts of Congress under the Articles of Confederation. A widely held view was that they had to be enacted by the state legislatures in order to become binding law. Until so enacted, they were only requests; Congress was in effect a consultative, not a legislative, body. In the case of TEC, because the ratification by the state churches of the initial Constitution took the form of ratification by their duly authorized representatives at the General Convention, it was a reasonable interpretation that the actions of General Convention would require similar ratification. This would not have been given by a state church that sent no representatives, and General Convention actions would have no legal effect in such a state *if the General Convention were purely a consultative body like some thought the Congress of the Confederation was.* The Article 2 language answered this question by indicating that General Convention was a legislative, not a consultative, body.

But this language says nothing at all about supremacy. Those who argue the contrary fail to understand the legal meaning of the term "bound,"

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[72] This was one of two possible theories of General Convention's authority considered by Murray Hoffman as late as 1850. Murray Hoffman, *A Treatise on the Law of the Protestant Episcopal Church in the United States,* (New York: Stanford and Swords, 1850), 108.

particularly the technical legal usage of that term in the eighteenth century. It is significant that this language, used in its precise sense, is found in a resolution passed by Congress during the Articles of Confederation period, then later in the Supremacy Clause of the United States Constitution, and finally in TEC's first Constitution. The resolution passed by the Confederation Congress on the legal effect of the peace treaty was authored by John Jay, as already noted, an influential deputy to one of TEC's organizing conventions.[73] Jay's language did not signal supremacy since Congress in the Confederation was not supreme. This resolution became the basis for similar language in the Supremacy Clause, where the "binding" concept comes immediately *after* the language of "supremacy." That the concept of "binding" did not signal supremacy in the new United States Constitution is shown both from the meaning it had in the Confederation and the fact that explicit language of supremacy was added to the "Supremacy Clause."

The legal meaning of the terms "bound" and "supreme" has been the subject of an influential law review article by Caleb Nelson that examines the origins of the Supremacy Clause in detail. He begins with an analysis of the language in the Supremacy Clause that federal law is the "Law of the Land" and that "the Judges in every State shall be bound thereby" and notes that the same language was used in Jay's resolution about Congress' authority in the Confederation. Nelson explains that the text of the Articles of Confederation by itself:

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[73] Nelson, *Preemption*, 256-57; McCall," Hierarchical," 9-12.

> did not necessarily mean that Congress's acts automatically became part of the law applied in state courts; it could be read to mean only that each state legislature was supposed to pass laws implementing Congress's directives. If a state legislature failed to do so, and if Congress's acts had the status of another sovereign's laws, then Congress's acts might have no effect in the courts of that state.[74]

Congress addressed this problem by adopting Jay's resolution that the peace treaty was the "Law of the Land" and "binding and obligatory." Nelson concludes that "Law of the Land" and "binding" signal a "rule of applicability." What is described by these terms is a self-executing law that does not require ratification or enactment by another body. He then continues:

> It was not enough, however, simply to declare that federal laws take effect of their own force within each state. If federal laws were merely on a par with state laws, then they would supersede whatever preexisting state laws they contradicted, but they might themselves be superseded by subsequent acts of the state legislatures. When two statutes contradicted each other and courts had to decide which one to follow, the established rule of priority was that the later statute prevailed.
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> Not surprisingly, the second part of the Supremacy Clause substitutes a federal rule of priority for the traditional *temporal* rule of

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[74] Nelson, *Preemption*, 247.

> priority. The Supremacy Clause not only makes valid federal law part of the same body of jurisprudence as state law, but also declares that within that body of jurisprudence federal law is "supreme"—a word that both Samuel Johnson and Chief Justice Marshall defined to mean "highest in authority." (Emphasis in the original.)[75]

Thus, to make a law "binding" signals a rule of applicability. What is described by this term is legislative authority. But without more, such a law has no hierarchical priority; it is simply on a par with all the laws of other legislatures. What signals hierarchy is not "binding," but "supreme." With "supremacy" one encounters a rule of priority, not merely a rule of applicability.

Thus, in the jurisprudence of the time, the language in the first TEC Constitution that dioceses not present were "bound by" acts of the General Convention simply established General Convention as a legislative rather than a consultative body. It made General Convention canons directly applicable ("binding") in the dioceses, without having to be adopted by state conventions. But absent a rule of priority using recognizable language of hierarchy, General Convention legislation was not supreme. It was on a par with diocesan legislation, *which was also binding*, and subject to nullification by the diocesan conventions under the traditional last in time rule.

It is significant that the highly competent lawyers drafting and reviewing TEC's first Constitution tracked part of the Supremacy Clause and expressly

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[75] Nelson, *Preemption*, 250.

included its rule of applicability, but omitted the language of "supremacy" that would have provided a rule of priority. Indeed, it is instructive to compare the precise language in TEC's Constitution to that in its precedents, the Supremacy Clause and the Jay resolution:

- October 1786: Jay resolution contains no language of supremacy but makes peace treaty the "Law of the Land" and "binding and obligatory";
- March 1789: New United States Constitution contains Supremacy Clause: federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."
- August 1789: TEC Constitution adds "the Church in such State [not present] shall nevertheless be bound by the acts of such Convention."

It is apparent from this chronology that TEC's initial constitutional language was patterned after the legal language used by Jay and the similar language later used in the United States Constitution. This concept was not incorporated into TEC's Constitution until after it had been used in these other documents. But it is also apparent from a careful examination that the TEC language was directly modeled on the new United States Constitution not on the Jay resolution; it tracks the language from the Supremacy Clause, but only insofar as the use of the concept of "bound by." In fact, one can see that TEC's founders took the Supremacy Clause and *rejected* the language "shall be the supreme Law of the Land," keeping only the language of applicability,

"bound by." Thus: far from evidencing supremacy, this language actually proves the opposite. Supremacy was intentionally rejected by TEC's founders.

Nineteenth Century Developments. In its court submissions, TEC relies heavily on certain nineteenth century "commentators" who are said to have "viewed the General Convention as the supreme authority" in TEC:

> a survey of Nineteenth-Century commentators on the ecclesiastical law of the Church reveals an unequivocal and unanimous view of the hierarchical nature of the Church and the lack of independence of its dioceses.[76]

The problem with this statement is that the nineteenth century commentators were neither unanimous nor unequivocal. The earliest work cited is that of Hawks in 1841, who did, indeed, opine that the dioceses "surrendered," *inter alia*, "such an exercise of independency as would permit them to withdraw from the union at their own pleasure, and without the assent of the other dioceses." This opinion was expressed, however, only after he had concluded:

- "we have no tribunal that can authoritatively declare to the whole Church what the meaning of the constitution is";
- "Its interpretation, therefore, should be liberal, and rather according to its general spirit, than to its strict letter, when the rigor of literal

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[76] "Mullin Affidavit" at par. 145.

interpretation would tend to defeat the great end of *union*, contemplated by its framers";

- "It is difficult to lay down a general principle on this delicate subject, of the respective rights of the Church at large, and the churches in the several dioceses."[77]

Given Hawks' interpretive method of ignoring the "rigor of literal interpretation" and the "strict letter" when necessary to preserve the *union*, it is hardly surprising that he drew the "difficult" line on what diocesan rights were "very clearly" "retained" and what were "it seems to us" "surrendered" so that one of the few things (five altogether) surrendered was the right to withdraw. Whatever opinions Hawks may have had on the legal issue under discussion—and this was long before the twentieth century developments in association law—the one thing that is absolutely clear from Hawks' consideration is that *there is no judicatory in TEC that can decide this issue and to which the courts can defer.*

The very year, 1841, that Hawks published his treatise Thomas Vail (later bishop) published an analysis that reached a very different conclusion. When Bishop Vail published the second edition of his book, he noted that his manuscript had been reviewed and concurred in by two other bishops (or future bishops) of TEC.[78] These bishops reached a conclusion opposite to that of Hawks:

> Furthermore, each Diocese is absolutely independent, except in certain particulars,

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[77] Hawks, *Constitution*, 9-11.

[78] Vail, *Comprehensive Church*, 2nd ed., 17.

> wherein, by its own voluntary union with the others, it transfers its own authority to the General Convention. The connection or union of each Diocese with the others, through the General Convention, is perfectly voluntary; and any diocese has a right to withdraw from that connection for absolute urgent cause morally justifying the annulling of its pledge.[79]

Even before going further, when three nineteenth-century bishops reach conclusions opposite to Hawks' on diocesan withdrawal, one can only regard with suspicion the claim of some "unequivocal and unanimous view of the hierarchical nature of The Episcopal Church and the corresponding lack of independence of its dioceses."

This pattern of nineteenth century debate producing opposite conclusions can be seen elsewhere. Another commentator on whom TEC places great reliance in its court submissions is Murray Hoffman, who concluded that General Convention was a body of "superior ultimate jurisdiction" in TEC. But Hoffman's reasoning is of more relevance to contemporary jurisprudence than his conclusion. He acknowledges that the authority he would give to General Convention under his "theory" is not found in the Constitution:

> Looking to the source of the power of the delegates, by whom the constitution and canons were formed, we might be led to the supposition that the analogies of the Constitution of the United States would prevail; and that the question upon any law of the

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[79] Vail, *Comprehensive Church*, 2nd ed., 95.

> convention would be, whether the power to make it had been expressly granted, or by a necessary implication was vested in it under some clause of the constitution.
>
> But this rule of construction will be found inapplicable. *It is impossible to find in that instrument, either in express language, or by any warrantable inference, any provisions on which to rest the validity of the greater part of the canons....*
>
> We have here a very limited foundation for the legislation of the convention over the whole Church. *In truth upon the doctrine of deriving authority from the constitution, there would be no power in it, except to regulate its own organization, to govern all changes in the Prayer Book, and to direct the trial of Bishops.*
>
> And from the view we have now taken, two classes of powers exist in this body—*those conferred by the constitution and those possessed without being so conferred.* I have before stated what fall under the first head.
>
> And as to the other powers, they vest in the General Convention by reason of its inherent sovereignty, and from their very nature cannot receive a strict definition or circumscription. (Emphasis added.)[80]

Hoffman is explicit about how this "inherent sovereignty" not found in the Constitution is derived:

> The mere act of establishing this Council involved and attached to it every power

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[80] Hoffman, *Treatise*, 115-16.

> inherent in such a body, and not expressly refused to it. Such powers are to be ascertained from the laws and practice of the apostles, the voice of ancient witnesses, the uninterrupted descent from age to age, from council to council, of known, and exercised, and unquestioned sway.... ow, what could possibly achieve the object of maintaining uniformity in discipline and worship, but this principle of ultimate authority in some constitutional body? What else could fulfil the primitive law of unity and perfection in a national Church — what else could have met the difficulties and exigencies of those days? Nothing saved us then, nothing but this can save us now, from being the dissevered members of separate congregations, and not the compact body of a national Church....
>
> Thus we have a theory of the power of the General Convention, adequate, consistent, and practical. There is neither safety, union, nor progress in any other; but there is every element of discord, and every omen of decay.[81]

To summarize Hoffman's "theory" (which he acknowledges is a matter previously "untouched"): the supremacy of General Convention, which is necessary to "save" the church, is *not* "conferred by the constitution" but inherent and ascertained from the practices of the apostles and the ancient councils of the church.

Hoffman, therefore, cannot be used to support an argument for judicial deference. It is not the constitutionally permitted role of the courts to choose between competing ecclesiastical theories based on

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[81] Hoffman, *Treatise*, 111, 114.

unwanted consequences. Courts cannot "ascertain" authority not found in governing instruments by looking to the practice of the apostles and the voice of ancient witnesses in uninterrupted descent from age to age. Courts know that there are churches with congregational and other polities and are unlikely to be persuaded by the argument "what national or provincial Church has ever been known without such a predominant body?" Courts will rightly see that, whatever ecclesiological merit it may have, the argument "nothing but this can save us now, from being the dissevered members of separate congregations, and not the compact body of a national Church" is not a legal argument at all, but essentially an admission that TEC's Constitution does not in fact specify such a "predominant body." The role of the courts is to ascertain the powers that *are* "conferred by the Constitution," not those that are not but should have been. And on this point, Hoffman's conclusions are fatal to the notion that General Convention is TEC's highest judicatory: "In truth upon the doctrine of deriving authority from the constitution, there would be no power in it, except to regulate its own organization, to govern all changes in the Prayer Book, and to direct the trial of Bishops."

Hoffman in effect advances theological arguments to remedy perceived defects in TEC's polity as expressed in its governing legal instrument. Most Episcopalians will be sympathetic to his ecclesiological goals of conforming to apostolic practice and the ancient witnesses. But interpretations of apostolic practice vary, as a comparison of the polities of the Roman Catholic and Orthodox Churches shows, and modern synodical governance that mirrors or complements national

parliaments is not the obvious inference of apostolic practice. The fact that there are papal, conciliar and synodical polities all claiming apostolic warrant illustrates why the courts are not competent to evaluate the theological arguments made by Hoffman. But Hoffman's theological concerns, especially what apostolic practice means for an episcopal church, are worth further consideration.

And Hoffman's views must be contrasted with those of his better-known contemporary, Bishop William Stevens Perry:

> By this simple provision [the Constitution's accession article] our fathers proposed to secure the perpetuation of Diocesan independence. As they had come into the union, surrendering only those rights and powers to the central or national organization specifically stated in the Constitution or bond of union, so were other State or Diocesan Churches to come in for all time.[82]

This nineteenth century debate does not end, however, with dueling commentaries. It was addressed decisively by General Convention itself in the constitutional revision at the end of the century. In his extensive study of this revision Allan Haley notes that in the 1890s a Joint Commission on the Revision of the Constitution and Canons proposed revisions to the Constitution to (i) add a supremacy clause making General Convention (which was to be renamed "General Synod") the "supreme legislative authority in this church"; (ii) give General Convention "exclusive power to legislate" in

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[82] Perry, *Constitution*, 262.

certain broad areas of church life, including ordinations and the creation of dioceses; and (iii) require that no diocesan legislation "contravene this Constitution or any Canon of the General Synod enacted in conformity therewith." Haley notes that this proposal was reported to the General Convention in 1895 and then overwhelmingly *rejected* in 1898. These provisions were never added to the Constitution.[83]

These are the very concepts, never found in TEC's Constitution and rejected overwhelmingly when proposed for addition in the late nineteenth century, on which any argument for judicial deference depends.

No Judicatory Higher than the Diocese. What is the result when one undertakes the careful examination of TEC polity required by the Supreme Court in light of the *Serbian* criteria? All of the following is clear:

- TEC's Constitution has no language making General Convention or any other central body or office the "supreme" or "highest" authority, making its decisions "final" or making dioceses "subordinate" to any other office or body.
- A central hierarchy was intentionally omitted when TEC's Constitution was drafted and was

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[83] Allan S. Haley, "Constitutional Changes," (Anglican Curmudgeon, November 2010) http://accurmudgeon.blogspot.com/2010/11/constitutional-changes-more-on-church.html http://accurmudgeon.blogspot.com/2010/11/constitutional-changes-opposing.html (accessed Dec. 8, 2010); *Journal of 1895 General Convention* (1896) App. XVI; *Journal of the 1898 General Convention,* (1899) App. XIV.

explicitly rejected a century later when the Constitution was revised.

- The Declarations that TEC requires of episcopal ordinands contain no "hierarchical oaths" by which allegiance is sworn to the hierarchical body or even any reference to a central body, but only a pledge of conformity to the doctrine, discipline and worship of The Episcopal Church.
- Dioceses are not created, extinguished or combined by General Convention as administrative districts of a hierarchically-controlled general church. The creation of a diocese "originates" in the diocese, which after being duly constituted as a legal entity is "admitted" to union with General Convention.
- The general bodies of The Episcopal Church have no right of prior review or authority to approve the actions of diocesan conventions, including in particular changes to the dioceses' governing instruments.
- TEC is organized legally as an association of dioceses that retain the rights enjoyed by all members of associations under settled law to withdraw from membership.

These facts all point to one conclusion. There is no judicatory higher than the diocese to which the courts can defer on the question of diocesan withdrawal.

Conclusion

This review of "justiciable facts" before courts considering the right of dioceses to withdraw from the General Convention of The Episcopal Church has shown

that TEC is an association of dioceses and that under association law dioceses do, in fact, have the right to withdraw. It has also addressed two possible and contradictory objections to this conclusion: the argument that TEC has a unitary form of government (in which the only rights possessed by dioceses are those extended to them by the General Convention) and the argument that dioceses held but surrendered the right of withdrawal by acceding to the Constitution of TEC. Finally, this review has considered the argument that a neutral principles analysis is unwarranted because the court must defer to TEC's highest judicatory. None of these objections is convincing.

2001 WL 36133139 (D.Md.) (Trial Motion, Memorandum and Affidavit)
United States District Court, D. Maryland,
Southern Division.

Jane Holmes DIXON, Plaintiff,
v.
Samuel L. EDWARDS, et al., Defendants.

No. PJM 01 CV 1838.
July 5, 2001.

Declaration of Louis Weil

I, LOUIS WELL, declare, under penalty of perjury, the following:

1. I am currently the James F. Hodges Professor of Liturgics at the Church Divinity School of the Pacific, in Berkeley, California. I submit this Declaration in support of Plaintiff's Motion for Preliminary Injunction and Expedition.

2. Based on my knowledge, experience, and scholarship as an Episcopal priest and professor of liturgics, I am qualified to explain the hierarchical structure of the Episcopal Church, and the diocesan bishop's position at the apex of that hierarchy as the apostle, chief priest, pastor and ecclesiastical authority of the diocese.

Mv Background Qualifications

3. My background qualifications may be briefly described as follows.

4. I am a graduate of Southern Methodist University, Dallas (B. Mus., 1956), Harvard University, Cambridge (A.M., 1958), The General Theological Seminary, New York (S.T.B., 1961), and Catholic Institute, Paris, France (Peritus Sacrae Liturgiae, 1966; Magister Sacrae Liturgiae, 1972; S.T.D., 1972). I was ordained in the Episcopal Church to the diaconate in 1961, and the priesthood in 1962.

5. I was priest-in-charge of several small missions in Lares, Puerto Rico from 1961 to 1964. I was an instructor at the Episcopal Seminary of the Caribbean from 1961 to 1964 and from 1966 to 1971. I was an Assistant at St. George's Church, Paris, France during the years 1964 to 1966 and 1969 to 1970. I was Canon of the Cathedral of St. John the Baptist in San Juan, Puerto Rico from 1966 to 1968. I was an Associate Professor from 1971 to 1974 and Professor from 1974 to 1988 of Liturgics and Church Music at Nashotah House, an Episcopal Church Seminary in Wisconsin. I have held my current position as Professor of Liturgies at the Church Divinity School of the Pacific since 1988.

6. I have written a number of articles and books on church liturgics, including Liturgy for Living, which I co-authored with Charles Price and which was prepared at the request of the Executive Council of the General Convention of the Episcopal Church as one of seven volumes in the Church's Teaching Series. My publications are set forth in my curriculum vitae, which I have attached hereto. Since the mid 1970's, at the time the Episcopal Church began to ordain women, I have been involved in an extended study of Holy Orders in Christianity in general and the Anglican Tradition in particular.

Types of Religious Polities

7. A number of different polities have been adopted by various religions throughout history. The most common forms of church polity are papal, episcopal, presbyteral, and congregational. These designations identify the source of administrative and spiritual authority within a given church. Papal and episcopal polities are hierarchical.

8. Papal authority is most commonly associated with the Roman Catholic Church. Under a papal system, administrative and spiritual authority is unified under one individual (*i.e.,* the Pope), who is the ultimate adjudicator. Generally, episcopal polity is similar to papal polity in that authority descends from above; however, in many hierarchical churches ultimate authority is not unified in a single person. Presbyteral polity is a form of church governance in which authority is vested with a group of presbyters (priests) and elders within a jurisdictional region. In congregational churches, power is held by a majority of the parishioners of a local congregation.

The Polity of the Episcopal Church

9. The polity of the Episcopal Church is hierarchical. In fact, the name of the Episcopal Church itself denotes the authoritative framework of the Church, and direction in which authority flows. The concept of episcope," from which episcopal is derived, means oversight. Oversight, within the polity of the Episcopal Church, is the responsibility of a bishop within his or her diocese.

10. The diocese is the jurisdictional unit of the Episcopal Church. A diocese consists of a union of local parishes within a set geographical area organized under the ecclesiastical authority of a bishop and bound together by the doctrine, discipline and worship of the Episcopal Church. There is only one diocesan bishop and ecclesiastical authority within a diocese, although he or she may have assisting bishops. This is in keeping with the words of Jesus Christ: "So there will be one flock, one shepherd." John 10:16. As St. Cyprian explained, "A number of shepherds or of flocks in one place is unthinkable." (*On Unity* 8)

The Hierarchical Role of the Bishop

11. The hierarchical structure of the Church, and the authoritative role of the bishop within it, is also evident in the organization of the Ministry of the Episcopal Church into separate categories: Bishops, Priests, Deacons, and Laity. The Book of Common Prayer ("BCP"), which contains the Liturgy of the Episcopal Church, clearly outlines the respective roles of bishops and priests, and relationship of one to the other. The Catechism, or Outline of Faith, states that:

> The ministry of a bishop is to represent Christ and his Church, particularly as *apostle, chief priest, and pastor of a diocese; to guard the faith, unity and discipline of the whole Church; to* proclaim the Word of God; to act in Christ's name for the reconciliation of the world and the building up of the Church; and to ordain others to continue Christ's ministry.

(BCP 855) (emphasis added). Whereas the ministry of a priest is:

> to represent Christ and his Church, particularly as pastor to the people; *to share with the bishop in the overseeing of the Church;* to proclaim the Gospel; to administer the sacraments; and to bless and declare pardon in the name of God.

(BCP 856) (emphasis added).

12. A Priest is required to share his or her ministry with the bishop, because a priest's ministry is derivative of the bishop. The subservient role of a priest to a bishop is one of the foundational principles upon which the Episcopal Church is based. A priest would not have a necessary ministry but for the fact that the-bishop cannot be in more than one place at the same time. In fact, individual churches in the Episcopal Church usually have a chair in the sanctuary designated for the bishop. The bishop's chair remains vacant, awaiting the arrival of the bishop.

13. The hierarchical roles of bishop and priest becomes apparent in the ordination rites for the priest. The ordinand must vow "in accordance with the canons of this Church, [to] obey [his] bishop and other ministers who may have authority over [him] and [his] work." (BCP 526). The ordinand must also vow to "respect and be guided by the pastoral direction and leadership of [his] bishop." (BCP 532).

14. It is the bishop who ministers to the needs of a congregation in his diocese. The rector shares the bishop's ministry only with the blessing of the bishop. Thus, at the church service celebrating a priest's induction as rector, the bishop reads his Letter of Institution to the rector elect, which says:

> [Y]ou have been called to work together with your Bishop and fellow-Presbyters as a pastor, priest, and teacher, and to take your share in the councils of the Church.... This letter is a sign that you are fully empowered and authorized to exercise this ministry, accepting its privileges and responsibilities as a priest of this Diocese, in communion with your Bishop.

(BCP 557). At the service of induction, the bishop says to the rector elect:
• "[T]ake this water, and help me baptize in obedience to our Lord."

• [R]eceive this stole, and be among us as a pastor and priest."

• "[O]bey these Canons, and be among us to share in the councils of this diocese."

• "[T]ake this bread and wine, and be among us to break the Bread and bless the Cup."

• "[L]et all these be signs of the ministry which is mine and yours in this place."

(BCP 561-62).

15. I now turn my attention to the theological underpinnings of the hierarchical nature of a Bishop's ministry, from which the priests derive their ministry and parishes receive their sacramental life.

The Bishop as Apostolic Witness

16. The Catechism makes clear that a bishop is "apostle, chief priest, and pastor of a diocese." (BCP 855).

17. Episcopalians believe in one holy catholic and apostolic Church. This belief is embodied in the Nicene Creed, which dates in its origin from the fourth century A.D at the Council of Nicea organized by the Emperor Constantine. The Nicene Creed is said by Episcopalians on Sundays during celebrations of the Holy Eucharist.

18. The Church is "apostolic" in the sense that it bears witness to the Word of God revealed by Jesus Christ. "Apostle" is the English transliteration of a Greek word meaning "one who is sent out." An apostle is a personal messenger commissioned to transmit a message or carry out instructions. In the early church, the Apostles were those who received a commission directly from Jesus. Matthew 28:18-20. These Apostles were eyewitness to the commission from the one true priest, Jesus Christ. It was they who built the Church in accordance with Jesus's commission by making disciples of the nations and teaching obedience to Jesus's commandments. The Church speaks of the commission by Jesus and its execution as "apostolic witness." It is this "apostolic witness" to which the Church strives to succeed.

19. The Church's apostolic witness is embodied in the bishop. He or she is the outward visible sign of the ministry that Jesus commissioned in this world. Jesus was the original and one true Bishop, the Shepherd and "Guardian" of the souls of the faithful. 1 Peter 2:25. Thus, we find this biblical text translated as "Bishop" in the King James version of the Bible: "For ye were as

sheep going astray; but are now returned unto the Shepherd and Bishop of your souls." Some modem translations use the term "Guardian," which has a parallel to the bishop's role as guardian of the Church.

20. The rubrics in the Book of Common Prayer that preface the ordination rites of a bishop observe that "the order of bishops ... carry on the apostolic work of leading, supervising, and uniting the Church." (BCP 510). During the ordination of a bishop, he or she is "called to be one with the apostles" and "to guard the faith, unity and discipline of the.Church." (BCP 517). At a bishop's consecration, bishops of the church lay hands on the bishop elect and pray to God to "[p]our out upon him the power of your princely Spirit, whom you bestowed upon your beloved Son Jesus Christ, with whom he endowed the apostles, and by whom your Church is built up in every place ... " (BCP 521).

21. Thus the Church has established a hierarchy of apostolic succession. The bishop shares a "heritage" with the "patriarchs, prophets, apostles, and martyrs, and those of every generation who have looked to God in hope." (BCP 517). The bishop thus not only guards the unity of the present day Church, but he or she also unifies it with its past generations and its foundation in Jesus Christ. The bishop gathers the Church of this time and this place and binds it to the church as originally commissioned by Jesus and built by the Apostles. The bishops have inherited the apostolic message as publicly transmitted in the Church's teaching ministry and the apostolic responsibility and authority as "stewards of God's mysteries." 1 Corinthians 4.1.

22. This concept of "apostolic succession" can be traced historically to the very early church in the second century and therefore would likely have developed from the system of leadership and governance established by the original church founders. Under this system of governance in the second century, Christians in each place had a single chief pastor who was styled *episkopos.* The episcopal ministry was perpetuated in order to safeguard the unity of the communion from one generation to the next. [1] Accordingly, the early church father St. Cyprian, Bishop of Carthage martyred in 258 A.D., wrote: "Hence by means of a chain of succession through time the ordination of bishops and the structure of the church has flowed on so that the church is built upon bishops and every act of the church is controlled by these same superiors." (Letters 33.1.1)

Footnotes

Bishop as Sacramental Provider

23. The Episcopal Church is a sacramental church. Sacraments are outward and visible signs of inward and spiritual grace, given by Christ as sure and certain means by which we receive that grace. The Sacraments sustain our present hope and anticipate its future fulfillment.

24. The Church has seven Sacraments. One, ordination, I have already mentioned. Only a bishop has the authority to ordain a person to the ministry and thereby share the ministry of a bishop. Of the remaining Sacraments, two are by far the most essential - Holy Baptism and the Holy Eucharist. Holy Baptism is the Sacrament by which God adopts us as his children and makes us members of Christ's Body, the Church, and inheritors of the kingdom of God. The Apostles originally established the Church through the Sacrament of Baptism. Acts 2: 41-42. Thus, the rubrics-of the Book of Common Prayer require that the bishop, when present, is the celebrant of the service of Holy Baptism. (BCP 298)

25. The Holy Eucharist is the Sacrament commanded by Christ for the continual remembrance of His life, death and resurrection, until His coming again. In most parishes, the Holy Eucharist is celebrated every Sunday. In some parishes, it is celebrated every day or at least on the feast days of saints. It is from the Eucharist that we strengthen our union with Christ and one another and encounter His real presence with us and in us.

26. When present, the bishop presides over the Holy Eucharist. The rubrics of the Book of Common Prayer make this clear: "It is the bishop's prerogative, when present, to be the principal celebrant at the Lord's Table, and to preach the Gospel." (BCP p. 322). When the Bishop is unable to be present, he or she delegates his or her sacramental responsibility to the parish clergy.

Hence, my dear friend the Rev. Charles P. Price, the late Professor Emeritus of Systematic Theology at Virginia Theological Seminary, wrote this concerning the bishop:

> [T]he Bishop is ordained to celebrate the sacraments. The Bishop is the liturgical President of the congregations of the diocese. As Bishops are expected to preach the Word on occasions of their official visits, they are also expected to baptize and celebrate Eucharist, that "blest sacrament of unity," so that their role as the source of sacramental life in the diocese can be made manifest. As the one who confers Holy Orders, the Bishop is also the source of the local ministries of Deacons and Priests. The sacramental ministry of our Bishops set forth in the American Book of Common Prayer is one powerful way in which they focus the unity of the Church. [2]

1 *See* Richard A. Norris, Jr., *Bishops, Succession, and the Apostolicity of The Church,* reprinted in J. Robert Wright, *On Being a Bishop,* p. 55 (1993).

27. This belief that the bishop is the sacramental provider of the diocese has its roots in the early church. St. Ignatius, Bishop of Antioch martyred in approximately 115 A.D., wrote:

> Avoid divisions, as the source of evils. Let all of you follow the bishop as Jesus Christ did the Father.... Let no one do any of the things that concern the church without the bishop. Let that Eucharist be considered valid which is held under the bishop, or under someone whom he appoints. Wherever the bishop appears, there let the people be, just as wherever Jesus Christ is, there is the catholic church. It is not lawful to baptize or to hold an *"agape"* without the bishop. Whatever he approves is also pleasing to God ... He who honors the bishop is honored by God. He who does anything without the bishop's knowledge is serving the devil.

(Smyrn. 8)

Bishop as Unifier

28. It is difficult to overstate the significance of the role of the bishop in the Episcopal Church. The bishop is the "anchor" person in the church's entire ministry.

29. St. Cyprian portrays the bishop as the bond of unity between each local church. St. Cyprian emphasized that bishops have inherited both the apostolic message and also the apostolic responsibility and authority. Cyprian wrote, "The Church is the people united to the bishop, the flock clinging to its shepherd. From this you should know that the bishop is in the Church, and the Church in the bishop." (Letter 66.8.3). According to St. Cyprian, to be "in communion" with one's bishop is to be "in communion with the Catholic Church." (Letter 55.1.2) It is appropriate to say that the bishop defines the diocese over which he or she is the ordinary.

Bishop as Ecclesiastical Authority

30. Taken together, the role of the bishop as apostle, chief priest and pastor of a diocese, and the ordination vows taken by every priest signify the hierarchical nature of the Episcopal Church. Within this framework, it is the bishop who is the ultimate authority on issues of ministry within his or her diocese. Bishops have this authority because all clergy within a diocese, priests and deacons alike, derive their ministerial authority from the bishop.

31. A bishop has the responsibility to ensure that the spiritual needs of his or her flock are being met. It is because of this responsibility that the diocesan bishop is tasked with determining whether a priest that a congregation proposes as its rector is duly qualified before he or she may act as an extension of the bishop's ministry,

32. In summary, the bishop is the cornerstone of the diocese. The history and liturgy of the Episcopal Church support the notion that the bishop is the ultimate authority over ecclesiastical matters within his or her diocese.

I declare under penalty of perjury that the foregoing is true and correct. Executed this day of July, 2001 at Berkeley, California.

<<signature>>

Louis Weil

2 Charles P. Price, *Teachers and Evangelists for the Equipment of the Saints: Prayer Book Doctrine Concerning the Bishop as Teacher, Evangelizer and Focus of Unity,* printed in J. Robert Wright, *On Being a Bishop,* p. 123 (1993).

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