FATAL FLAWS:
A RESPONSE TO DR. JOAN GUNDERSEN

By Mark McCall

I would like to thank Dr. Gundersen, a church historian, for reviewing my recent paper, "Is The Episcopal Church Hierarchical?".[1] Reading her response, one could perhaps be forgiven when informed that my paper contains a "fatal flaw" for thinking that she had discovered that TEC's constitution did in fact contain explicit technical legal language identifying General Convention as the supreme or highest authority. But she makes no such claim. Nor did she discover that the Church of England, contrary to the claims in my original paper, lacked a "Supremacy Act" and an "Oath of Supremacy" at the time TEC was being formed. Or that the governing legal instruments of other churches widely-regarded as hierarchical are actually devoid of the legally-precise hierarchical language identified in the original paper. Because those points are at the heart of the argument developed in that paper, one senses right away that the "fatal flaw" is unrelated to the main lines of the paper. What is not so quickly apparent, however, is that Dr. Gundersen's critique itself contains a "fatal flaw": she overlooks my discussion of the very topic she says is not there. It is Dr. Gundersen who engages in an anachronistic and legally uninformed reading of the text, and it is she who clearly misunderstands legal terminology, preferring to use colloquial definitions and references to an ordinary dictionary for the legal terminology analyzed in the original paper.

What follows is necessarily technical, but to avoid the anachronistic reading Dr. Gundersen gives the language in question some technical understanding is required.

The "Fatal Flaw"

The supposed "fatal flaw" is that the original paper "overlooked" language in the first constitution making General Convention canons "binding" on the state churches. But that provision was not overlooked. Indeed, both the technical legal meaning of "binding" and the specific language she cites were analyzed in the original paper. It was she who "overlooked" my discussion of this issue. What follows is the same discussion in more detail. As was done in the original paper, this response will start with an explanation of the legal meaning of "binding" as used in the 1780's and then look at the specific language from the first TEC constitution Dr. Gundersen references.

As is discussed in depth in an acclaimed law review article, "binding" is used, and was particularly used in the 1780's, to distinguish legislative acts that are "laws" from those that are mere "recommendations."[2] In legal terminology, this term specifies whether a legislative body's acts are "self-executing" or merely consultative. Caleb Nelson, in his influential analysis of the Supremacy Clause, explains it as follows in the context of the Supremacy Clause's language that federal law is the "Law of the Land" and that "the Judges in every State shall be bound thereby." He begins, ironically

enough, with a warning against just the sort of anachronistic reading Dr. Gundersen gives to the identical language in the allegedly "overlooked" passage from the TEC constitution:[3]

> The first aspect of the Supremacy Clause may strike modern readers as highfalutin rhetoric. But it serves a straightforward function: It sets out what might be called a "rule of applicability," making clear that federal law applies even in state courts…. For reasons that some modern commentators may not fully appreciate, this was an important point. Under prevailing conceptions of the law of nations, the laws of one country did not apply in another country's courts of their own force, but only as a matter of comity.[4]

He continues:

> The Articles of Confederation had gone only part of the way toward solving this problem. Article XIII had specified that "[e]very State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them." But this language 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.[5]

Nelson then discusses the treaty nullification controversy that occupied John Jay and James Duane in 1784 through 1786 and concludes:

> 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.)[6]

As my original paper explained, this same terminology ("Law of the Land" and "binding") was used by John Jay in 1786 in his work on the treaty nullification controversy and was incorporated into the Supremacy Clause the following year.[7] It was right in the middle of this work on the nullification controversy in 1786 that Jay was a deputy to the general convention. To summarize, "Law of the Land" and "binding" signal a rule of applicability. What is described by these terms is a self-executing law.

But such a law has no hierarchical priority; it is simply on a par with all other laws. What signals hierarchy is not "binding," but "supreme." With "supremacy" one encounters a rule of priority, not merely a rule of applicability.

This response has addressed this issue in some detail because "binding" in this context is a technical term whose legal precision can be overlooked by the kind of anachronistic reading of which Dr. Gundersen rightly complains.

With this unavoidable technical background, we can easily understand the significance of the language in the first TEC constitution that Dr. Gundersen mistakenly states was overlooked. In fact it was addressed in note 44, and was put in an endnote only because *the language was later deleted from TEC's constitution and is no longer present in any form.* Note 44 reads as follows:

> The first constitution contained a provision making General Convention actions binding on dioceses that were not present. In the jurisprudence of the time, explained above in connection with the treaty nullification controversy, this established General Convention as a legislative, not a consultative, body. In legal terminology, this is a rule of applicability, not a rule of priority. It subjects General Convention legislation to the usual rule of priority, the last in time rule, absent specification of another rule of priority using the language of hierarchy. It is significant that the highly competent lawyers drafting TEC's first constitution expressly included a rule of applicability, but omitted a rule of priority. In any event, this provision was later deleted from TEC's constitution. (Internal citation omitted.)

Thus, in the jurisprudence of the time, this language made General Convention canons directly applicable ("binding") in the dioceses, without having to be adopted by a state convention. But absent a rule of priority, they were not supreme. They could be nullified by the diocesan conventions under the traditional last in time rule. And the lawyers drafting TEC's first constitution understood this, as demonstrated by Jay's and Duane's use of this technical vocabulary documented in detail in the original paper. Far from being a "flaw," fatal or otherwise, this language actually buttresses my argument, but it was not pressed in the original paper because the language was subsequently deleted from TEC's constitution.

Subordination and Subsidiarity

Dr. Gundersen also repeatedly confuses the legal terms "subordination" and "subsidiarity."[8] In her defense, it should be acknowledged that subsidiarity is a term more prevalent in European jurisprudence than in that of the United States, although the principle it expresses is widely held on both sides of the Atlantic. In fact, "subordination" and "subsidiarity" are almost opposite in their legal meanings. "Subordination" is the proper legal term used to describe the relationship of being lower in "the pecking order," as Dr. Gundersen puts it in note 3 when purporting to define subsidiarity. "Subsidiarity" on the other hand is defined in a recent comprehensive law review article as follows: "Subsidiarity expresses a preference for governance at the most

local level consistent with achieving government's stated purposes."[9] It is the principle behind the Tenth Amendment to the United States Constitution, and as noted in the original paper, is fundamental to European law and Roman Catholic social teaching.[10] And it is described by the Windsor Report as a "key strand" of Anglican governance.[11] Subsidiarity may be a principle applicable to hierarchical structures, in which case it is usually the subordinate body in favor of which the presumption for local governance operates. But it is also applicable to non-hierarchical organizations as well as is shown by its importance in the Anglican Communion. The distinction drawn by subsidiarity, however, is between local and central, not between subordinate and supreme. The Windsor Report defines the principle as follows: "the principle that matters should be decided as close to the local level as possible."[12]

Of particular relevance to the formation of TEC is the fact that subsidiarity was also expressed as a "fundamental principle" by the nascent Pennsylvania church in 1784, and through it for TEC as a whole.[13] This fundamental principle was later incorporated by reference into the Pennsylvania church's first act of association.[14] Dr. Gundersen quotes it on page 3 of her response, but seems not to grasp its legal significance: "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." Note the term "delegated." Powers are delegated by the local body to the central body, not *vice-versa.* This is an explicit statement that the reservoir of authority was to be in the local bodies, not the central one. Thus, such powers must be explicitly, not implicitly, delegated by the local body to the general body. In other words, this principle creates the presumption that silence indicates that the local body retains the power. To limit the authority of a local body, whether a parish or a diocese, an explicit prohibition must be stated.

But leaving aside the confusion over the proper legal terminology, Dr. Gundersen purports to find subordination in a variety of general canons pertaining to diocesan functions and in vows made in ordinations and consecrations. Once again, Dr. Gundersen's lack of legal understanding is apparent. As a matter of law, it is a truism that anyone joining or belonging to any association, not just religious societies, must accept the rules of the organization so long as that person or body is a member. This is simply an application of the fundamental rule of contract law, the source of the law of voluntary associations, that there must be an unqualified acceptance of an offer to form a contract. A member joining an association must "accept" the association's "offer" to join. This principle was clearly articulated by the Supreme Court as long ago as 1872 in *Watson v. Jones,* 80 U.S. 679, 728-29: "All who unite themselves to [voluntary religious associations] do so with an implied consent to this government, and are bound to submit to it." But this by itself does not make a religious association hierarchical or membership in it irrevocable. If it did, there would be no Baptists or Congregationalists. One of the main points of the original paper was to distinguish hierarchies as defined by the law from mere rules for association membership, which are shared by all associations, religious and otherwise. Simply establishing that a church has applicable rules does not establish a hierarchy. The local community church has rules for membership specifying

what is required of the members as long as they are members. Hierarchy, on the other hand, must be established using the proper legal language recognized by the civil law.

Historical Excursus

Much of Dr. Gundersen's response is devoted to two historical excursus whose purposes are not entirely clear. The first, on the reference to the Anglican Communion, manifests her discomfort with any reference to that communion in TEC's constitution, but misses the point of that reference in the section of the original paper on sacramental communion. That point was a very limited one: the only definition of sacramental communion in TEC's constitution was the one in the preamble.

There is another excursus on the organization of the Pennsylvania diocese that appears to be an argument that this diocese was organized pursuant to the general convention and not prior to it. That is simply an unsustainable argument. For example, the supplement to the Pennsylvania church's act of association, adopted in May 1786 and giving the state convention the power to amend its Prayer Book, states that this power "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…."[15] This makes quite clear that as of May 1786, the Pennsylvania church, already organized, thought TEC was still to be formed. And the Pennsylvania constitution, adopted in 1814, refers to the act of association in 1785 as the formation of the state church and then recites "*after 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.)[16] Finally, White & Dykman, TEC's official commentary on its constitution and canons states flatly: "Before their adherence to the Constitution united the Churches in the several states into a national body, each was completely independent." It then describes the national body they created as a "federation of equal and independent Churches in the several states."[17]

Missionary Dioceses

In her "Conclusions," Dr. Gundersen raises for the first time the matter of missionary dioceses, claiming "New dioceses thus were not outside the church when they applied for union." Here we see once again, as we have throughout her response, the difference between an historical account and a legal analysis of the situation. There undoubtedly are continuities between the missionary areas and the prospective new dioceses. But as a matter of legal formalities, a new entity is created when a diocese applies for union with the General Convention. This is made necessary by the requirements of Article V of the TEC constitution. The proceedings must "originate" in the new diocese, which must "duly adopt" its own constitution. This is prior to union with General Convention. When it "duly adopts" its own constitution, it acquires its own legal personality. But it still, by definition, is not yet part of General Convention. It then applies to General Convention for "admission," and when General Convention consents, the end of this process ("thereupon") is union with General Convention. The historian may regard this process as

seamless, and see only the continuities with the prior missionary diocese. But as a matter of law, a different analysis is required. A new entity is created which then becomes a member of General Convention. To maintain otherwise is to maintain the logical contradiction that prior to union with General Convention, the new diocese was a part of General Convention.

Miscellany

Dr. Gundersen is quick to find "historical errors" in the original paper. More often than not, as we have already seen, the errors are hers. Some additional points:

- She concludes after consulting the OED that the paper's use of "accession" is modern, and therefore anachronistic. In fact, "acceding" was the term used, precisely in the manner identified in the original paper, in the Articles of Confederation, which were signed in 1778 by James Duane on behalf of New York.[18]
- She states that the term "the Church" or "this Church" consistently refers to the "whole Episcopal Church." Yet the very language she claims the original paper overlooked states "the Church in such state shall nevertheless be bound by the acts of such Convention." And the same constitution made provision for the admission of new state churches by language beginning "A Protestant Episcopal Church in any of the United States not now represented…."[19] And of course, Article I.4 reads to this day "the Church in each diocese…shall be entitled to representation" in General Convention.
- She claims the original paper mistakenly identified William Smith instead of David Griffith as a candidate for bishop when he served with Duane on the committee seeking English consecrations because Smith was no longer a candidate in 1786. But the committee was formed in 1785, when Smith was still very much a candidate and a year before Griffith was chosen by the state church in Virginia in 1786.[20]

Supremacy

Finally, we end where we began, with supremacy. Dr. Gundersen makes the curious argument that those, including Jay and Duane, drafting TEC's constitution in 1785 and 1786 would not have been familiar with the legal concept of supremacy because the Supremacy Clause of the new United States Constitution was not drafted until 1787. It was, she says, "new territory." Leaving aside the fact that TEC's first constitution was not ratified until after further amendments in 1789, when the new United States Constitution was already in effect, she inexplicably neglects the paramount importance of the concept of supremacy in the legal framework that was foremost in the minds of those at the early conventions: the English Supremacy Act and the Oath of Supremacy. Indeed, one of the primary objectives of the conventions in 1785 and 1786 was to get an exemption from the Supremacy Act for prospective American bishops. The efforts were successful in that the British Parliament passed an act in 1786 exempting American bishops from the supremacy oath. The letter from the Archbishop of Canterbury advising

the 1786 convention of this act was read aloud at the convention. The act provided as follows: "it shall and may be lawful for the Archbishop of Canterbury, or the Archbishop of York for the time being [to consecrate American bishops] without requiring them to take the oaths of allegiance and supremacy, and the oath of due obedience to the Archbishop for the time being." [21]

Thus, far from being unknown, the legal concepts of supremacy and subordination to a supreme hierarchy were in fact the crucial issue at the time. The drafters of the first constitution in 1785 and 1786 knew very well what supremacy was and intentionally replaced submission to a supreme hierarchy, not with submission to a different supreme hierarchy, but with a recital of doctrinal conformity. It could hardly be more conclusive.

This is not just a matter of historical interest. In its seminal case on religious hierarchies, the United States Supreme Court emphasized that Serbian Orthodox bishops swore an oath of "perpetual obedience" to the *hierarchical body,* the Holy Assembly of Bishops, which was identified in the church's constitution as "the highest hierarchical body."[22] As this case and the governing legal instruments of other churches reveal at a glance, these issues are not matters of nuance. They are easily spotted by anyone understanding the legal concepts. They are difficult to spot in TEC's constitution only because they are not there.

Conclusion

This response has been unavoidably technical, like the often tedious first section of the original paper it partially replicates. But that technical material at the outset of a lengthy paper was included to prevent just the sort of mistake Dr. Gundersen makes in her response. To undertake a legal analysis of TEC's constitution requires an understanding of a technical legal vocabulary, both that used now by the courts and that used by the lawyers well-versed in that vocabulary who drafted TEC's first constitution. Dr. Gundersen did us all a service in warning against anachronistic readings of that constitution. But avoiding that pitfall means mastering the technical legal vocabulary of the time. As the original paper demonstrated, that vocabulary was in fact developed in large part by the draftsmen of TEC's first constitution. Their use of that language when they used it was precise, and their failure to use it where it is missing was intentional. The lack of hierarchical language in TEC's constitution is thus not a flaw; it is rather by design.

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[1] Joan R. Gundersen, Ph.D., "A Response to Mark McCall's "Is The Episcopal Church Hierarchical?", Progressive Episcopalians of Pittsburgh, September 17, 2008.
[2] Nelson, pp. 245-50. References in this response, unless otherwise indicated, are to the bibliography in the original paper.
[3] The United States Constitution, which Nelson analyzes, took effect in 1789, the same year as TEC's constitution containing the language Dr. Gundersen relies upon. The context is the same in both: the legal effect of acts of the central legislature on the local bodies. The language is identical: "the Judges in every State shall be bound thereby"; "the Church in such state shall nevertheless be bound."
[4] Id., p. 246.
[5] Id., p. 247.

[6] Id., p. 250.
[7] Original paper, pp. 9-10.
[8] Gundersen, n. 3 ("'Subsidiarity' is a way of saying the same thing [as supremacy] by setting up a clear ranking subordinating some units of an organization or government to another"); p. 6 ("McCall wanted a statement of subsidiarity," citing my discussion of hierarchy, not subsidiarity; p. 7 ("McCall wanted a statement of subsidiarity").
[9] George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," 94 Colum. L.Rev. 331, 339 (1994).
[10] *Catechism of the Catholic Church,* par. 1883.
[11] Anglican Communion Office, "The Windsor Report 2004," par. 38.
[12] Id.
[13] *Pennsylvania Journals (1790)*, p. 6.
[14] Id., p. 12.
[15] Petition By Plaintiffs, Exh. 2, December 19, 2004, *Calvary Episcopal Church v. Duncan* (Common Pleas, Allegheny Cty Pa. GD-03-020941).
[16] Id.
[17] I White & Dykman, pp. 12, 29.
[18] See original paper, p. 20.
[19] *Journals of General Conventions,* pp. 83-84.
[20] Id., p. 25.
[21] Id., pp. 51-56.
[22] *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 716-18 (1976).