IS THE EPISCOPAL CHURCH HIERARCHICAL?

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September 2008

The question posed in the title of this paper may seem at first glance to be a variant of the perennial rhetorical tautology "Is the Pope Catholic?" As will be shown below, the answer to this second question is definitely "yes," but the answer to the first is much less obvious and ultimately will be "yes, but," at least at the national level. TEC is hierarchical, but the hierarchy is not what you think. It is often said that TEC's polity is unique, democratic and misunderstood. Whether it is democratic is debatable, but it is certainly unique and unquestionably misunderstood, not least by many in TEC itself.

The task of this analysis is to examine the governance and constitution of TEC from the perspective of civil law. What may appear to be a similar exercise has been undertaken by some who seek to determine whether TEC's polity is federal, confederal or unitary. For example, one source cited by proponents of a central hierarchy within TEC is an unpublished doctoral dissertation in political science submitted in 1959.[1] This dissertation considered different models of government by which political sovereigns are organized and sovereign power allocated. The question posed in that dissertation was: what kind of government would TEC be?[2] But TEC is not a sovereign government; for one thing, sovereigns are immune from the law they create unless they waive that immunity. Their subjects, on the other hand, including those who organize themselves into voluntary associations such as religious societies, are very much subject to the civil law. Asking what kind of "government" TEC has is a category mistake.[3] It is not a government of any kind.

That is not to say that this question is of no professional interest to political scientists, but only to recognize that it does not even address, much less answer, the question of TEC's status under the law. That is the purpose of this paper. A legal analysis does not depend on classifications derived from political theorists, but on the framework provided by the law, a framework derived from principles found in enactments by legislatures and case law developed by the courts. The legal categories relevant to this analysis are well-defined. They are those of hierarchy, supremacy, subordination, preemption and finality. These concepts are found in a variety of legal contexts, including of course governmental constitutions, but it is their legal significance, not their political classification, that is relevant. In the case of the issues addressed in this paper, the United States Supreme Court has specified the categories and analysis that are to be used in determining questions of church hierarchy. That is the method of analysis used below.

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This paper develops the following argument:

1. The legal categories of hierarchy are well known. They typically are defined in precise technical terms. These categories were inherited from English common law and were substantially developed by American jurisprudence shortly after independence.
2. TEC's constitution is largely silent on questions of hierarchy. The legal language of hierarchy is almost totally absent. Two fundamental bodies are identified in that constitution, a general convention that is established by the constitution itself and dioceses that existed prior to the constitution's adoption. In neither instance does the constitution define in general terms the powers and limitations of the bodies.
3. Explicit language of hierarchy and supremacy is readily apparent in the governing constitutions of other churches.
4. A careful review of the history of TEC's formation demonstrates that the lack of these hierarchical concepts was not inadvertent. Its first constitution was drafted and reviewed by sophisticated lawyers who were familiar with, and indeed had themselves developed, the American jurisprudence on hierarchy. The relevant constitutional language is virtually unchanged since the initial draft of the constitution. It was the explicit intention of TEC's founders to create a decentralized structure with primary authority reserved to the diocese. Some of the churches were still subject to state control at the time the first constitution was drafted, and, in any event, there were so many profound differences among the independent churches that combined to form TEC that they united on the explicit basis that state (now diocesan) authority to maintain these differences would be preserved.
5. Under the law, churches are treated as voluntary associations pursuant to well-defined principles of contract law. They are free to agree on whatever principles of governance they wish. The role of the courts under the First Amendment is first to determine what principles of governance have been agreed and then to defer to the body or bodies specified as the governing authority in the church's constitution. The Supreme Court has recognized that interpreting a church's constitution may require "careful examination" of the governing instruments, that in some cases the result may be ambiguous, and that this inquiry could itself be constitutionally impermissible, leaving the courts unable to resolve the dispute. The Court has identified the indicia of hierarchy and supremacy by which the courts determine what is the highest judicatory of a religious body. The General Convention of TEC does not posses those indicia of hierarchy. The cases to date concerning TEC have ruled in favor of the diocese or its bishop as the highest authority.
6. The implications of this analysis for issues facing TEC and the wider Anglican Communion are summarized in the conclusion.

Three preliminary points must be stated clearly at the outset. First, this paper does not address the structure of individual dioceses. It is the conclusion of this analysis that dioceses are constitutionally authorized to organize themselves as they see fit. This subject will not be addressed below except in the context of court decisions that have found specific dioceses to

be hierarchical.

Second, the appropriate legal question is not whether the diocese or the "national church" is the hierarchy, but whether within the structure of the national church there is one central hierarchy, the General Convention, or whether authority is dispersed among dioceses and the central body without a clear hierarchical relationship. To say the "national church" is the highest authority or that the constitution and canons are binding does not answer the question; it merely restates it.

Third, this paper focuses on TEC's constitution, which states that it "sets forth the basic articles of government of this Church." Any attempts that have been made in the past or that might be made in the future to alter TEC's constitutional governance by canon rather than by the specified procedures for amending the constitution would be unconstitutional and void *ab initio.*[4]

The argument below is developed by examining the legal concepts and the historical facts in substantial detail. Therefore, the following outline may be helpful.

I. THE LEGAL LANGUAGE OF HIERARCHY

Before examining the provisions of TEC's constitution relevant to the question of hierarchy it will be helpful to identify the legal concepts that are used in such an analysis.

How Hierarchy Is Expressed in Legal Language

Hierarchy is identified in legal discourse by a cluster of related concepts that are widely used and familiar to any court or lawyer, including those of supremacy, subordination, preemption and finality.

In the context of this paper, the best known example of hierarchical language is found in the Act of Supremacy by which the Church of England's break with Rome was formalized. That act provided that the king was the "only supreme head in earth of the Church of England" and had "full power and authority" over it.[5] The Oath of Supremacy that clergy (and others) had to swear recognized the monarch as "the only supreme governor of this realm…as well in all spiritual or ecclesiastical things or causes, as temporal…."[6] It was the inability of American clergy to take this oath that led to the formation of TEC. This same language is commonly found in other legal contexts in which a hierarchy is identified. In the United States Constitution, hierarchy is also expressed through the language of supremacy. There is a "supremacy clause," Article VI, that makes federal law superior to state law: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[7] Similarly, Article III provides that "The judicial Power of the United States shall be vested in one supreme Court...."[8] The oldest legal code extant, the

C*odex Iuris Canonici,* the code of canon law of the Roman Catholic Church, also uses the language of supremacy: "By virtue of his office [the Roman Pontiff] possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely."[9] In addition to using the term "supreme," legal instruments also use "highest" to express the concept of supremacy. Whichever term is used, it is a clearly defined concept that is not easily missed in legal language.

In legal instruments, the language of supremacy by itself does not indicate exclusivity or unlimited power, but demonstrates a hierarchical relationship. For example, both the federal legislature and the various state legislatures can enact legislation on a variety of topics, but in the case of conflict the Supremacy Clause provides that the federal law prevails. Similarly, the federal and state courts have concurrent jurisdiction in many cases, but the decision of the Supreme Court prevails.

Hierarchy is also expressed legally in the language of subordination. In many cases, legal draftsmen use the term "subordination" itself. This term is common in financial agreements, and widely-used books of legal forms list numerous examples of "subordination clauses."[10] But subordination is also expressed in other terms as well, including the language of "subject to," "without the consent of," and provisions giving one body the authority to define the powers of another. For example, Article VI of the Articles of Confederation, the United States constitution in effect when TEC's constitution was first drafted, contains numerous restrictions on states' powers all expressed by the phrase "without the Consent of the united states in congress assembled."[11] Article VII of TEC's constitution contains two different examples of subordination language: "Dioceses may be united into Provinces in such manner, under such conditions, and with such powers, as shall be provided by Canon of General Convention; Provided, however, that no Diocese shall be included in a Province without its own consent."[12] By this language, the organization of TEC's internal provinces is clearly subordinated both to the dioceses and to the General Convention. Similarly, the United Methodist constitution provides that the legislative powers of its intermediate conferences, the Jurisdictional Conferences, are "subject to such powers as have been or shall be vested in the General Conference."[13]

The ultimate hierarchical relationship is expressed through the legal language of preemption. When a legal power is preempted, the subordinate body is prohibited from taking any action whatsoever, even action consistent with acts of the higher body. This concept is expressed through the use of technical terms, such as "preempt" or "notwithstanding," as well as more general terms, including "sole" and "exclusive." It can also be expressed by prohibitions on actions by the lower body. There is abundant law on this topic with a highly-developed jurisprudence.[14] To take an example from a recent case in the Supreme Court, the federal government preempts any regulation of airlines by the states by the language in the Airline Deregulation Act of 1978 in a section entitled "Federal Preemption" that provides "no State or political subdivision thereof . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier...."[15] Article IX of the Articles of Confederation expresses preemption as follows: "The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war."[16] In the centuries prior to the

development of the American jurisprudence on hierarchy, a primitive form of preemption was expressed through a common device known as a "*non obstante* clause," *non obstante* being Latin for "notwithstanding." These clauses typically read "anything to the contrary notwithstanding." The Act of Supremacy contained a *non obstante* clause, and the second Supremacy Act in 1559, which reinstated the original one passed under Henry VIII and repealed under Mary, contained no fewer than fifteen such clauses.[17] The significance of these clauses will be discussed in the next section.

The legal language used to express finality is obvious. What may not be as obvious to non-lawyers is how routine this concept is in the practice of law. Many contracts, including a majority of commercial agreements, contain a "choice of forum" clause that explicitly specifies a particular body with final authority to resolve contractual disputes. For example, one widely-used clause reads as follows: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."[18] Similarly, the United Methodist constitution provides succinctly: "All decisions of the Judicial Council shall be final."[19]

All of these terms are common in the law and used in legal drafting to express the concept of hierarchy. When a legal instrument identifies a highest or final authority, this is the language used. It is important to note that hierarchy in the law is unrelated to whether the hierarchy possesses limited or unlimited power or authority. The highest body may have limited power. For example the federal government in the United States, the highest body in our system, is constrained by limits imposed by the constitution and the fundamental principle of our law that the reservoir of power is with the people and not in a "royal prerogative." On the other hand, in many legal relationships several entities possess overlapping unlimited power. One such relationship familiar to everyone is joint ownership of property. It is a basic precept of property law that each joint owner enjoys unlimited use of the property.[20] Any owner of a joint bank account can withdraw the entire amount. Similarly, unless restricted by agreement, any partner of a partnership can act for and impose legal duties and liability on the entire partnership.[21] In the law of agency, which together with contract law is the foundation of the law governing religious societies, a principal retains complete unlimited power notwithstanding any delegation of power to an agent.[22] If a principal and agent with power of attorney are sitting side-by-side, either has full legal power to act and bind.[23] As will be explained below, the traditional rule of priority among bodies with unlimited or equal power is the "last in time" rule: the final word prevails. To change this result requires the use of the language of supremacy. Thus, the notion that power is unlimited is not relevant to an inquiry concerning hierarchy absent the language of supremacy, subordination, preemption or finality that is the indication of a hierarchical body.

These concepts of hierarchy are not ones that are novel or difficult to define; they are instead ones that are routinely expressed in precise legal language. Many of these concepts, however, were developed just as TEC was being formed and were at that time anything but routine, being instead among the most pressing legal issues of the day. To put TEC's constitution in the legal context in which it was drafted, it is necessary to understand the

framework of hierarchy that was developed at that time.

The Legal Concepts of Hierarchy Were Substantially Developed Shortly After the American Revolution

At the time of the American Revolution, the colonies inherited the English common law system, the definitive articulation of which had just been summarized in William Blackstone's *Commentaries on the English Law,* published in England in four volumes in the 1760's and in America in 1771.[24] It is known that sixteen signers of the Declaration of Independence owned copies of the *Commentaries,* and much of that Declaration is based on legal principles found in Blackstone.[25] As recently as this June, the Supreme Court cited Blackstone several times in an important decision on the Second Amendment, calling him the "preeminent authority on English law for the founding generation."[26] Blackstone is one of eighteen lawgivers memorialized in the marble frieze on the courthouse of the Supreme Court, along with Moses, Solomon and others, and displayed next to the great Chief Justice John Marshall, who relied on Blackstone in the most important case ever decided in American jurisprudence, *Marbury v. Madison.*[27]

For Blackstone any hierarchy in the positive law of sovereign nations, what we call "civil law" and what he referred to as "municipal law," was very limited. The reason for this was that he recognized no hierarchy among lawmaking bodies. Lawmaking and supremacy were one and the same: a municipal law was "a rule of civil conduct prescribed by the supreme power in a state. For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another....Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other."[28] Parliament, consisting of the three bodies, the Crown, the Lords and the Commons, was the supreme power, and no one, not even Parliament itself, could bind Parliament:

> Acts of parliament derogatory from the power of subsequent parliaments bind not....Because the legislature being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior on earth, which the prior legislature must have been, if its ordinances could bind the present parliament. And upon the same principle Cicero, in his letter to Atticus, treats with a proper contempt these restraining clauses to tie up the hands of succeeding legislatures: "When you repeal the the law itself," says he, you at the same time repeal the prohibitory "clause which guards against such repeal."[29]

Thus, in the English system of common law inherited by the American states hierarchy was limited to *temporal* priority: when two statutes are "clearly repugnant" the "later takes the place of the elder: *leges posteriores priores contraries abrogant* is a maxim of universal law."[30] Latin no longer being the favored language of legal discourse, this is now known as the "last in time rule."[31] Whatever parliament did one day it could undo the next.

This rule of priority was too powerful in practice, however. If interpreted broadly, it could lead to the repeal of whole statutes when only parts were repugnant to the new one.

Therefore, another principle developed to mitigate somewhat the *leges posteriores* or last in time rule. If possible, a statute should be construed so as not to repeal existing ones; i.e., repeals by implication were not favored. As Blackstone put it: "But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy."[32] Under this rule, if the two (or more) statutes were not "clearly repugnant," they were harmonized, sometimes giving the new act a meaning different than was intended.

This principle in turn led to an enhanced version of the last in time rule. If the legislature wanted a statute to be given effect independent of existing law and not harmonized to it, the lawmakers included a standard clause known by the Latin shorthand, "*non obstante"* meaning "notwithstanding." These clauses generally read "any law to the contrary notwithstanding." This language signaled a primitive form of preemption; the new statute was given its full meaning and other statutes were displaced even if they could be harmonized. Significantly, the *absence* of this clause in legislation came to be seen as an important signal of its lack of priority. Blackstone's predecessor, Matthew Bacon, stated this maxim in a widely quoted form: "Although two Acts of Parliament are seemingly repugnant, yet if there be no Clause of *non Obstante* in the latter, they shall if possible have such a Construction that the latter may not be a Repeal of the former by Implication."[33]

These principles of hierarchy, although accepted in the newly-independent American states, were not adequate to their needs. Instead of one legislating sovereign, Parliament, they had in their new "league" of thirteen independent and sovereign states fourteen legislating sovereigns: the thirteen states plus Congress. The problems were immediate. Even before the Treaty of Peace ending the Revolutionary War was formally signed in Paris and the British troops withdrawn from American territory, the states began passing laws nullifying provisions of the treaty they found objectionable, mainly those having to do with protecting the rights of British creditors and barring lawsuits against British subjects. This controversy led to two well-known decisions that provided substantial development of the concept of hierarchy in the nascent American jurisprudence.[34]

The first of these was a decision in 1784 in a private lawsuit in the Mayor's Court in New York. The Chief Judge of that court and the author of the opinion was the first mayor of New York, James Duane, a highly learned and respected lawyer and a signatory on behalf of New York to the Articles of Confederation. In his most famous case, he surveyed the development of the law from Cicero through Charlemagne to Grotius and Blackstone, including a discussion of the leading legal theorists of several countries. The case was *Rutgers v. Waddington,* in which an American property owner sued a British merchant for back rent on premises occupied to support the British military during the war.[35] The plaintiff argued on the basis of the last in time rule that the New York statute superseded the treaty's prohibition on her suit. Alexander Hamilton, representing the British defendant, argued both that a state law could not supersede a national treaty and, in the alternative, that the two should be construed to be consistent so as not to repeal the treaty. After two hundred years of jurisprudence recognizing supreme federal authority, it is hard to conceive that Hamilton's first argument even needed to be made, but the principles we now take for granted were then under

development. In any event, Judge Duane, in a famous opinion now interpreted as the forerunner of the principle of judicial review, *rejected* Hamilton's first argument, but instead ruled largely in favor of the British defendant on the grounds that the state statute lacked a *non obstante* clause and therefore should be harmonized with the treaty. Citing Blackstone and Bacon, he acknowledged the validity of the last in time rule and treated the state statute as *potentially* superior to the treaty, but because it lacked the legal term of art signaling priority he construed the act in such a way that essentially negated its intended effect.[36]

The second of these decisions was the response of Congress to the state laws nullifying the Treaty of Peace. The year after Duane's decision, John Adams, the American ambassador to Britain, asked the British government to withdraw its troops from American territory in compliance with the treaty.[37] The British government responded by advising Adams that the United States was in breach of the treaty through the state laws that by then had been enacted in several states.[38] The significance of the link between the continued presence of British troops and these state laws was not lost on anyone, and Adams sent the British reply to the Congress in March 1786. Congress immediately instructed the United States Secretary for Foreign Affairs, John Jay, later to be the first chief justice of the Supreme Court, to investigate the problem. Jay submitted a lengthy report to Congress in October 1786 with a proposed solution that is now available in the provocatively entitled *Secret Journals of Congress,* so titled because they were not published with the original journals.[39] Although Jay himself was an ardent advocate of central authority and personally of the opinion that the state laws should be considered void, he recognized that the law was not clear on this point. Indeed, he stated explicitly that he was not addressing whether the laws were valid, but he proposed as a solution to the problem three resolutions that Congress eventually passed unanimously. These resolutions in fact were the prototype for the Supremacy Clause in the new constitution that was drafted the next year. The three resolutions were substantially as follows:

> First, "that for being constitutionally made, ratified and published [the provisions of the treaty] become in virtue of the confederation part of the Law of the Land, and are not only independent of the will and power of such Legislatures [of the states], but also binding and obligatory on them."
>
> Second, that the state acts should be repealed by the state legislatures.
>
> Third, that such repeals contain an explicit *non obstante* clause specifying that the treaty shall be judged "according to the true meaning thereof, anything in the said Act or parts of Acts to the contrary notwithstanding."[40]

Again, after two hundred years of federal supremacy, these terms of art have to be understood in their historical context to appreciate their meaning. The first resolution, which parallels in the same words the later language of the Supremacy Clause, establishes what has been called the "rule of applicability."[41] As incredible as it now seems to us, it was not universally accepted at that time that acts of Congress were part of the "law of the land" and "binding" on the states absent enactment by the state legislatures. Were federal laws simply recommendations or binding laws? The rule of applicability is not a rule of priority, but

merely provides as a first step a level playing field: federal laws are laws. This places them on a par with state laws and subject to the usual rules of last in time, harmonization and *non obstante* clauses.

In the confederation, the central government could not unilaterally declare its laws supreme, so it had to request in the second resolution that the states themselves repeal the repugnant laws. A year later, in the new constitution, the Supremacy Clause got its name by making the federal laws not just the "law of the land" and "binding," but the "*supreme* law of the land." This has been called the "rule of priority."[42] It makes federal law trump state law without regard to the last in time rule. For the first time, the new constitution provides a rule of priority that is not temporal, but based on the identity of the legislator. This was a problem Blackstone and the English jurists could not conceive, but one that was pressing in the early days of the United States.

Jay's third resolution provided the enhanced priority that comes from a *non obstante* clause. The Supremacy Clause in the new constitution enhanced this further by providing that all federal laws are deemed to contain the magic words of *non obstante.* Federal law is not to be interpreted in such a way as to be harmonized with state law; it is to be construed on its own terms without regard to state law. This has been called the "rule of construction," but it might better be understood as a rule of primitive preemption, from which the full blown preemption we now find is derived.[43]

What is most important to recognize, however, is that these are three different rules relating to hierarchy, each with its own legal language and significance. We blur them today or read over them only because we fail to grasp the technical vocabulary of the legal language in which they are written and the importance of the novel issues that were then matters of first impression but have long since been taken for granted.

II. TEC's CONSTITUTION LACKS THE LANGUAGE OF HIERARCHY

With this legal background, one can readily see from a simple perusal of TEC's constitution that it is totally devoid of the typical language of hierarchy when specifying the relationship between its General Convention and its constituent members, the dioceses. The only provision specifying the general power and authority of the General Convention is the opening sentence of Article I: "There shall be a General Convention of this Church, consisting of the House of Bishops and the House of Deputies, which Houses shall sit and deliberate separately; and in all deliberations freedom of debate shall be allowed." What follows immediately are detailed provisions on membership, voting and officers of the two houses and their relations *inter se* (e.g., either house can initiate legislation). The operative language, the first six words, "there shall be a General Convention," have been the only general specification of the power and authority of the General Convention since the very first draft in 1785.[44]

It is manifest at a glance that there is no language of hierarchy in this provision; there is no supremacy, subordination, exclusivity, preemption or finality. There is only the creation of a

body. And lest anyone think that hierarchical language is used elsewhere in the constitution to establish the General Convention as the highest authority, it can easily be seen that this is not so. A simple check of the constitution with any search engine demonstrates that none of the language of hierarchy is to be found. The following routine terms indicating hierarchy are not found at all in the constitution: "supreme"; "supremacy"; "highest"; "subordinate"; "sole"; "preempt"; "final"; and "contrary." There is one instance each of "exclusive" and "inconsistent," but neither is relevant to the question of hierarchy.[45] There are two *non obstante* clauses, but again they are not relevant to this inquiry except to demonstrate that this technical language is used when its effect is intended.[46] The only hierarchical terms found in the constitution are "subject to" and "consent," but in the majority of instances these terms operate in favor of the diocese or parishes, not General Convention.[47] In only one provision, that relating to the admission of new dioceses, is it even debatable whether special authority is conferred on the General Convention.[48] That provision is discussed in detail below, but it is enough to say at present that the provision in question requires the consent of both the new diocese and the General Convention.

Not only is there no provision making General Convention supreme, there is nothing in the constitution providing that general canons supersede diocesan ones or even that diocesan canons must be consistent with the general ones. This is often assumed, but it is simply not found in the constitution.[49] In summary, if General Convention is the hierarchy in TEC, that hypothesis must be inferred from silence because hierarchical language is not used. It is true that no general limits on General Convention's power are specified (minor *ad hoc* limits are noted in places), but as already shown that has nothing to do with hierarchy. And it is equally manifest that there are no general limits placed on the authority of dioceses either.

So, how are we to interpret the silence in the TEC constitution regarding hierarchy? To begin, two points are paramount. First, it is a fundamental principle of many legal systems, including both United States constitutional law and Anglican canon law, that power is generally reserved to a local body if not explicitly granted to the central body. As summarized by the foremost expert on Anglican canon law, Norman Doe, in the context of provincial assemblies: "It is a general principle of Anglican canon law that, unless a power is clearly reserved by law, the provincial assembly is not competent to interfere with the internal affairs of a diocese or to usurp the jurisdiction of a diocesan assembly."[50] As noted below, this is the principle of subsidiarity, which is a principle found also in Unites States constitutional law, European law, Anglican self understanding, Roman Catholic social teaching and the explicit "fundamental principles" of TEC's founders.[51]

The second point is this: *two of the most active participants in the general conventions that organized TEC and drafted its first constitution were James Duane and John Jay.* Six weeks after Duane ruled in the *Rutgers* case that the lack of a routine technical term indicating hierarchical priority substantially eviscerated a New York statute, he was a delegate to the first interstate convention that in October 1784 established the fundamental principles of what was to become the TEC constitution.[52] The first of these principles was that "there be a general convention." Duane was again a delegate to the general convention in 1785, one of only two from New York, and served on the committee that drafted the first constitution.[53] He was also

made a member of the executive committee that was selected to correspond with the churches in the United States and the Archbishop of Canterbury to obtain consecrations for American bishops.[54] He was once again a delegate to the 1786 convention.[55]

John Jay was a delegate to the general convention in June 1786, which occurred right in the middle of his work on the response to the states' nullification of the Treaty of Peace.[56] It was this convention that amended and then approved the constitution drafted the year before. Although Jay arrived late, after the constitution had been agreed, he had to have been aware of the terms of the constitution since the draft was a primary item on the agenda. After his arrival, Jay took a leading role in drafting a response to the Archbishop of Canterbury from the convention.[57] He did not attend the adjourned session of the convention in October 1786, undoubtedly because it 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 become the Supremacy Clause of the United States Constitution. It is inconceivable that these two sophisticated 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. They well understood what a league of sovereign entities was and how to express that structure legally--and how not to. In this context, the silence in the TEC constitution becomes deafening; as in the Articles of Confederation era and in the *Rutgers* case, silence means a lack of a central hierarchy.

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 Oath of Supremacy that all prospective bishops and clergy were required to swear.[58] It was the paradigm of legal language recognizing a hierarchical body: allegiance was pledged to the British monarch as the "only supreme governor" of the church.[59] 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. He was one of six members on the committee designated to implement the plan, along with the first three prospective bishops, William White, Samuel Provoost and William Smith (Smith was never consecrated) and two other prominent lawyers, one a member of the Continental Congress and the other the mayor of Philadelphia.[60] Between October 1785 and October 1786, no fewer than six letters were exchanged between the general convention and the English bishops on this topic.[61] Both Duane and Jay played major roles in drafting this correspondence.[62] The agreement reached was that the Oath of Supremacy would be replaced for American bishops by the recital "I do solemnly engage to conform to the doctrine and worship of the Protestant Episcopal Church…."[63] Submission to a *hierarchy*, the monarch, 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 Oath of Supremacy. It surely is no coincidence that the Archbishop of Canterbury advised the general convention of the new act of Parliament by letter dated July 4, 1786, precisely ten years after the Declaration

of Independence.[64]

Thus, the two primary legal influences on TEC's structure, the English Act of Supremacy and the United States constitutional framework, were of preeminent interest at precisely the time TEC was organized. None of the participants in creating TEC's structures would have missed the significance of removing the hierarchy stipulated by English law. It was their primary objective. Nor could it have been accidental that just as the United States was creating a hierarchical federal government, with the two chief jurisprudential sources of the supremacy clause having been authored by the very people guiding the formation of TEC, the young church elected not to include an explicit central hierarchy in its governance. And although the TEC constitution has been amended many times since its adoption, including several times since the major decisions of the Supreme Court on religious hierarchies in the 1970's, that original structure has never been changed.[65]

The lack of a central hierarchy does not mean of course that there is no hierarchy. Just as the thirteen states were the "independent and sovereign" constituents of the American confederation that existed when TEC was being formed, the state churches (later called "dioceses") were the undefined constitutive elements out of which all other bodies in TEC were derived. It was the dioceses, then co-extensive with the newly-independent states, that created TEC's constitution and General Convention. TEC's official commentary on its constitution and canons states that "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."[66]

The general convention in 1785 that drafted the first constitution made explicit in its very first resolution that the states were its constituent members: the resolution was that "each State have one vote."[67] In the general convention of 1786 a resolution was passed asking "the several States" to ratify the constitution at the next convention.[68] The first constitution called for "suffrages by states" in the General Convention.[69] In the convention in 1789, at which the organization of TEC was completed, the issue before the convention was "proposed union with the Churches in the States of New Hampshire, Massachusetts, and Connecticut."[70] This understanding is reflected in the current constitution in Article I.4 concerning representation at General Convention: "*The Church in each diocese* which has been admitted to union with the General Convention...shall be entitled to representation...." (Emphasis added.) As this current language makes clear, "Churches" in dioceses are not created by General Convention. They are admitted (upon their application and its acceptance) to union with the General Convention. Dioceses are both historically and ontologically prior to the constitution and the General Convention. And upon admission, it is the *diocese,* not the individual parishioners, that is "entitled to representation."[71]

Indeed, the closest the constitution comes to recognizably hierarchical language is Article IV, which makes a diocesan standing committee "*the* ecclesiastical authority" in the diocese in the absence of a bishop. The definite article used in this description implies uniqueness, hence supremacy. (Compare this to the indefinite article used in Article I: "*a* General Convention.")

Moreover, as is true of the General Convention, the constitution specifies no general limits on the authority of dioceses. There are three mandatory duties placed on dioceses: if they choose a bishop, they must do so "agreeably to rules prescribed by the convention of that diocese"; they must have a Standing Committee that in the absence of a bishop will function as the Ecclesiastical Authority "for all purposes declared by the General Convention"; and the Prayer Book adopted by General Convention must be "in use" in the diocese. The first of these mandates will be discussed below, but it can be noted now that there is no requirement that a diocese have a bishop. The second of these provisions tends to confirm that the bishop and standing committee are the highest authority in the diocese. And it is obvious from current practices that "in use" in the last mandate mentioned does not mean used exclusively or even widely.

Not only is the authority of the diocese not generally restricted or subordinated to any other body, it is expressly protected from encroachment by others. In addition to the point just made about the ecclesiastical authority in the diocese, Article II of the constitution completely prohibits any bishop, including the Presiding Bishop, from acting within a diocese without the consent of that diocese. This prohibition, being constitutional, would remain even if all other bishops agreed and acted in concert or the General Convention authorized the intervention. This is the language of preemption; episcopal and ecclesiastical authority is given exclusively to the diocese.

To summarize: (1) there is no provision in the constitution making General Convention the supreme or highest authority in the church; (2) there is no provision requiring that diocesan canons be consistent with the general canons; and (3) there *is* language indicating that the bishop and standing committee are "the" authority in the diocese. What these provisions demonstrate is the co-existence of two bodies that are interrelated, but whose relationship is never explicitly defined in hierarchical terms. That relationship can be further illuminated by examining some of the key areas of church governance.

Representation and Voting at General Convention

As noted above it is "the church in each diocese" that is "entitled" to representation at General Convention. The diocese is not required to participate, nor is it required to send both clerical and lay deputies (an issue of monumental importance at the founding), but the representation when present is of the diocese. All dioceses have equal representation. As has been noted before, the largest dioceses, with over 80,000 communicants, have the same number of deputies as the smallest, with fewer than 2,000. This representation, in conjunction with the extraordinary voting mechanism constitutionally required in the House of Deputies, gives the dioceses collectively control over the General Convention.[72]

The House of Deputies does not decide important matters by majority vote, but by a vote "by orders." 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 presents the possibility of results highly unrepresentative of even the deputies present, who are themselves unrepresentative of the church as a whole. These procedures can only be understood as

reflecting the foundational authority of the dioceses. For example, it is easy to calculate that in the limiting case a measure could be passed with the support of only 38 percent of the deputies. This would be the result if a bare majority of the 110 diocesan deputations, 56, approved the measure by 3-1 votes in each order and all other deputies voted against. In such a case, of the 880 deputies, 336 (38%) would be in favor and 544 (62%) would be opposed, yet the measure would pass. In terms of blocking legislation, the power of the diocesan deputations is even more pronounced. If half of the diocesan deputations in one order were divided 2-2 and all other deputies were in favor, the measure would fail notwithstanding 770 (88%) deputies in favor and only 110 (12%) against.[73]

More significantly, if one were to consider individual communicants instead of diocesan deputies, the unrepresentative nature of General Convention would be even more profound. If the smallest 56 dioceses voted in favor of a measure, e.g., amending the constitution, and all others opposed, the measure would pass with approval of deputies representing fewer than twenty percent of the church's communicants. All of this, of course, is simply a reflection of the provision already noted in Article I.4 that it is the *diocese,* not the individual communicant, who is represented in General Convention. 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."[74]

As observed at the outset, TEC's polity is unique, but not necessarily democratic. It is instead a church governed by dioceses.

Constitutional Provisions and Changes

As already noted, TEC's original constitution was ratified by the preexisting state (diocesan) churches. There was no review or approval at that time of the constitutions of the state churches. Under the current provisions, a new diocese joining TEC ratifies the general constitution when it joins TEC by an accession clause in its own constitution. Apart from an initial review when a new diocese applies for membership in TEC, there is no provision for prior review or approval of diocesan constitutional changes, canons or other actions or any requirement that any provisions, including the accession clause, be maintained. A diocese within TEC, as opposed to one applying to join, has unconstrained authority in terms of its own constitution and canons. This is not merely an inference from silence, but an authority that is expressly granted. *See, e.g.,* Article II (diocese selects bishop "agreeably to rules prescribed by the Convention of that Diocese.")

The TEC constitution's withholding of any authority in General Convention to approve the actions of diocesan conventions, including in particular the dioceses' governing instruments, clearly establishes the general body's lack of hierarchical authority. One fundamental characteristic shared by hierarchical churches is the prior review and approval by the hierarchy of the subordinate body's actions.[75] This is the mechanism of hierarchical control; without such a mechanism, there is no control. Indeed, the Supreme Court has recognized this as a key indicium of hierarchical control.[76]

TEC's constitution, in contrast, cannot be amended until one reading has passed at General Convention and the proposed amendment is then formally sent to each diocese for consideration at the next diocesan convention. The amendment is passed only after this notice and consideration by the dioceses and approval by their deputations at the next General Convention. Although the second approval or ratification occurs at General Convention rather than the individual diocesan conventions, the formal notice requirements and voting by orders at General Convention make this process effectively one of diocesan approval. As noted earlier, it could theoretically be approved by scarcely a third of the deputies and representatives of fewer than a fifth of the communicants. Again, there is substantial control of the General Convention by the dioceses, but virtually none by the general body over the dioceses themselves.

Bishops

It is a curiosity of a church named "Episcopal" that there is no requirement that dioceses have bishops. The only constitutional requirement is the provision in Article II.1 that "[i]n every Diocese the Bishop or the Bishop Coadjutor shall be chosen agreeably to rules prescribed by the Convention of that Diocese...." That this provision does not impose a requirement of a bishop is demonstrated by the fact that Article IV makes the Standing Committee the Ecclesiastical Authority for purposes relating to General Convention in the absence of a bishop. And to remove any question that this is merely a tendentious reading of these provisions, it was quite clear that there was great hostility to bishops at the beginning of TEC, and several dioceses, including TEC's largest, did not want one.[77] At the organization of TEC, only three of the thirteen states had a bishop, and in each case he served as rector of a parish. New Jersey did not have a bishop until 1815, North Carolina until 1823 and Georgia until 1841. Massachusetts had a bishop only briefly until 1811.[78]

TEC's constitution does not define the office of bishop beyond stating that the bishop is the ecclesiastical authority in the diocese. This permits a range of understandings of the episcopacy. The constitution of the largest state church, Virginia, so downgraded the office of bishop at its inception that he was essentially a superintendent who performed ordinations and confirmations, and the architect of TEC, William White, argued in his blueprint for the general church that bishops could be dispensed with altogether.[79] These actions caused the high church bishop of Connecticut, Samuel Seabury, to dismiss the new church as "presbyterian."[80] Yet in one place, the constitution refers to the bishop as the "Ordinary," as if he were assumed to possess all the powers associated with the apostolic office.[81] Thus, regarding the eponymous office of TEC, its constitution simply becomes, as it also does elsewhere, indeterminate.[82]

Under TEC's constitution, as has already been noted, dioceses that do choose bishops are free to choose them "agreeably" to their own rules. There is no constitutional requirement that they be elected by a convention; they could be chosen by a clergy convocation or by the diocesan standing committee or even appointed by the previous bishop (or a foreign primate for that matter). The General Convention has virtually nothing to do with the selection of

bishops; it is only in the exceptional case when one is elected within 120 days of a General Convention that it plays any role at all, and even in that case it is simply that consent is given by the dioceses' deputations instead of the normal procedure of consents by diocesan standing committees. In all cases, the required episcopal consents are from diocesan bishops with jurisdiction, not the House of Bishops. Thus, the selection and confirmation of bishops, the highest officers in the church, is handled entirely at the diocesan level.

Admission and Alteration of Dioceses

Leaving aside the simple 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. There is considerable misrepresentation 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." Its relevant provisions are as follows:

> A new Diocese may be formed, with the consent of the General Convention and under such conditions as the General Convention shall prescribe by General Canon or Canons, (1) by the division of an existing Diocese; (2) by the junction of two or more Dioceses or of parts of two or more Dioceses; or (3) by the erection into a Diocese of an unorganized area evangelized as provided in Article VI. The proceedings shall originate in a Convocation of the Clergy and Laity of the unorganized area ....After consent of the General Convention, when a certified copy of the duly adopted Constitution of the new Diocese, including an unqualified accession to the Constitution and Canons of this Church, shall have been filed with the Secretary of the General Convention and approved by the Executive Council of this Church, such new Diocese shall thereupon be in union with the General Convention.

Several points should be noted about this process. First, unlike some of the other important structural or official actions in the church, the General Convention plays a role in this process. Second, the proceedings "originate" in the new diocese. It has an organizing convention and "duly adopts" its own constitution. Third, it then applies to the Executive Council, an arm of the General Convention, which gives consent on behalf of the convention. Finally, the end point of the process ("thereupon") is union of the new diocese with the General Convention. It is a condition of General Convention's consent that the constitution of the new diocese contain an "unqualified accession" to the constitution and canons of TEC.

Five conclusions are inescapable. First, dioceses are the constituent members of the General Convention. They are the entities, not any other body or individual, who are admitted to the General Convention and are "entitled to representation."

Second, the diocese is organized, has its own convention and acquires its own legal personality sufficient to "duly adopt" its own constitution prior to its application to General Convention. The point here is legal, not practical. It does not matter whether practical

assistance is given to the organizing process by the general church. Constitutionally, the proceedings "originate" in the new diocese. Those who continue to say that General Convention creates dioceses cannot have examined this process or be familiar with the corresponding process in truly hierarchical churches.

Third, the General Convention is expressly authorized (which highlights the lack of such authorization in so many other places in TEC's constitution) to attach conditions to this process. "Unqualified accession" is one clear condition; others are permissible. This would be an inherent right of General Convention in any event since it is union with that convention that is at issue. But it is quite obviously a possibility that a diocese could organize itself, duly adopt a constitution and fail to include the appropriate accession or to satisfy some other condition placed on General Convention's consent. The result in such a case is that the diocese would be duly organized and existing, but would not be accepted into union with the General Convention. (I will defer for the moment discussing whether the unqualified accession must be maintained except to note that nothing in this provision requires it. Such accession, and satisfaction of any other conditions imposed by General Convention, is clearly required in order to join, however.)

Fourth, because the proceedings must "originate" in the new diocese, its "consent" is necessarily required prior to any involvement by General Convention. Although the consent of both parties ultimately is necessary, to the extent either controls the process it is the diocese. Indeed, there is no process if the diocese does not originate one.

Finally, the process described here is one that is fundamental to contract law: that of "offer and acceptance," the formation of a contract. This is not a unilateral decision made at General Convention to reorganize its administrative districts. This process by definition involves two parties: it is a union between an entity that is not part of General Convention, on the one hand, and that convention itself, on the other. To maintain otherwise would be to maintain the logical contradiction that prior to the union with General Convention, the new diocese was part of General Convention.

Although General Convention plays an essential role (as a matter of logic as well as constitutional mandate) in admitting new dioceses into itself, its role is significantly reduced when it comes to altering existing dioceses. Territorial boundaries between two dioceses can be altered by agreement of the two dioceses with the consent of a majority of bishops with jurisdiction and standing committees. Such consent can also be given by General Convention, but is not required.[83]

Sacramental Communion

One of the remarkable features of TEC's constitution is that it does not require, or even describe, sacramental communion among the dioceses or with the Presiding Bishop or General Convention. Aside from the preamble, there are only three passing references to communion in the constitution, all to churches or bishops that are or are not "in communion with this Church."[84] What that means is not defined, but when the constitution and canons are

considered together it is clear that TEC's understanding of communion is incoherent at best and more accurately self-contradictory.

To start with what is clear, the preamble to the constitution, added in 1967, contains an unattributed paraphrase of Resolution 49 from the 1930 Lambeth Conference: TEC " is a constituent member of the Anglican Communion, a Fellowship within the One, Holy, Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury, upholding and propagating the historic Faith and Order as set forth in the Book of Common Prayer."[85] This would appear to define the "communion of this Church" as those dioceses and churches that are in communion with the see of Canterbury and part of the Anglican Communion (which are not the same thing). A second provision, Canon I.20, lists the churches "in full communion" with TEC: The Old Catholic Churches of the Union of Utrecht, churches in The Philippines and Malabar, and the Evangelical Lutheran Church in America. This canon identifies TEC in prefatory language as "a member of the Anglican Communion," but does not include that Communion in the list of those identified as in "full communion." Finally, Canon IV.13 defines the "communion of this church" indirectly by defining what it is to abandon it. This canon includes among the instances of such abandonment the open renunciation of the discipline of "this Church," which a majority of TEC bishops present at the last meeting of the House of Bishops concluded had occurred when a bishop of TEC joined another church in the Anglican Communion.[86] Under this interpretation, joining a church "in communion" with TEC is regarded as abandonment of the "communion of this Church." It is manifest from these provisions that TEC canonically has no clear understanding of what communion is.

Moreover, to the extent that anything coherent is articulated about communion in TEC's constitution it is that it is defined as communion with the see of Canterbury, not as communion with any see or body in TEC. The canons extend this definition to include churches with which TEC has concordats of full communion, but again, even in these provisions there is no reference to communion *within* TEC. There simply are no canonical provisions even defining, let alone requiring, sacramental communion in TEC. Whatever TEC's canons specify regarding the relationships among the various bodies comprising it, those relationships are legal and administrative, not sacramental.

It follows from what already has been said but bears repeating that Communion in TEC is not defined by communion with the Presiding Bishop, a primary see (other than Canterbury) or the House of Bishops. There is no primary see, the Presiding Bishop has no see at all, much less a primary one, and the House of Bishops is not a college of bishops in the traditional sense, but simply a subdivision of General Convention, an administrative entity.

Finally, there is no restriction on dioceses' determining their own sacramental relationships. Indeed, given the incoherence of TEC's understanding of communion, compounded by the incoherence of such relations in the Anglican Communion (not all members of that communion are in communion with each other, and TEC claims to be in communion with churches that do not recognize TEC as being in communion with them), defining those relationships at the diocesan level is not only permissible, but necessary.

Withdrawal from TEC

This issue is already the subject of pending litigation with more to come. It will be addressed again in the final section of this paper after the civil law context has been examined in detail. What can be said now is that there is no prohibition in TEC's constitution on a diocese withdrawing from its union with the General Convention. Once again, the issue is one of interpreting silence. Is that which is not prohibited permitted? Or is that which is not permitted prohibited?

TEC leadership has repeatedly asserted that the provision in Article V of TEC's constitution that dioceses wishing to join TEC submit an "unqualified accession" to TEC's constitution and canons means that this accession cannot be withdrawn. It is significant that the term used to describe a diocese's joining TEC is "accession," a legal term of art with a technical meaning. The Unites States Court of Appeals, quoting Lord McNair's *The Law of Treaties,* explains it as follows: "'Accession' is 'the act whereby a State accepts the offer or the opportunity of becoming a party to a treaty already signed by some other States....'"[87] Accession is not a term normally used in the law of contracts or in ecclesiastical documents, but it (or its cognate "acceding") has been used since the first draft of TEC's constitution in 1785.[88] The use of this unusual term to describe the act of a diocese's joining TEC cannot have been unintentional since that first constitution was drafted in part by James Duane, who as noted above was a sophisticated lawyer experienced in the interpretation of treaties and was himself a signatory on behalf of New York to the Articles of Confederation. In addition to Duane, that first constitution was reviewed by other experienced lawyers and members of the Continental Congress, including John Page, Richard Peters, Samuel Powell, Francis Hopkinson, a signer of the Declaration of Independence, and, of course, John Jay, who was the United States Foreign Secretary and whose experience with treaties included negotiating the treaty known to this day as the "Jay Treaty."[89]

How are we to interpret this unusual use of a term of art from international law? First, we must acknowledge that this is an inappropriate use of a technical term. The TEC constitution is not an international treaty and the dioceses who sign on are not "states" under international law. This usage, therefore, is an instance of the same category mistake noted at the outset of this paper. But given the extraordinary legal competence of TEC's founders, the use of that term was intended to convey some meaning other than the standard contractual term, "acceptance," that normally would be used to describe an agreement between private parties.

The answer to this question of interpretation can be found in the definition of "state" under international law: the essence of statehood is that a state is sovereign and independent.[90] Thus, the Articles of Confederation used the term "acceding" to describe joining its "league of friendship." The Articles have been considered by legal scholars as a treaty among the American states, not least because of its self-characterization as a league of friendship, but also due to its insistence that "[e]ach state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated...."[91] The Unites States Constitution, in contrast, does not use the term "acceding," does not regard the states as sovereign and independent and indeed at its inception bypassed

the state legislatures for ratification "by the people" at special conventions to make this very point. The use of the term "acceding," therefore, in TEC's first constitution, which was drafted just as the Articles of Confederation were being terminated and the new constitution adopted, demonstrates that TEC's founders intended a relationship among dioceses analogous to the Articles and not to the new national constitution. Although TEC's dioceses are not sovereign "states," the term "accession" signifies the independence and autonomy that the dioceses retain with respect to the General Convention.

TEC maintains that "accession," is an irrevocable act, but that claim compounds several errors. First, it arrogates to TEC the attributes of sovereign governments, which it clearly is not. TEC's pretensions notwithstanding, it is just a voluntary association, governed by ordinary principles of contract law. And contracts between private parties are terminable absent express provision to the contrary. Second, treaties -- the concept invoked by the technical term "accession" -- 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 terminated or nullified, as already noted, just as TEC's constitution was being drafted and ratified.[92] If one were intending to express irrevocability, one would not do so by choosing a term relating to treaties, which are frequently abrogated, but would use more obvious legal terminology such as "this agreement is not subject to termination without the express written consent of all parties." Third, with respect to treaties, it has always been the law of the United States that a *treaty can be abrogated or modified at any time by Congress or the President notwithstanding the terms of the treaty.*[93] This was a power that was conceded by all sides in the debates concerning the United States' very first treaty, the Treaty of Peace with Great Britain, discussed above. As John Jay conceded in his report to Congress, there is no legal remedy for breach of a treaty, there is only the "appeal to Heaven and to Arms."[94] Arms not being an option in the case of TEC, the only appeal is to Heaven.

The argument based on the technical term "accession," therefore, proves not that membership in General Convention is irrevocable, but the opposite. Dioceses are independent and autonomous, and can withdraw at their pleasure. It is, moreover, a principle of both the law of treaties and the law of contracts that they can be terminated in the event of material breach or repudiation by another party or by fundamental changes of circumstances.[95] The application of this principle depends in part on the intentions of the parties to the agreement. It is, among other things, to the preambles of agreements that courts may look to discern what the parties themselves considered material or fundamental.[96] In this regard, it is significant that the preamble to the TEC constitution makes only two points: (1) that TEC is a "constituent member of the Anglican Communion a Fellowship within the One, Holy, Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury"; and (2) that the constitution "sets forth the basic articles of government of this Church." Given that representatives of over half the active membership in the Anglican Communion have declared that they do not recognize TEC, the circumstances specified in the preamble already have fundamentally changed in that TEC no longer remains in fellowship with a significant number of the "dioceses, provinces and regional churches" identified in its own constitution.[97] And were TEC to materially

change its constitutional governance to restrict diocesan autonomy, it would constitute a material breach or repudiation of its "basic" governing agreement.[98]

Moreover, even without regard to the technical usage of the term "accession," the assertion that joining an organization and agreeing to its terms at the outset means one can never withdraw is without any legal support. If "accession" does not have a technical meaning, but simply signifies agreement, Article V merely states a truism. As the Supreme Court has noted, "[a]ll who unite themselves to [a voluntary religious association] do so with an implied consent to this government, and are bound to submit to it."[99] Any party to a relationship must agree to enter that relationship and to accept its terms, but this by itself does not make such relationships permanent or it would be the case that all voluntary associations would have permanent memberships. As will be shown below in section five, the settled law in this country is that a member can withdraw from a voluntary association at any time absent agreement to the contrary. And this rule merely tracks the general principle of contract law that agreements without an express term of duration are terminable at will or on reasonable notice.[100]

Simply put, the argument that joining an organization and agreeing to its terms means one will remain a member forever is without merit. If membership is to be irrevocable, there must be clear indication of such a restriction. This elementary principle is as true of religious societies as of any other association. For example, joining the Southern Baptist Convention or the United Church of Christ, both of which disclaim any authority over their member churches, requires adherence to their constitutions. In particular, the constitution of the UCC, the epitome of Congregationalism, requires of its constituent associations: "An Association may retain or secure its own charter, and adopt its own constitution, bylaws and other rules which it deems essential to its own welfare and *not inconsistent with this Constitution and the Bylaws of the United Church of Christ*."[101] The Southern Baptist constitution contains comparable provisions.[102] If withdrawal from TEC is prohibited, that prohibition must be found not in the mere fact of joining, but in some other constitutional provision that makes the union with General Convention irrevocable. But of course there is none.

Anticipating the case law discussed in section five, such a requirement of irrevocable union could only come from an explicit prohibition, which is not to be found, or a finding that a diocese is a *subordinate and inextricable* part of a higher body that created and controls it. From the discussion above, it is apparent that this latter proposition simply cannot be proved. Indeed, if there is a hierarchical structure to be discerned in TEC's polity, which has accurately been described as an eighteenth-century institution, it is the diocese, not the general church. The dioceses precede the General Convention, they collectively control it, they are absolutely protected from outside episcopal interference, and key ecclesiastical actions, including the selection of bishops and the alteration of diocesan boundaries can and do take place without any involvement by the General Convention.

TEC's decisive break, moreover, with the Church of England at the time of the American Revolution and subsequent organization as a new church also introduced a significant change in its canonical jurisprudence. The original preamble to TEC's proposed constitution recited

in place of the current language of constituent membership in the Anglican Communion that "Whereas, in the course of Divine Providence, the Protestant Episcopal Church in the United States of America is become independent of all foreign authority, civil and ecclesiastical."[103] The similarity to the opening lines of the Declaration of Independence is striking and clearly no accident. But where the American colonies adopted but reshaped the common law of England, the new Episcopal Churches rejected the canon law of the Church of England. The first convention of the largest church, Virginia, resolved that the "canons of the Church of England have no obligation" on the Virginia church and proceeded to enact a constitution not even remotely resembling the English canons.[104]

In rejecting English canon law, the new American church embraced instead the principles of the common law as its jurisprudential framework, rather than traditional canon law, which even in England derives from Roman Catholic canon law that in turn is based jurisprudentially on the Roman civil code.[105] One key difference between the British common law, ironically embraced by the American church, and the civil law codes, ironically continued in English ecclesiastical law, is that at common law prohibitions as a general rule must be expressed.

The young Episcopal Church soon demonstrated this principle in practice. Maryland elected a suffragan bishop early in the nineteenth century, an office not authorized in TEC's constitution. The church nonetheless consented on the principle that "while the office of suffragan was not authorized by the Constitution, it was not prohibited by it, and therefore, a suffragan bishop might be had on the principle of *lex non scripta,* the common law ecclesiastical, whenever necessity required it."[106] What is not prohibited is permitted. As will be shown below, that is the principle also followed by American courts, themselves a product of the jurisprudence of the common law.

III. OTHER CHURCH CONSTITUTIONS USE CLEAR HIERARCHICAL LANGUAGE

Discussion of these issues within TEC has focused so exclusively on the constitution and canons of this church that it is easy to lose sight of the fact that the major cases developing these principles in the American courts have done so in the context of other churches. The discussion above has shown that TEC polity is silent on the key issues and consists of a complex and undefined relationship among different bodies. This silence stands out in stark relief when one reviews the governing legal instruments of other churches generally considered to be hierarchical.

Roman Catholic Church

One would expect to find clear language of hierarchy, i.e., the operative legal terms indicating supremacy, subordination, preemption and finality, in the *Codex Iuris Canonici,* the code of canon law of the Roman Catholic Church. They are not hidden, nor are they discerned by inferences from silence. In the chapter entitled "The Hierarchical Constitution of the Church," Section I, "The Supreme Authority of the Church," Article 1, "The Roman Pontiff," are the following:

> Can. 331 The bishop of the Roman Church, in whom continues the office given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors, is the head of the college of bishops, the Vicar of Christ, and the pastor of the universal Church on earth. **By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely.**
>
> ...
>
> Can. 333 §1. **By virtue of his office, the Roman Pontiff not only possesses power over the universal Church but also obtains the primacy of ordinary power over all particular churches and groups of them.** Moreover, this primacy strengthens and protects the proper, ordinary, and immediate power which bishops possess in the particular churches entrusted to their care.
>
> §2. In fulfilling the office of supreme pastor of the Church, the Roman Pontiff is always joined in communion with the other bishops and with the universal Church. He nevertheless has the right, according to the needs of the Church, to determine the manner, whether personal or collegial, of exercising this office.
>
> §3. **No appeal or recourse is permitted against a sentence or decree of the Roman Pontiff.**[107]

Dioceses are known as particular churches in Catholic canon law. Canon 373 specifies how they are created: "It is only for the supreme authority to erect particular churches; those legitimately erected possess juridic personality by the law itself."[108] Unlike TEC dioceses, which are duly organized before admission to TEC, Roman Catholic dioceses are created by the pontiff and have no legal personality until after they are created.

Canon 377 specifies how bishops are chosen: "The Supreme Pontiff freely appoints bishops or confirms those legitimately elected."[109] Diocesan bishops possess ordinary power over their dioceses, subject to decrees of the supreme pontiff who has full ordinary power over all particular churches.

The people of God in the dioceses are in sacramental communion with their diocesan bishop, who himself is in "hierarchical communion" with the "Supreme Pontiff."[110] The decisions of the highest collegial body, the college of bishops or ecumenical council, take effect only when approved by the pontiff.[111]

This review of Roman Catholic canon law demonstrates immediately the clear use of the legal concepts and language of hierarchy, including supremacy, exclusivity, subordination and finality. In the case of Roman Catholic polity, the supremacy is found in one person, but the significance of the *Codex Iuris Canonici* is not the identity of the hierarchy, but the unambiguous use of hierarchical language.

Serbian Orthodox Church

The polity of the Serbian Orthodox Church is significant because it has been the subject of the most extensive analysis to date of religious hierarchies by the United States Supreme Court. Like the Roman Catholic Church, the Serbian Orthodox Church expresses its governance in unambiguous hierarchical language. Unlike the Catholic hierarchy, however, Serbian supremacy resides in a body not an individual. The highest legislative, judicial, ecclesiastical, and administrative authority of the Serbian Church is the Holy Assembly of Bishops, a body composed of all diocesan bishops presided over by its patriarch. An executive body, the Holy Synod of Bishops, consists of the Patriarch and four bishops selected by the Holy Assembly. The hierarchical structure is indicated by the following provisions of its constitution:

> 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.[112]
>
> 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**.[113]
>
> [The church's] main administrative division is composed of dioceses, both in regard to church hierarchical and church administrative aspect....Decisions of establishing, naming, liquidating, reorganizing, and the seat of the dioceses, and establishing or eliminating of position of vicar bishops, is decided upon by the [Holy Assembly], in agreement with the Patriarchal Council.[114]

The Supreme Court concluded that the "Holy Synod and the Holy Assembly have the **exclusive power to remove, suspend, defrock, or appoint Diocesan Bishops**."[115] The Holy Assembly of Bishops also " interprets canonical-ecclesiastical rules,...prescribes the ecclesiastical-judicial procedure for all Ecclesiastical Courts,... settles disputes of jurisdiction between hierarchical and church-self governing organs;...[and] adjudges...[i]n first and in final instances...disagreements between bishops and the Holy Synod, and between the bishops and the Patriarch."[116] As the Supreme Court emphasized, the "[d]iocese's subordinate nature was manifested by ... submission of corporate bylaws, proposed constitutional changes, and final judgments of the Diocesan Ecclesiastical Court to the Holy Synod or Holy Assembly for approval."[117] The permanence of the relationship is manifested in the "Episcopal-Hierarchical Oath" signed by bishops by which they swear that they will "**always** be obedient to the **Most Holy Assembly**."[118] Note that the oath is to a body, not to doctrine or a constitution.

Again, this presents a different structure from the Roman Catholic Church, but the

hierarchical concepts of supremacy, subordination, exclusivity and finality are unambiguously stated.

Evangelical Lutheran Church in America

The ELCA consists of three levels of organization, the highest of which is its Churchwide Assembly. Its constitution provides:

> The Churchwide Assembly shall be the **highest legislative authority of the churchwide organization** and shall deal with all matters which are necessary in pursuit of the purposes and functions of this church. The powers of the Churchwide Assembly are limited only by the provisions of the Articles of Incorporation, this constitution and bylaws, and the assembly's own resolutions.[119]

The intermediate bodies are synods, which correspond in size and function to dioceses in TEC. The names and territories of synods are defined by the Churchwide Assembly.[120] Each synod must be incorporated and have a constitution. The articles of incorporation and synod constitution cannot become effective until ratified by the Church Council, the executive arm of the Churchwide Assembly.[121] Thus, the synod does not acquire a legal personality without prior approval of the general church.

The authority of the Churchwide Assembly is maintained by the synod constitutions, which contain mandatory provisions specified by the general constitution. In particular, each synod constitution must contain the following provisions:

> **This synod possesses the powers conferred upon it**, and accepts the duties and responsibilities assigned to it, in the *Constitution, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America* (ELCA or "this church"), which are recognized as having governing force in the life of this synod....[122]
>
> **No provision of this constitution shall be inconsistent** with the constitution and bylaws of this church....[123]
>
> This synod may adopt bylaws **not in conflict** with this constitution nor with the constitution and bylaws of this church. This synod may amend its bylaws at any meeting of the Synod Assembly by a two-thirds vote of voting members of the assembly present and voting. Newly adopted bylaws and amendments to existing bylaws shall be reported to the secretary of this church....[124]
>
> This synod may adopt continuing resolutions **not in conflict** with this constitution or its bylaws or the constitution and bylaws of this church. Such continuing resolutions may be adopted or amended by a majority vote of the Synod Assembly or by a two-

> thirds vote of Synod Council. Newly adopted continuing resolutions and amendments to existing continuing resolutions shall be reported to the secretary of this church.[125]

Again, these provisions of the synod constitutions are *defined and mandated in the general constitution.* Unlike TEC, the ELCA insures that its synods are permanently subordinate to the Churchwide Assembly by mandating that all amendments to the synod articles of incorporation and constitution be submitted to the general church for review and approval before they become effective:

> Amendments to the articles of incorporation of all synods **shall be submitted to the Church Council for ratification before filing**....[126]

> Each synod shall have a constitution, which shall become **effective upon ratification by the Church Council. Amendments thereto shall be subject to like ratification**….[127]

Unlike the Roman Catholic Church and the Serbian Orthodox Church, the hierarchy in the ELCA is an assembly composed of clergy and laity. But like both of the other hierarchical churches, the hierarchical structure is clearly stated using the standard legal language, especially that of supremacy and subordination.

Presbyterian Church USA

Like the ELCA, the Presbyterian Church is governed by an assembly of clergy and laity, but it does not have bishops as do the three churches discussed above. It has four levels of governance: the General Assembly; synods; presbyteries; and sessions.[128] The constitution indicates unequivocally the hierarchical relationship of these bodies:

> **The General Assembly is the highest governing body of this church** and is representative of the unity of the synods, presbyteries, sessions, and congregations of the Presbyterian Church (U.S.A.).[129]

The authority of the General Assembly include the power

> to **oversee** the work of the synods and to facilitate their participation in the mission of the church;...

> to **review** the records of the synods and t**o take care that they observe the Constitution of the church**;...

> to **organize new synods and to divide, unite, or otherwise combine synods** or portions of synods previously existing;...

> to **approve the organization, division, uniting, or combining of presbyteries** or portions of presbyteries by synods;...

to serve in judicial matters in accordance with the Rules of Discipline;...

to **provide authoritative interpretation of the *Book of Order* which shall be binding on the governing bodies of the church** when rendered in accord with G-13.0112 or through a decision of the Permanent Judicial Commission in a remedial or disciplinary case. The most recent interpretation of a provision of the *Book of Order* shall be binding....[130]

The powers and duties of synods include the following:

to **review** the records of its presbyteries and **to take care that they observe the Constitution of the church**;...

to maintain regular and continuing relationship to the General Assembly, including (1) **seeing that the orders and instructions of the General Assembly are observed and carried out**....[131]

The powers and duties of presbyteries include the following:

to assume original jurisdiction in any case in which it determines that a session cannot exercise its authority. Whenever, after a thorough investigation, and after full opportunity to be heard has been accorded to the session in question, the presbytery of jurisdiction shall determine that the session of a particular church is unable or unwilling to manage wisely the affairs of its church, the presbytery may appoint an administrative commission (G-9.0503) with the full power of a session. This commission shall assume original jurisdiction of the existing session, if any, **which shall cease to act until such time as the presbytery shall otherwise direct**;...

to maintain regular and continuing relationship to the higher governing bodies of the church, including (1) electing commissioners to the synod and to the General Assembly and receiving their reports, (2) **seeing that the orders of higher governing bodies are observed and carried out**....[132]

Thus, in clear language of hierarchy, the General Assembly maintains complete and final authority over the creation, continued existence and actions of the lower bodies. Note that at the lowest level, the intermediate body, the presbytery, has constitutional authority, subject to review and approval of the higher bodies, to take over and directly govern the session, "which shall cease to act." This is complete preemption of the authority of the session. Taken together with the repeated language of supremacy, subordination and finality, the Presbyterian Church's hierarchy is articulated in the expected legal terms.

United Methodist Church

The United Methodist Church is governed by several layers of conferences, General, Jurisdictional, Annual, District and Charge, by a Council of Bishops, and by a Judicial Council.[133] The governance is based on the principle of separation of powers into legislative, executive and judicial functions, but the respective jurisdiction of the different bodies is defined and their relationships ordered in a shared hierarchy.

The highest legislative body is the General Conference, which is composed of clergy and laity. It has "full legislative power over all matters distinctively connectional...."[134] Its authority over the lower conferences is manifested in its constitutional power:

> **To define and fix the powers and duties** of annual conferences, provisional conferences, missionary conferences and missions, and of central conferences, district conferences, charge conferences and congregational meetings.[135]

The annual conference is defined as the "basic body in the Church" and is given certain constitutional powers, most importantly the right to ratify amendments to the constitution. Aside from these limited constitutional powers, the annual conference "shall discharge such duties and exercise such powers **as the General Conference under the Constitution may determine**."[136]

The authority of the District Conferences is also defined by the General Conference:

> There may be organized in an annual conference, district conferences composed of such persons and invested with **such powers as the General conference may determine**.[137]

Likewise for the Charge Conferences:

> There shall be organized in each charge a charge conference composed of such persons and invested with **such powers as the General Conference shall provide**.[138]

The Jurisdictional Conferences have a limited role, primarily that of electing bishops. The basis of representation in these conferences is fixed by the General Conference. It is the duty of the Jurisdictional Conferences to "cooperate in carrying out such plans for [the bishops'] support as may be determined by the General Conference."[139] In addition to their limited constitutional authority, the Jurisdictional Conferences may "make such rules and regulations

for the administration of the work of the Church within the jurisdiction, subject to such powers as have been or shall be vested in the General Conference."[140] Thus, a complex layer of legislative conferences is made subordinate to the General Conference, primarily by means of its explicit constitutional prerogative to determine the powers of the subordinate bodies.

The General Conference has the same prerogative with respect to the bishops, who are the administrative body in the church. The General Conference is given the authority to "define and fix the powers, duties and privileges of the episcopacy..."[141] Thus, the constitutional office of bishop is subject in the performance of that office to the authority granted by the legislative body. In this respect, the executive body in the United Methodist Church differs from that in the United States Constitution in that the President of the United States is given constitutional power independent of the legislature.

Finally, the United Methodist Church has a Judicial Council with the authority in specified instances to determine the constitutionality and legality of actions taken by the General Conference and lower conferences. It is the final arbiter of all matters within its jurisdiction: "All decisions of the Judicial Council **shall be final**."[142]

The constitution of the United Methodist Church demonstrates that a hierarchical structure can be readily identified even when the structure is complex and the power is shared. Notwithstanding the complexity, the hierarchical relationship is articulated in each case through the use of familiar legal categories, particularly subordination and finality.

Taken together, this examination of the polities of other churches regarded as hierarchical demonstrates how that relationship is communicated in appropriate legal categories notwithstanding widely-differing ecclesiologies and a variety of church bodies and officers, including pontiff, patriarch, bishops, synods, assemblies, conferences and judicial councils. What they have in common despite the obvious differences is that in each case the key relations of supremacy, subordination, preemption and finality are made explicit in precise legal language and not left to presumption or inference.

IV. HISTORICAL CONTEXT

The extent to which TEC will be considered hierarchical under the law will be determined by its constitution as it exists today. As the analysis above demonstrates, however, the TEC constitution is for the most part silent on the authority and supremacy of the General Convention. It is also largely silent on the authority of the constituent dioceses, containing very few limits on their autonomy. Does that silence imply absolute and supreme power in a general body as is characteristic of clearly hierarchical churches or does the silence instead imply concurrent authority? Because the relevant constitutional language specifying the authority of the General Convention is virtually unchanged since the first draft of the

constitution, the understanding of the initial drafters becomes relevant. We have already seen that the drafters of TEC's first constitution included sophisticated lawyers well-versed in the legal vocabulary of hierarchy. It is inconceivable that these lawyers, who were developing the hierarchical structure of the United States government at precisely this time, would have intended a centralized church hierarchy to be inferred from silence. They knew full well from their own experience that silence meant an absence of hierarchy.

What follows is an analysis of what was understood by three key groups that participated in the formation of TEC: first, the church in Pennsylvania, which conceived and then engineered the organization of the general church; second, the church in Virginia, which was the largest and most important of the colonial churches and which remained subject to state control during the crucial period when TEC's constitution was first drafted; and finally, the churches in Connecticut and New England, which had major ecclesiological differences with the other colonial churches and refused to join the general convention until 1789 when a compromise was reached permitting them to retain their unique governance. This discussion is a summary of a longer treatment contained in Appendix A to this paper, which examines in detail the events summarized here.

Pennsylvania: The Architect

One thing on which all students of TEC history can agree is that its architect and founding father was the Reverend (later Bishop) William White of Philadelphia. It was White who in 1782, while the Revolutionary War was still in progress, devised the outline of the future structure of the American church in his pamphlet, *The Case of the Episcopal Churches in the United States Considered*—and note the plural in the title. It was White who in May 1784 implemented the plan set forth in *The Case* in Pennsylvania by calling a convention of clergy and laity in that state that adopted six Fundamental Principles for the proposed church. It was White who later in 1784 presented those fundamental principles to the first interstate convention of clergy and laity, which agreed principles for a national constitution. It was White who in 1785 hosted and chaired the first general convention of the American Episcopal Churches at his parish in Philadelphia at which the first national constitution was drafted. It was White who was the first American (along with Samuel Provoost of New York) to be consecrated bishop by the Church of England in 1787. It was White who forged the crucial compromise with the "High Church" group led by the Scottish-consecrated bishop, Samuel Seabury of Connecticut. It was White who with Seabury constituted the first House of Bishops at the first unified convention in 1789. It was White who served as bishop for almost fifty years until 1836, most of that time as Presiding Bishop. It was White who stated late in his life that he never deviated from the plan set out in *The Case.* And it was White more than anyone else who understood the form of governance intended by the first constitution.

White published *The Case* in 1782, and it became the blueprint for the later union of the various state churches. On its cover page was the following quote from Hooker: "to make new articles of faith and doctrine, no man thinketh it lawful; new laws of government, what commonwealth or government is there which maketh not at one time or another."[143] Whatever else one may say of White's plan, later implemented, all agree that it was new.

The larger part of White's booklet is devoted to establishing two propositions about the role of the episcopacy: that it was desirable and that it was not necessary. It is unclear which of these propositions was more controversial at the time. The early part of his argument, however, addressed issues more germane to the topic of this paper. Looking ahead presciently, if prematurely, White outlines a plan for a church that will no longer be established. In place of being bound by the sovereign law, he foresees churches coming together in "voluntary associations."[144] He then introduces one of his fundamental principles, "to retain in each church every power that need not be delegated for the good of the whole."[145] The superintendence by the "superior order of clergy," bishops, "will therefore be confined to a small district, a favorite idea with all moderate episcopalians."[146] There would be three levels of such association, the largest of which, the continental, would meet only every three years and "make such regulations, and receive appeals in such matters only, as shall be judged necessary for their continuing one religious communion."[147] He distinguishes three types of matters for these various levels of association, doctrine, worship and government. On the latter, he adopts the principle that "the great art of governing consists in not governing too much."[148] This presumption of governance at the lowest level, repeatedly articulated in White's blueprint, is known in jurisprudence as the principle of "subsidiarity," and is often found in legal systems. Subsidiarity is an important concept in Roman Catholic political philosophy, and the Windsor Report concludes that it is a hallmark of the Anglican Communion.[149]

The first step in implementing the plan set out in *The Case* occurred in May 1784, when representatives of congregations in Pennsylvania met and agreed to confer with representatives from other states. The Pennsylvania delegates were to be "bound by the following instructions, or fundamental principles," including "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."[150] Subsidiarity is again articulated as a fundamental principle of the new body.

The Pennsylvania delegation met with representatives from other state churches at the first interstate convention in New York later in 1784.[151] This convention proposed a union pursuant to a "general ecclesiastical constitution" based on certain "fundamental principles." The first of these principles was the following: "that there be a general convention of the episcopal church in the United States of America." That language subsequently became the first sentence of the first article in the "General Ecclesiastical Constitution" drafted at the first general convention in Philadelphia in 1785, then remained the first article in the constitution ratified in 1789, and remains to this day the first sentence of the first article of TEC's constitution. Nothing more than those six words, "there shall be a general convention," has ever been added to the constitution to define the powers, limitations, authority or supremacy of the general convention. What exists today in terms of the authority of the general convention is what was proposed at that first convention in New York in 1784.

That 1784 convention also urged the churches in the several states to associate themselves "agreeably to such rules as they shall think proper" and send deputies to the general

convention to meet the next year.[152] In May 1785 the church in Pennsylvania did just that and adopted an "act of association" for their church. Meeting at White's parish and with his being unanimously chosen as the president, the former Church of England congregations in Pennsylvania agreed to associate under the name "the protestant episcopal church in the state of Pennsylvania." The second provision of this act of association was "that there shall be a convention of the said church." Unlike the draft general constitution, however, this language in the Pennsylvania constitution was supplemented by an explicit "applicability" clause: "all the acts and proceedings of the said convention shall be considered as the acts and proceedings of the protestant episcopal church in this state." This constitutional authority, however, was subject to an express proviso: "that the same shall be consistent with the fundamental principles agreed on at the two aforesaid meetings in Philadelphia and New York."[153] Thus, by White's actions over the course of 1784-85, the architect of TEC demonstrated the fundamental polity of the episcopal churches in the United States. There is a general convention, but its acts are not made supreme over the acts of the state conventions. The Pennsylvania convention is made the lawful authority in that state. And it is expressly recognized that both constitutions are consistent with the fundamental principle of subsidiarity agreed at the outset: "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."

Later that year, in September 1785, the first "general convention" met at White's parish in Philadelphia, unanimously elected him as its president and agreed a proposed "General Ecclesiastical Constitution." Article I contained the sole provision concerning the authority of the General Convention: "That there shall be a General Convention of the Protestant Episcopal Church in the United States of America." In addition to agreeing a proposed constitution, the 1785 convention also adopted a plan for securing bishops consecrated in England.[154] This was no easy matter, coming after two decades of widespread public controversy on this very subject both in the colonies and England itself. Indeed, Seabury had been denied consecration in England only the year before. But after receiving certificates from the governor of New York, the governing council of Pennsylvania, the President of Congress and the Secretary of State, arranging the personal intervention by the American ambassador to England, John Adams, with the Archbishop of Canterbury, and ultimately benefiting from an act of Parliament dispensing with the oath of supremacy, White and Samuel Provoost, rector of Trinity Church, New York, were consecrated bishops at Lambeth Palace on February 4, 1787.[155]

Not present at either the 1785 convention or the two that met in 1786 to make revisions to the constitution, particularly on matters related to the prayer book, and to further the plan for obtaining bishops from England, were either Seabury, already consecrated a bishop in Scotland, or those "eastern states" (New England) that recognized Seabury as their bishop. The years between 1785 and 1789 were largely spent on prayer book revision and agreeing changes to the *structure,* but not the *authority,* of the general convention to accommodate the Seabury "high church" group.[156] The eventual compromise was to separate the general convention into a "House of Clergy and Lay Deputies" and a "House of Bishops" and to remove the requirement that each state be represented by both clergy and laity. (There was

never any requirement that states have bishops.) With these constitutional changes, the Seabury churches attended the 1789 convention, Connecticut with a clergy-only deputation, and White and Seabury formed the first House of Bishops—Provoost being unwilling to attend a convention at which Seabury was present. The key provision of the constitution relating to the authority of the general convention, Article I, remained essentially unchanged since 1784: "There shall be a General Convention of the Protestant Episcopal Church in the United States of America."[157]

As will be seen below, the crucial compromise with Seabury was made possible by White's original "fundamental principle" that governance be reserved to the state churches where possible. In the words of the committee of General Convention, including White, inviting Seabury to join them: "The admission of yours and the other Eastern Churches is provided for upon your own principles of representation; while our Churches are not required to make any sacrifices of theirs."[158]

Virginia: Legal Restrictions

For the church in Virginia, the organization of a general church presented a different problem. Under Virginia law, it was still controlled by the state assembly and could not even send an official delegation to the first convention in New York in 1784.[159] At the end of the Revolutionary War, the state of Virginia accounted for approximately forty percent of the Anglicans in America.[160] Its state church was over twice the size of the second largest, Maryland, which was also an established church.[161] Virginia itself was the largest and most important of the thirteen colonies. Four of the first five Presidents were Virginians, as were the primary draftsmen of both the Declaration of Independence and the Constitution. Although, unlike Pennsylvania or Connecticut, the Virginia church did not play a leading role in organizing the general church (for reasons that will become clear), its participation in that church was crucial to the viability of the general church if for no other reason than its size and importance.

The Church of England was the established church in Virginia during colonial times. During the century and a half prior to the revolution, there had been a long struggle in Virginia for control of the state church. The local vestries fought in turn the governor, the clergy, a potential bishop and finally the king himself, and in each case established themselves as the real ecclesiastical authority in Virginia.[162] 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. One exasperated governor described a vestry with whom he was fighting as "Twelve Bishops."[163] Scholars have characterized the situation variously as "semi-feudal," the vestry as the "cornerstone in the structure...their status had long-range 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."[164] 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."[165] As late as 1785, the power given to the vestries in

the first Virginia Episcopal constitution was criticized by James Madison, the statesman and future President (not to be confused with his namesake and cousin, the first bishop of Virginia who had actually presided at the convention that adopted the constitution) as a potential "monster of oppression."[166]

With the revolution and Virginia's independence, the status of the church in that state eventually changed completely, but much more slowly than is generally recognized. There was no one "Declaration of Disestablishment," just as there was no one "Law of Establishment." The establishment consisted of a web of laws (Thomas Jefferson counted 23 enacted between 1661 and independence), and these were repealed piecemeal over the quarter century after the revolution.[167] Even today there is no agreement as to when disestablishment occurred in Virginia. The leading work on Virginia's early church history, Eckenrode's *Separation of Church and State in Virginia,* notes variously (1) that the act in 1776 suspending payment of Anglican clergy from tax revenues "in effect, destroyed the establishment. Many dates have been given for its end, but it really came on January 1, 1777 [when the act took effect]"; (2) that it was the incorporation of the episcopal church in Virginia in 1784 that "may be said to have completed disestablishment.... And yet at the same time the civil authority maintained a certain hold on the church.... [S]eparation of church and state was not entirely complete"; (3) that the famous "Statute for Religious Freedom," drafted by Thomas Jefferson in 1779 but not enacted until 1786 at the instigation of Madison, "destroyed the last vestige of the establishment....And yet the divorce between church and state had not reached that absolute quality which Madison deemed desirable"; (4) that it was the *repeal* in 1787 of the act incorporating the Episcopal church (in 1784) that "definitely marks the separation of church and state in Virginia"; and finally (5) ends with the confiscation by the state of the glebe lands (essentially endowments) of the church in 1802 and notes that it was this act that was "the culmination of the radical spirit in Virginia."[168]

One early historian concluded that 1776 marked the "absolute divorce between Church and State."[169] Jefferson, the primary advocate of disestablishment, concluded that 1779 was when the "establishment of the Anglican church [was] entirely put down," but also described the legal status of religion in 1781 as "legal slavery, under which a people have been willing to remain, who have lavished their lives and fortunes for the establishment of their civil freedom."[170] The country's leading scholar on religion and the First Amendment, former professor, now United States Appeals Court Judge Michael McConnell, puts the date of disestablishment in Virginia as 1786, as does a prominent historian of Virginia's church.[171] The United States Supreme Court, more cautiously, characterized that year, the year of Jefferson's famous statute, as the "climax" of disestablishment.[172] The analysis of the majority of the Virginia assembly in the 1790's, later followed by one of the Virginia Court opinions upholding the confiscation of the glebes, was that the disestablishment of the *Church of England* occurred in 1784 with the incorporation of the Virginia Episcopal Church, but that this same act thereby made the *Virginia Episcopal Church* the *second* established church, at least until the incorporation act was itself repealed in 1787.[173] The Diocese of Virginia's own history is the most realistic of any of these, noting that disestablishment was a process that began in 1784 and ended with the confiscation of the glebes in the nineteenth century.[174]

An even more cautious assessment would be that disestablishment was a long process beginning in 1776 and ending only after 1802. The only thing that is clear is that the legal status and rights of the new Virginia Episcopal Church were uncertain throughout most of this period. Even what is clear in hindsight, such as the fact that no clerical salaries were paid from public revenues after 1776, was not at all obvious at the time. The state assembly continued to consider bills for public funding of religion until 1785, often suspending funding for only a year or even six months at a time, and as late as 1784 the fiercest opponent of public funding, James Madison, considered a "general assessment" for this purpose a foregone conclusion.[175] What all of these analyses emphasize, however, is that the years between 1784 (the first year after the Revolutionary War ended) and 1787 were crucial. Those are also the years in which the general constitution of the Episcopal Church was conceived, drafted and initially agreed to by both the general church and the church in Virginia.

Because the assent without any recorded debate by Virginia, then comprising forty percent of the country's Anglicans, to the polity of the general constitution has much to tell us about what that polity is, the chronology of Virginia's disestablishment is reviewed in detail in Appendix A. Although the overall situation is complex, the facts relevant to the subject of this paper are quite clear:

First, during the crucial two-year-plus period from late 1784 to early 1787, the Virginia Episcopal Church was either established or quasi-established in the state of Virginia. The best analysis, widely accepted at the time by the Virginia legislature and courts, was that the 1784 act of incorporation established the Virginia Episcopal Church as the state church. Ultimate control of its governance rested with the state assembly. It enjoyed distinctions and privileges not available to other churches; its government was in fact as well as in theory regulated by the legislature; and it was given possession of the property formerly belonging to the Church of England. It was not until 1787, with the repeal of the incorporation act, that the Virginia church was free for the first time to govern its own affairs. When its 1787 convention passed a new ordinance on vestries to replace the provisions in the repealed state statute, the ordinance recited that "in consequence of" the repeal "the several powers of government, and discipline in the said Church, are returned to the members at large."[176] This analysis was accepted by the Episcopal Church at the time, its opponents, the Virginia legislature and a key opinion of the Virginia courts. It is also now recognized by historians.[177]

Second, it was precisely during this period that the first general convention drafted, the second Convention approved, and the Virginia convention also approved the first general constitution of the national church. The sole language specifying the authority of the general convention, "there shall be a General Convention," was adopted then and remains unchanged in substance to this day. This language was summarily agreed at both general and Virginia conventions without meaningful recorded debate. Clearly, the Virginia church could not delegate to a general convention powers it did not legally possess itself.

Third, the Virginia church was in the midst of a quarter-century-long and ultimately unsuccessful struggle to retain the property formerly owned by the Church of England, and its position was that it was the same entity as the former established church, differing only in its

"appellation" and that its parishes and vestries were the same as the former vestries that originally acquired the property.

Fourth, without regard to the property issue, both the Virginia incorporation statute and the Virginia Episcopal constitution continued the long-standing practice of giving most governing power to the parish vestries.

In this context it is inconceivable that Virginia would cede without debate absolute and supreme authority to a newly-created national church body. It could not legally do so, and it would not have done so had it been able. The record clearly shows that the general convention was focused on matters of doctrine and worship (the Creeds and the Prayer Book), that Virginia instructed its delegates only on those two matters and that those were precisely the two matters over which the Virginia church was given complete authority by the state assembly. Governance was a different matter. Authority there rested first with the state assembly and secondarily with the vestries. White's plan for a general constitution offered subsidiarity as its governance, and that is what Virginia accepted.

Connecticut and New England: Retaining "Independency"

It is necessary at this point to return briefly to White's publication of *The Case* in 1782, specifically to his discussion of the episcopacy, which was only alluded to above. Most of White's argument was devoted to showing that bishops, although desirable, are not essential to the church. Due to the circumstances in which the Anglican churches in the newly-independent states found themselves, a means of ordaining clergy was becoming an urgent matter. White proposed a superior order of clergy for this purpose, designated either as bishops or presidents, who would be elected by conventions of clergy and laity and consecrated by clergy, not English (or other) bishops.[178]

But White's proposal was not only influenced by the exigencies of the former colonial churches, it was also an expression of his absorption of the democratic political philosophy of Locke. The "consent of the governed" was not only the basis for the new civil governments in the former colonies, it was also the foundational principle of White's ecclesiology. Hence, his support for governance by mixed clergy-laity conventions and the principle of subsidiarity. His proposal was widely considered, and not only by critics, as a form of presbyterianism or even congregationalism.[179]

The publication of *The Case* had the unintended consequence of catalyzing those in New England who had a decidedly different understanding of the church. In 1783, the clergy in Connecticut met in convocation and after discussing White's proposal took two significant actions. First, they wrote White rejecting completely his plan: "Really, Sir, we think an Episcopal Church without Episcopacy, if it not be a contradiction in terms, would, however, be a new thing under the sun....As far as we can find, it has been the constant opinion of our Church in England and here, that the Episcopal superiority is an ordinance of Christ...."[180] Second, they elected Samuel Seabury their bishop (their first choice, Jeremiah Leaming, having declined) and sent Seabury immediately to England to gain consecration.[181] When the

English bishops refused, he of course was consecrated in November 1784 by the non-juring bishops in Scotland.[182]

As has been noted elsewhere, there were two inconsistent ecclesiologies at play. The New England or "Eastern" churches (Connecticut was joined by the churches in Massachusetts, New Hampshire and Rhode Island and significant clergy in New York and New Jersey) had an "apostolic" or "catholic" view, in which church authority derives from Christ through the apostles, and church governance is by the bishop and his clergy. The White or "Southern" view was "democratic" or "presbyterian" with church authority coming from the consent of the governed, ultimately the laity, and governance by voluntary associations of clergy and laity at the lowest level appropriate.[183] For the purposes of the present analysis, the significant fact is that neither side contemplated absolute and supreme power residing in a *general* convention. This fact explains the silence regarding General Convention's authority in the constitution, and the lack of controversy concerning the authority of that convention, as opposed to its organization, in the negotiations that led eventually to the hybrid that was neither catholic and apostolic nor democratic and presbyterian, but something else—something "unique" or a "new thing under the sun."

The differences between the two sides were not only philosophical. Seabury and the Eastern Churches objected to the requirement in the first general constitution, drafted at the 1785 general convention, that bishops be treated simply as members along with the clergy and laity of the one body in the convention, that state delegations must include both clergy and laity, and that laity could participate in the deposition of clergy. Most importantly, at least in the amount of time spent in argumentation, they objected to the proposed prayer book adopted in 1785 that made major changes to the English prayer book, including deleting the Nicene and Athanasian creeds and modifying the Apostle's creed, which greatly encouraged the incipient Unitarians at King's Chapel in Boston.[184] (Seabury's chief nemesis, Provoost, was on record with the opinion that the "doctrine of the Trinity has been a bone of contention since the first ages of Christianity, and will be to the end of the world. It is an abstruse point, upon which great charity is due to different opinions....")[185]

Seabury, by then bishop of Connecticut, stated the basis of an eventual compromise as early as 1785 in a letter to William Smith, one of the primary leaders of the general convention and first President of the House of Deputies: "I do not think it necessary that the Churches in every State should be just as the Church in Connecticut is, though I think that the best model. Particular circumstances, I know, will care for particular considerations."[186] But the Southern churches were in no mood to compromise; at the 1785 and 1786 general conventions they passed resolutions at the urging of Provoost that were hostile to Seabury, adopted an extensively revised prayer book, and were then anticipating the consecration of three bishops in England for an "English line" of bishops uncontaminated by Scotland.[187]

By 1788, however, things had changed. The proposed prayer book was so unpopular it was made optional by the 1786 general convention, the Archbishops of Canterbury and York had voiced virtually the same objections to that book as those made by Seabury, and there was no hope of getting three bishops in the "English line" anytime soon, both Maryland and Virginia

having rejected the bishops elected in their states.[188] White, ever the diplomat, began to work for compromise.

His first overture in 1788 was to Samuel Parker, rector of Trinity Church in Boston, a Seabury ally and a key intermediary: White expressed his desire for a "junction" with Connecticut and stated "If there are any matters in which we do not think exactly alike, you may rely on it that there is an accommodating spirit on our part."[189]

Parker replied to White on January 20, 1789: "It appears to me that a union might take place, even if the constitutions of government and the Liturgy varied a little in the States. An absolute uniformity of government and worship, perhaps, will never take place under a Republican form of civil government, and where there is such a variety of sentiments in religious matters. Still I conceive we may become so far united as to be one Church, agreeing in the general principles of discipline and worship."[190]

On the eve of the 1789 General Convention Seabury wrote to White: "I…beg you to believe that nothing on my part shall be wanting to keep up a friendly intercourse, and the nearest possible connections with you, and with all the Churches in the United States, that our different situations can permit."[191]

Three weeks later, Seabury wrote William Smith: "I agree with you, that there may be a strong and efficacious union between Churches where the usages are different." And later: "I have, however, the strongest hope that all difficulties will be removed by your convention – that the Connecticut Episcopacy will be explicitly acknowledged, and that Church enabled to join in union with you, without giving up her own independency."[192]

The letters from Seabury to White and Smith were read to the General Convention. It then unanimously passed a resolution affirming Seabury's consecration (Provoost not being present due either to illness or the likely accommodation of Seabury), agreed to amend the constitution to make lay delegations permissive rather than mandatory and to create a separate House of Bishops, and passed a resolution asking Seabury, Provoost and White jointly to consecrate a new bishop for Massachusetts, thus merging the English and Scottish lines, upon receiving consent from the English bishops.[193] That consent was never received and the consecration never happened, but Seabury was largely satisfied by these actions and agreed to attend an adjourned convention.[194]

The convention also sent a joint letter to the English bishops requesting their consent to the proposed consecration and discussing the state of their agreement. This letter quoted Samuel Parker's position that "[s]ome little difference in government may exist in different States, without affecting the essential points of union and communion," and also the portion of Seabury's letter to Smith in which he agreed "that there may be a strong and efficacious union between Churches where the usages are different."[195]

On August 16, 1789, a committee of the convention, including White, formally advised Seabury of the convention's actions and invited him to join them. It stated explicitly the basis of the convention's decisions: the "good and wise principles admitted by you as well as us, viz: that there may be a strong and efficacious union between Churches, where the usages are in some respects different." It noted: "The admission of yours and the other Eastern Churches is provided for upon your own principles of representation; while our Churches are not required to make any sacrifice of theirs." Later it concluded that "experience will either demonstrate that an efficacious union may be had upon these principles; or mutual goodwill and a further reciprocation of sentiments will eventually lead to a more perfect uniformity of Discipline and well as of Doctrine."[196]

As authorized by the convention, Smith sent a separate letter to Seabury on the same day in which he endorsed their agreement on the "healing and charitable idea of 'an efficacious union and communion in all Essentials of Doctrine, as well as Discipline, notwithstanding some differences in the usages of Churches." He added that he was confident "that we shall attain a perfect uniformity in all our Churches: or, what is, perhaps, alike lovely in the sight of God, a perfect harmony and brotherly agreement wherever, through local circumstances and use, smaller difference may prevail."[197]

On August 26, 1789, Seabury wrote Parker that he would be going to the adjourned convention, but said that the other bishops' actions and letter to the English bishops "shew a degree of thralldom, both to the Convention and English Archbishops, that ought not to be."[198]

On October 2, 1789, after additional changes to the constitution concerning the House of Bishops, Seabury and the Eastern churches agreed to the constitution, and Seabury and White separated from the new House of Clerical and Lay Deputies to form the first House of Bishops, Provoost never being in attendance. The two houses then agreed to a new prayer book that restored the Nicene Creed and improved the communion office as requested by Seabury, while keeping many of the less controversial changes in the proposed 1785 book.[199]

One cannot read this correspondence leading to the compromises that produced the union of the Eastern and Southern states without acknowledging that it was a union that preserved differences and state church "independency," not one that produced uniformity. Indeed, the committee of the convention stated explicitly that this was the basis of its actions. Reflecting this understanding, Connecticut was represented at the 1789 convention only by clergy while Virginia was represented only by a layman. And Seabury continued to make his own changes to the liturgy, notwithstanding the agreed upon prayer book and the acknowledgment by all sides that uniformity of worship was the primary function of the General Convention.[200]

Bishop Marshall concludes his history of these events with this unattributed quote: "the Episcopal Church had become one, 'as far as its state would allow.'"[201] TEC's

historiographer, J. Robert Wright, has this description of the polity produced by these organizing conventions: a federation of local churches.[202] TEC's official commentary on its constitution and canons notes that its polity reflects "its origins in a federation of equal and independent Churches in the several states."[203] Most of the historians of TEC's origins agree. See, for example, Mills (confederation); Hanckel (confederation); William J. Seabury (federation of independent dioceses); Brydon (federated union; sovereign dioceses); Dawley (federal union); Andrews (federal union); Salomon (federation); Muller (confederation); and Stotsenburg (confederated dioceses).[204]

In William Smith's words, the structure finally agreed was a "harmony" of different voices with different parts, not a solo by a single voice.

V. LEGAL CONTEXT

Having examined in detail both the current language of TEC's constitution and its history and also having compared TEC's polity with that of other religious bodies, in this section we will turn once again to the law. We are now in a position to summarize the law governing religious societies in this country and then to draw the conclusions that follow from this presentation of facts and law.

General Background: The Law of Voluntary Associations

When William White described the new Episcopal Church as a grouping of "voluntary associations" he was speaking with legal precision. Churches are in fact one of a number of organizations that are governed by that area of law dealing with what are called "voluntary associations." This point was made by the United States Supreme Court at the outset of a long line of cases dealing with ecclesiastical disputes:

> Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, and of the extent to which it has agitated the intelligent and pious body of Christians in whose bosom it originated, we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.[205]

Those with any familiarity of the law in this area tend to focus so narrowly on a handful of decisions dealing primarily with the Establishment and Free Exercise Clauses of the First Amendment that they tend to forget that those issues are only one aspect of the law governing churches. For example, in one of its TEC cases, the Supreme Judicial Court of Massachusetts opened its discussion of whether TEC is a hierarchy with this statement:

> We consider, first, the issue of hierarchy. The question is relevant because "[i]t is in disputes involving hierarchical churches that civil courts must tread more cautiously, for the First Amendment 'permits hierarchical [churches] to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.'" (Quotations in the original; internal citations omitted.)[206]

One would think from reading this that the courts are free to run roughshod over congregational churches and that nonreligious associations had no constitutional protection whatsoever. In fact, all associations enjoy the rights identified in this quote and all have, in fact, the constitutional protection of the Freedom of Assembly guaranteed in the First Amendment.[207] Thus, it is necessary to keep in mind the Supreme Court's starting point: the primary law for religious societies is that dealing with all voluntary associations.

Voluntary associations are traditionally defined as a body of three or more members joined by mutual consent for a common purpose.[208] They are distinguished in the law from partnerships by the fact that a partnership must be conducted for profit. It is universally understood that the legal basis for voluntary associations is the law of contract.[209] More specifically, associations, like partnerships, are also governed by principles of the law of agency on the theory that those who manage the affairs of the association are the agents of its members.[210]

All of these principles are so foundational in the law that they are seldom articulated, but the issues addressed in this paper, particularly the legal effect of silence or ambiguity in TEC's constitution, require that these fundamental principles be recognized explicitly. First, parties to a contract are generally free to strike whatever bargain they wish so long as their objective is not contrary to law or public policy. This is true of parties to any contract, but all associations, not just religious ones, have a First Amendment freedom that limits the power of the state to regulate their contract of association. Religious associations have double First Amendment protection, both under the Freedom of Assembly Clause applicable to all associations and under the Free Exercise Clause protecting religious practices.

Second, although the express terms of a contract reflecting the parties' agreement are honored, many rules of construction have been developed over the centuries to guide courts in interpreting contracts when the express terms of the agreement are not clear. Among those relevant to the issues addressed in this paper are the rules that express terms prevail over customs, specific terms prevail over general terms, technical terms and terms of art are given their technical meaning, the intentions of the parties will be given effect when possible, and those intentions are revealed by the preambles to contracts.[211]

Third, when essential terms are omitted from a contract, they can in some cases be supplied by the courts according to established principles of law. The courts will not, and indeed cannot, re-write the contract for the parties. In most cases, if an essential term is lacking, there is no enforceable agreement. But in some instances, the legal presumptions are so settled that the parties are presumed to have intended this outcome. These are often referred to as "default

rules."[212] One of the best developed of these default rules concerns termination of a contract when no time period is specified in the agreement. Numerous cases have arisen over the years concerning employment contracts, agency relationships, franchise agreements and leases. In such cases, the courts "imply" into the contract one of two terms: either that the agreement is terminable at will or, in cases where that works an injustice (e.g., where a franchisee has made a substantial investment) that the agreement is terminable upon reasonable notice.[213] The presumption in all cases is that absent express agreement to the contrary, the agreement is not intended to be irrevocable.

Fourth, one area of contract law, that governing principals and agents, is so well-developed that it has become a separate body of law. Among the settled rules of agency are that the principal retains authority to act for itself unless the agent is given exclusive authority, i.e., the principal and agent have concurrent authority unless their agreement specifies otherwise.[214] In addition, the appointment of an agent is revocable at will. This rule is so basic that it applies even if the agency appointment is said to be irrevocable.[215] This does not shield a principal from liability for damages, if there are any to the agent, but a principal has an absolute right to choose its agent, including the right to terminate one.

Fifth, having identified these general principles of contract and agency law, their applicability to voluntary associations is straightforward. The constitution of an association is a contract among its members and is enforced as such. The members of the association are those who are parties to the contract and who participate in the selection of those who manage its affairs.[216] The members may be individuals, as in the case of the local country club or local parish, or juridic persons, such as corporations or other associations, e.g., one well known association that has been the subject of much litigation is the National Collegiate Athletic Association ("NCAA"), whose members are colleges and universities.[217] Similarly, the United Church of Christ is explicitly an association of associations.[218] The managers of an association are the agents of its members.[219] The express terms of the association's constitution govern the relationships among the members and between the members and managers, subject only to civil law rights, typically constitutional rights, protected by the civil authorities. In the absence of express terms, the usual rules of contract interpretation apply.[220]

One area that has often been litigated is the right of an association to exclude or expel members and the right of members to withdraw. On this latter point, courts apply what the Supreme Court has called the "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."[221] This "often cited rule" applies equally to members in religious and nonreligious associations.[222]

Law Derived from the First Amendment

With these general principles established, it is appropriate to consider the legal implications of the First Amendment, which guarantees the "free exercise" of religion. There is a line of Supreme Court cases addressing this issue that is now familiar even to non-lawyers. It must be emphasized, however, that the First Amendment does not set out a body of law governing

religious bodies; it does just the opposite. It frees churches to organize and govern themselves as they see fit. Thus, in general terms, it constitutionally guarantees what was articulated earlier regarding the general right of associations, and indeed all parties to a contract, to reach agreement on their own terms. These cases do not supersede the general law already discussed; instead they articulate the principles courts must use when applying these principles.

In the context of issues now relevant to TEC, the First Amendment cases address two questions: (1) what is the role of the courts in ecclesiastical disputes; and (2) since the answer to the first question involves issues of church hierarchies, how are such hierarchies to be determined.

On the first of these questions, the basic rule was first articulated a century ago in the case of *Watson v. Jones*:

> we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the questions of discipline or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them in their application to the case before them.[223]

This rule is simply an application of the general rules for voluntary associations already discussed:

> the right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.[224]

The general rule articulated in *Watson v. Jones* is clearly correct as far as it goes, but it avoids addressing a difficult problem. How does the court determine which body is the "highest judicatory" of the religious body to which the court must defer? Although the *Watson* opinion recognized that this was a potential problem, it was able to avoid the issue on the facts presented in that case.[225]

Watson was decided in 1872, and in the century following that decision courts, including the Supreme Court, grappled with the inevitable problem presented by the "deference to the highest judicatory rule." By 1979, the Supreme Court realized that the problems were sufficiently difficult that it encouraged courts to apply "neutral principles of law" to property disputes, a primary, but not the only, source of church litigation. In *Jones v. Wolf,* the dissent argued that the deference articulated by *Watson* was constitutionally required, prompting the majority to summarize the problems that analysis presents:

> 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. (Internal citations omitted.)[226]

The Court, both majority and dissent, have now come completely to grips with the nature of the judicial inquiry required by the deference standard. They recognize that it involves detailed analysis of which body constitutes the highest judicatory in the particular dispute and that the "locus of control" could be ambiguous. The dissent thought this "careful examination" was constitutionally mandated; the majority disagreed, concluding that, far from being required, in some cases it would even be impermissible.

What the *Jones v. Wolf* decision demonstrates is that courts do not, and constitutionally

cannot, merely accept the pleading of the general church body as that of the highest judicatory and proceed to enforce the will of that body. If the court is to defer to the highest judicatory, it must determine what that body is, whether it has acted, and what its decision is. The kind of scrutiny this can entail, and the perils that accompany it, are shown in a subsequent case in an opinion by Justices Marshall and Brennan, both of whom were in the majority in the major cases of the 1960's and 1970's, some of the most important of which were authored by Brennan. A dissenting group at a church in Virginia brought an action against their pastor alleging he had been fired by a duly held meeting of the church's governing body. The state court issued a preliminary injunction against the pastor barring him from church premises, appointed a commissioner to hold a church election, and then entered a permanent injunction against the pastor when a majority of the church voted in this election to fire him. He appealed to the United States Supreme Court, which refused to hear his case.

It is an elementary principle of Supreme Court jurisdiction that a denial of review does not constitute a decision on the merits and is without any authority as precedent. No one can conclude therefore that the Court approved the extraordinary measures taken by the Virginia court. What is significant, however, is the opinion by Marshall and Brennan dissenting from the court's refusal to hear the case. Their opinion outlines what the proper procedure should have been:

> The court took respondents' word [the dissenting members] that they represented the Church without any evidence, although petitioner [the pastor] contested the fact. The court made no inquiry into whether the alleged meeting at which petitioner was fired actually took place, whether a quorum was present, or how the members voted. Lacking any evidence that the authorized decisionmaker had acted, the court induced a decision on its own initiative. This participation in the decisionmaking of an ecclesiastical body is both dangerous and unwarranted. Courts have no business "helping" a religious organization to make its wishes known. The court in this case should have limited its inquiry to the terms of petitioner's employment contract and to whether the Church had taken the actions requisite to terminating that contract. If the authorized body had indeed terminated petitioner's employment, then the court could validly have taken steps to enforce the Church's right to keep petitioner off Church property. Until respondents, who bore the burden of proof, demonstrated that such termination had taken place, the court's only proper response was to do nothing.[227]

It must be emphasized that this opinion was by two of the strongest advocates on the Court of judicial disentanglement from religious disputes. And it is easy to see why the courts prefer to avoid this kind of inquiry in matters touching on the First Amendment, but when a "neutral principles" analysis is not appropriate either the courts engage in this kind of analysis or they "do nothing."

This brings us to the second question raised by the First Amendment cases: when the

courts must undertake the "careful examination" necessary to determine the highest judicatory in a particular dispute, what factors do they consider? The primary case on this subject is *Serbian Eastern Orthodox Diocese v. Milivojevich,* with an opinion by Brennan. The case involved the removal of a bishop in an American diocese by the "Holy Assembly of Bishops," the council of bishops of the Serbian church, and the 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:
>
> > "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.[228]

Thus, the very questions at issue in that case were committed to a body explicitly identified in the church's constitution as "highest" and "final." 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 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 approval; the bishop swore an oath of perpetual obedience to the Holy Assembly; and the diocesan constitution confirmed its subordinate status.[229]

Note that (1) the diocesan constitution explicitly made the diocese subordinate to a body, the Holy Assembly, not a constitution; (2) the general body had a constitutional mechanism of prior review and approval of diocesan amendments that permitted it to exercise control over the diocese; (3) the diocesan provisions were still in place at the time of the litigation; and (4) the diocesan constitution merely "confirmed" the hierarchical status of the Holy Assembly, which was clearly articulated in the expected legal language in many places in the general constitution.

What permitted the Supreme Court to determine the highest judicatory in the *Serbian Eastern Orthodox* case was that these factors, including the general constitution, the diocesan constitution and the oath, clearly identified the *same body* as the highest and final authority. There is no such thing as a generic "highest judicatory." It is a specific body in a specific

church for a specific matter. In some churches, such as the Roman Catholic Church or the Serbian Orthodox Church, the highest judicatory is easy to spot and is constant. In other cases, such as the United Methodist Church, it is more difficult to identify and varies from issue to issue. In TEC, it may be impossible for a civil court to identify any judicatory as highest at the level of the general church.

Cases Concluding TEC Is Hierarchical

There are a number of cases finding TEC to be "hierarchical." As the preceding discussion indicates, that finding by itself is not the relevant finding for a particular case. In any dispute before the court, the question it must decide is which church body is the highest judicatory for that particular dispute. A finding that a church is "hierarchical" tells us that there is a hierarchy, but does not tell us what it is. Most of the cases that have been decided up until now have contained little analysis, let alone the "careful examination" of TEC's polity that is constitutionally required. In most, all the parties have conceded that TEC is hierarchical. Not surprisingly given the analysis in the second section of this paper, the courts sometimes reach conclusions that are clearly erroneous.

But the most important point is this: *all of the cases hold that a diocese or bishop is the hierarchy vis-a-vis a parish; not a single one adjudicates between the General Convention and a diocese.* For example, in *Dixon v. Edwards,* the court found that the bishop was "the highest ecclesiastical authority" in a dispute with a parish in the diocese. It reached this decision notwithstanding its earlier conclusion that "Episcopalism (sic) is said to mean 'the theory that in church government supreme authority resides in a body of bishops and not in any one individual.'"[230] Similarly, in *Parish of the Advent v. Diocese of Massachusetts,* the court concluded that "the constitution and canons detail the authority exercised by PECUSA *through a diocese* to each local parish." (Emphasis added.)[231] In *Diocese of Massachusetts v. DeVine,* the court found that "Because [TEC] is a hierarchical religious organization, …we are required under settled law to defer to the determination of *diocesan authority* within the hierarchy of the religious organization." (Emphasis added.)[232] *See also Moses v. Diocese of Colorado* ("the diocese 'is governed by its bishop and a diocesan convention'")[233]; O*lston v. Hallock* (bishop was authority)[234]; *Hiles v.Diocese of Massachusetts* (court defers to diocesan disciplinary bodies).[235] There have been some cases that simply equate the diocese with the national or general church in decisions that uphold diocesan determinations. *See e.g., Diocese of Albany v. Trinity Episcopal Church*[236]*; Bennison v. Sharp*[237]*; Diocese of New Jersey v. Graves*[238]*; Bishop and Diocese of Colorado v. Mote*[239]*; Tea v. Diocese of Nevada.*[240] *Accord Bjorkman v. Diocese of Lexington* (church is hierarchical but awarding property to parish under neutral principles analysis).[241]

And then there are cases that uphold the authority of a diocese or bishop over a parish, but, like the court in *Dixon,* become hopelessly confused when attempting to describe TEC's governance. For example, in *Trinity-St Michael's Parish v. Diocese of Connecticut,* the court reached all of the following conclusions: (1) "bishops have authority to govern their dioceses"; (2) bishop is "the ecclesiastical authority"; (3) TEC is governed by General Convention and

"its own" constitution and canons; (4) dioceses and local parishes are bound by their "own supplementary constitution and set of canons"; (5) diocese of Connecticut accedes to and "adopts" the general constitution and "acknowledged the authority of the *Episcopal Church* (sic) thereunder" (emphasis supplied); and (6) Connecticut law "*explicitly* codified, as a matter of state law, the polity, constitution and canons of [TEC]" (emphasis in original).[242] One hardly knows what to make of remarks that appear to be based on a distinction between the diocese and the Episcopal Church and state law codifying TEC polity, but these statements were *dicta* in any event since the decision upheld the authority of the diocese. After reviewing the constitution of TEC in detail, one cannot fault the Connecticut court too much for the same confusion is found in the constitution itself. But this case demonstrates the truth of the Supreme Court's conclusion in *Jones v. Wolf* that even after a careful examination, a church's polity may be so ambiguous that proceeding is constitutionally impermissible and the court can "do nothing."

VI. CONCLUSION

Having carefully considered the terms of TEC's constitution, the terms of other church constitutions, the historical context of TEC's formation, and the law governing religious associations in this country, it is now possible to draw conclusions regarding the legal status of TEC.

First, the highest authority in TEC is the diocese. This follows from the legal principles just discussed. The TEC constitution will be recognized by the law as a contract among its members and given effect according to its terms. In particular, the law will not presume that terms that are not in the constitution are to be implied even if they are found in the governing documents of other churches regarded as hierarchical. Such terms would include "highest," "supreme," "final," "sole," "exclusive," and others suggesting hierarchical status. Technical terms that are found in the TEC constitution, such as "accession," will be given their technical meanings. In accordance with general principles of law applicable to voluntary associations, the "members" of TEC's General Convention are its dioceses. It was the state churches (dioceses) that created the constitution, including the General Convention; it is duly constituted dioceses, already organized, that accede to union with the General Convention; and it is the dioceses that vote at General Conventions and choose the managers of TEC, through the deputies they elect and pursuant to the constitution's unique voting rules that give each diocese one vote in each order. The constitution specifies the bishop and standing committee as "the" ecclesiastical authority in the diocese. It gives General Convention virtually no control over dioceses, while dioceses collectively control the General Convention. When resort is made to civil courts in internal TEC disputes, the courts are constitutionally required either to apply neutral principles of law or to make a careful examination of TEC's constitution to determine the highest judicatory in TEC designated by that constitution to adjudicate that dispute. When courts undertake this examination they will likely conclude, as they have in all cases to date, that the highest judicatory is the diocese or its bishop. There is no provision in TEC's constitution making General Convention the "highest" or "final" authority; there is no unambiguous evidence that this was the intention of the founders; the

jurisdictional boundaries of dioceses are strictly protected by TEC's constitution; General Convention plays virtually no role in the selection of bishops; it does not dictate or even have the right of prior review of diocesan constitutional amendments; it does not organize dioceses, but merely approves their joining General Convention; and bishops do not pledge allegiance or obedience to General Convention. On this last point, it is not sufficient that bishops promise to uphold the "discipline" of TEC; the question presented is what that discipline is. The constitution indicates it is governance with the diocese as the highest authority.

Second, this is a constitutional structure that cannot be changed by canon. Any attempt to do so would be unconstitutional as an attempt to amend the constitution without following the required procedures. As an unconstitutional act, it would be void *ab initio.* The only legal basis for diocesan deference to the General Convention is a provision in the *diocesan* constitution voluntarily accepting the general canons for so long as the diocese maintains that provision. That is a matter of diocesan, not general, polity.

Third, this analysis does not address questions of hierarchy within a diocese. These are matters governed by the constitutions of the individual dioceses. As far as TEC's constitution is concerned, dioceses are permitted to organize themselves under a variety of polities, from strongly hierarchical to congregational.

Fourth, there is no requirement that dioceses maintain sacramental communion with other dioceses or the Presiding Bishop. TEC does not have a primate in the ecclesiological sense of a bishop of a primary see by which communion is defined. The Presiding Bishop has no see, and there is no constitutional provision for establishing or maintaining communion with that office.

Fifth, there is no prohibition on a diocese's entering into communion with a body not in communion with TEC. Pursuant to the "abandonment of communion" canon, a bishop can be deposed from TEC for performing episcopal acts for a body not in communion with TEC without the requisite consent, but that consent would fall within the purview of the diocesan bishop. This prohibition does not apply in any event to dioceses themselves. Indeed, there is no requirement that a diocese have a TEC bishop or any bishop for that matter. A diocese could legally be run by its Standing Committee as the ecclesiastical authority with a non-TEC bishop available for episcopal acts. Similarly, in recent years certain dioceses have considered "alternative primatial oversight," which implies in part the transference of the Presiding Bishop's very limited authority to another primate. A related concept consistent with the constitution is "alternative primatial communion" by which a diocese would enter into an inter-communion agreement with another primate that would bestow sacramental communion but would not entail transfer of the very limited authority possessed by the Presiding Bishop. Such an agreement is not prohibited by TEC's constitution, and no consent would be required.

Sixth, in view of the foregoing, it is questionable whether assent by TEC to an Anglican covenant would effectively bind dioceses that do not wish to enter into such a covenant. Conversely, there is no prohibition on dioceses' entering into such a covenant on their own behalf if TEC did not wish to assent. Indeed, diocesan accession may be the only means of

binding TEC's dioceses given the principles of diocesan autonomy discussed in this paper.

Seventh, there is no prohibition on a diocese's revoking its accession to TEC's constitution and withdrawing from TEC. Pursuant to settled law, in the absence of constitutional provisions to the contrary, members of a religious association can withdraw from membership at any time. For reasons discussed above, the "members" of General Convention are TEC's dioceses, who therefore can revoke their accession clauses and withdraw from General Convention whenever they choose to do so. This is the subject, of course, of pending and threatened litigation, but the undeniable fact is that there is no such prohibition in the TEC constitution. Absent proof that there is a judicatory in TEC higher than a diocese that can forbid such withdrawals, which is highly questionable for reasons discussed at length in this paper, the lack of an express prohibition on withdrawal is conclusive when the principles of voluntary compact are considered. The duration of a contract is determined by the provisions of the agreement. And on this point the law of contract is clear: in the absence of a specified term, a contract is terminable. In the case of voluntary associations, mere agreement to join does not constitute agreement to remain. As the Supreme Court noted in W*atson v. Jones,* such initial agreement is presumed whenever anyone joins any association. But members are free to leave at any time absent an agreement to the contrary. In the case of religious bodies, this is a right protected by the First Amendment, which cannot be revoked without the member's, in this case diocese's, consent. Dioceses remain in TEC at their pleasure.

Finally, although ecclesiology is beyond the scope of this paper, and most certainly beyond the competence of its author, it can hardly escape notice that the Archbishop of Canterbury has consistently promoted an understanding of the church as the local Eucharistic fellowship gathered around a bishop. He has characterized more general structures in the church as abstractions. In a recent message to an ecumenical conference, the Archbishop gave his qualified endorsement to the view that the "church is not an organization controlled from a single point." His qualification was to emphasize the interdependence of the particular or diocesan churches.[243] "Interdependent dioceses not controlled from a single point" is a succinct summary of TEC's polity.

As the history of TEC's founding surveyed above demonstrates, it is unlikely that TEC's legal structure, specified in the first instance by sophisticated lawyers who simultaneously were creating this country's legal institutions and churchmen who can only be described as quasi-presbyterian, intentionally reflects the Archbishop's catholic ecclesiology. But if that was not the intention of the human authors of TEC's constitution, but only the product of the Divine Providence they referenced in their first preamble, the congruence between the Archbishop's understanding of the church and the civil law's analysis of TEC's legal structure is readily apparent.

APPENDIX A: HISTORICAL CONTEXT

The extent to which TEC will be considered hierarchical under the law will be determined by its constitution as it exists today. As the analysis in the main body of this paper demonstrates, however, the TEC constitution is for the most part silent on the authority and supremacy of the General Convention. It is also largely silent on the authority of the constituent dioceses, containing very few limits on their autonomy. Does that silence imply absolute and supreme power in a general body as is characteristic of clearly hierarchical churches or does the silence instead imply concurrent authority? Because the relevant constitutional language specifying the authority of the General Convention is virtually unchanged since the first draft of the constitution, the understanding of the initial drafters becomes relevant. What follows in some detail is an analysis of what was understood by three key groups that participated in the formation of TEC: first, the church in Pennsylvania, which conceived and then engineered the organization of the general church; second, the church in Virginia, which was the largest and most important of the colonial churches; and finally, the churches in Connecticut and New England, which had major ecclesiological differences with the other colonial churches and refused to participate in the general conventions until 1789 when a compromise was reached.

Pennsylvania: The Architect

One thing on which all students of TEC history can agree is that its architect and founding father was the Reverend (later Bishop) William White of Philadelphia. It was White who in 1782, while the Revolutionary War was still in progress, devised the outline of the future structure of the American church in his pamphlet, *The Case of the Episcopal Churches in the United States Considered*. It was White who in May 1784 implemented the plan set forth in *The Case* in Pennsylvania by calling a convention of clergy and laity in that state that adopted six Fundamental Principles for the proposed church. It was White who later in 1784 presented those fundamental principles to the first interstate convention of clergy and laity, which agreed principles for a national constitution. It was White who in 1785 hosted and chaired the first general convention of the American Episcopal Churches at his parish in Philadelphia at which the first national constitution was drafted. It was White who was the first American (along with Samuel Provoost of New York) to be consecrated bishop by the Church of England in 1787. It was White who forged the crucial compromise with the "High Church" group led by the Scottish-consecrated bishop, Samuel Seabury of Connecticut. It was White who with Seabury constituted the first House of Bishops at the first unified convention in 1789. It was White who served as bishop for almost fifty years until 1836, most of that time as Presiding Bishop. It was White who stated late in his life that he never deviated from the plan set out in *The Case.* And it was White more than anyone else who understood the form of governance intended by the first constitution.

White published *The Case* in 1782, and it became the blueprint for the later union of the various state churches. On its cover page was the following quote from Hooker: "to make new articles of faith and doctrine, no man thinketh it lawful; new laws of government, what commonwealth or government is there which maketh not at one time or another."[244]

Whatever else one may say of White's plan, later implemented, all agree that it was new.

The larger part of White's booklet is devoted to establishing two propositions about the role of the episcopacy: that it was desirable and that it was not necessary. It is unclear which of these propositions was more controversial at the time. The early part of his argument, however, addressed issues more germane to the topic of this paper. Looking ahead presciently, if prematurely, White outlines a plan for a church that will no longer be established. In place of being bound by the sovereign law, he foresees churches coming together in "voluntary associations."[245] He then introduces one of his fundamental principles, "to retain in each church every power that need not be delegated for the good of the whole."[246] The superintendence by the "superior order of clergy," bishops, "will therefore be confined to a small district, a favorite idea with all moderate episcopalians."[247] There would be three levels of such association, the largest of which, the continental, would meet only every three years and "make such regulations, and receive appeals in such matters only, as shall be judged necessary for their continuing one religious communion."[248] He distinguishes three types of matters for these various levels of association, doctrine, worship and government. On the latter, he adopts the principle that "the great art of governing consists in not governing too much."[249] This presumption of governance at the lowest level, repeatedly articulated in White's blueprint, is known in jurisprudence as the principle of "subsidiarity," and is often found in legal systems. Subsidiarity is an important concept in Roman Catholic political philosophy, and the Windsor Report concludes that it is a hallmark of the Anglican Communion.[250]

White again invokes Hooker on the distinction between doctrine and worship on the one hand and governance on the other and the different bodies competent in each: "The most natural and religious course of making laws, is that the matter of them be taken from the judgement of the wisest in those things which they are to concern. In matters of God, to set down a form of prayer, a solemn confession of the articles of the christian faith and ceremonies meet for the exercise of our religion, it were unnatural not to think the pastors and bishops of our souls, a great deal more fit than men of secular trades and callings—howbeit, when all that the wisdom of all forms can do is done for the devising of laws for the church, it is the general consent of all that giveth them the form and vigor of laws."[251] This distinction was to become crucial to the organization of the new church as the various state churches agreed on uniformity of doctrine and worship, but largely independent governance.

The next steps in White's plan are documented in the journals of the Episcopal Church in the state of Pennsylvania, which begin with a meeting held in White's house in March 1784. The purpose of this meeting of clergy and lay deputies from three Philadelphia congregations was to consider "the formation of a representative body of the episcopal church in this state." Those present "were of the opinion, that a subject of such importance ought to be taken up, if possible, with the general concurrence of the episcopalians in the United States."[252] This was the first step to implement the plan set out in *The Case* of "voluntary associations" in the states joining together to form a national structure.

In May 1784, representatives of congregations throughout the state met again and, after

electing White chairman, appointed a standing committee to confer with representatives from other states and assist in framing a constitution for approval by the congregations in Pennsylvania. This standing committee was to be "bound by the following instructions, or fundamental principles," including "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."[253] Subsidiarity is again articulated as a fundamental principle of the new body.

Not surprisingly, White was elected chairman of the standing committee established by this meeting. In October 1784 White and several of his fellow standing committee members met in New York with representatives of seven other states at what was the first convention of clergy and laity of the episcopal churches in the United States.[254] A ninth state was present, but not officially represented. Virginia, which accounted for approximately forty percent of the Anglicans in the colonies at the end of the Revolutionary War, could not participate: "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."[255] The Virginia church was at the midpoint of a quarter-century long struggle, ultimately unsuccessful, to preserve its unique rights and properties as the new state of Virginia embarked on a long process of disestablishing the Church of England in Virginia that would not be completed until after 1800.

This interstate convention in New York elected the Reverend William Smith, then of Maryland, as its president.[256] Smith had formerly succeeded Benjamin Franklin, the founder, as provost of the College of Philadelphia (now known as the University of Pennsylvania) and had been the leading Anglican clergyman in the state of Pennsylvania. During the war he moved to a parish in Maryland, where the Anglican church was established, and became the leader of the clergy there. In 1783 he had been chosen by the Maryland clergy to be their first bishop, but the laity were overwhelmingly opposed, both to the concept of a bishop in general and to Smith in particular. He was never certified by the church in Maryland and never became its bishop. Later, he was instrumental in gaining the participation of Seabury and the eastern states at the first unified General Convention in 1789, at which he preached the opening sermon, hosted Seabury in his home, arranged honorary degrees from the College of Philadelphia for key Seabury allies, authored crucial compromise resolutions, and then became the first President of the House of Clerical and Lay Deputies. Apart from White and Seabury, Smith was the most important of the "founding fathers" of the Episcopal Church.[257]

The convention meeting in New York proposed a union pursuant to a "general ecclesiastical constitution" based on certain "fundamental principles." The first of these principles was the following: "that there be a general convention of the episcopal church in the United States of America."[258] That language subsequently became the first sentence of the first article in the "General Ecclesiastical Constitution" drafted at the first general convention in Philadelphia in 1785, then remained the first article in the constitution ratified in 1789, and remains to this day the first sentence of the first article of TEC's constitution. Nothing more than the six words, "there shall be a general convention," has ever been added to the constitution to define the powers, limitations, authority or supremacy of the general

convention. What exists today in terms of the authority of the general convention is what was proposed at that first convention in New York in 1784.

That 1784 convention also urged the churches in the several states to associate themselves "agreeably to such rules as they shall think proper" and send deputies to the general convention to meet the next year.[259] In May 1785 the church in Pennsylvania did just that and adopted an "act of association" for their church. Meeting at White's parish and with his being unanimously chosen as the president, the former Church of England congregations in Pennsylvania agreed to associate under the name "the protestant episcopal church in the state of Pennsylvania." The second provision of this act of association was "that there shall be a convention of the said church." Unlike the draft general constitution, however, this language in the Pennsylvania constitution was supplemented by an explicit "applicability" clause: "all the acts and proceedings of the said convention shall be considered as the acts and proceedings of the protestant episcopal church in this state." This constitutional authority, however, was subject to an express proviso: "that the same shall be consistent with the fundamental principles agreed on at the two aforesaid meetings in Philadelphia and New York."[260] Thus, by White's actions over the course of 1784-85, the architect of TEC demonstrated the fundamental polity of the episcopal churches in the United States. There is a general convention, but its acts are not made supreme over the acts of the state conventions. The Pennsylvania convention is made the lawful authority in that state. And it is expressly recognized that both constitutions are consistent with the fundamental principle of subsidiarity agreed at the outset: "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."

Later that year, in September 1785, the first "General Convention" met at White's parish in Philadelphia, unanimously elected him as its president and agreed a proposed "General Ecclesiastical Constitution." Article I contained the sole provision concerning the authority of the General Convention: "That there shall be a General Convention of the Protestant Episcopal Church in the United States of America." In addition to agreeing a proposed constitution, the 1785 convention also adopted a plan for securing bishops consecrated in England.[261] This was no easy matter, coming after two decades of widespread public controversy on this very subject both in the colonies and England itself. Indeed, Seabury had been denied consecration in England only the year before. But after receiving certificates from the governor of New York, the governing council of Pennsylvania, the President of Congress and the Secretary of State, arranging the personal intervention by the American ambassador to England, John Adams, with the Archbishop of Canterbury, and ultimately benefiting from an act of Parliament dispensing with the oath of supremacy, White and Samuel Provoost, rector of Trinity Church, New York, were consecrated bishops at Lambeth Palace on February 4, 1787.[262]

Not present at either the 1785 convention or the two that met in 1786 to make revisions to the constitution, particularly on matters related to the prayer book, and to further the plan for obtaining bishops from England, were either Seabury, already consecrated a bishop in Scotland, or those "eastern states" (New England) that recognized Seabury as their bishop.

The years between 1785 and 1789 were largely spent on prayer book revision and agreeing changes to the *structure,* but not the *authority,* of the general convention to accommodate the Seabury "high church" group.[263] The eventual compromise was to separate the general convention into a "House of Clergy and Lay Deputies" and a "House of Bishops" and to remove the requirement that each state be represented by both clergy and laity. (There was never any requirement that states have bishops.) With these constitutional changes, the Seabury churches attended the 1789 convention, Connecticut with a clergy-only deputation, and White and Seabury formed the first House of Bishops—Provoost being unwilling to attend a convention at which Seabury was present. The key provision of the constitution relating to the authority of the general convention, Article I, remained essentially unchanged since 1784: "There shall be a General Convention of the Protestant Episcopal Church in the United States of America."[264]

Two actions of White's Pennsylvania church during this period shed further light on the relationship between the state churches and the general convention. First, in 1789, the Pennsylvania convention instructed its bishop (White) and his council to "revise the canons of the church of England to prepare a set for the government of the protestant episcopal church in this state."[265] No reference was made to the general convention or its constitution and canons. Second, by the time of the 1790 Pennsylvania convention, William Smith had given up on the possibility of becoming the bishop of Maryland and had returned to Pennsylvania. He had just served as President of the House of Deputies at the 1789 General Convention, which had enacted the first set of national canons. According to the Pennsylvania journal, he "informed the convention, that, in consequence of the 16th canon of the general convention, he considered himself a member of the convention of this church, and accordingly attended, to take his seat." This announcement provoked considerable debate and resulted in the rejection of two resolutions to accommodate Smith, one of which would only have given him a seat while a committee considered the question. Eventually the committee recommended, and the convention passed, a resolution granting seats to resident clergy without a parochial charge. "Upon which, the Rev. Dr. Smith took his seat in the convention." Neither the various convention resolutions nor the recorded debate made any reference to the general convention or its canons, and the initial response to Smith's contention demonstrates that the Pennsylvania church, with White presiding, did not regard the general convention canon as controlling.[266]

This is not to say that Pennsylvania was in any way hostile or adverse to the General Convention. They were in fact its biggest promoters. But even they did not regard the General Convention as the supreme and final authority over the state church. Their attitude can be seen in a resolution passed by the state convention in 1791, which noted that a general canon required that a state have a standing committee and that Pennsylvania instead had a Council of Advice with whom the bishop consulted. They then designated their committee a "Council of Advice and Standing Committee" and specified its rules of procedure, but did not otherwise change its authority.[267] They undoubtedly regarded this as the full cooperation with the General Convention expected of the states, but like the issue of clergy membership in their convention, they also considered this a matter for their own decision.

Virginia: Legal Restrictions

At the end of the Revolutionary War, the state of Virginia accounted for approximately forty percent of the Anglicans in America.[268] Its state church was over twice the size of the second largest, Maryland, which was also an established church.[269] Virginia itself was the largest and most important of the thirteen colonies. Four of the first five Presidents were Virginians, as were the primary draftsmen of both the Declaration of Independence and the Constitution. Although, unlike Pennsylvania or Connecticut, the Virginia church did not play a leading role in organizing the general church (for reasons that will become clear), its participation in that church was crucial to the viability of the general church if for no other reason than its size and importance.

Prior to the revolution, Virginia was a royal colony that was subject to the king and British parliament and enjoyed only such home rule as was granted by these rulers. The king's representative was a royal governor, who had a council of advice. There was also a state legislature, the House of Burgesses (and the name is significant), whose acts were subject to veto by the king and his advisers. The Church of England was established in Virginia, and ecclesiastical jurisdiction was nominally exercised by the Bishop of London. In fact, his role was basically limited to ordaining and licensing clergy who were sent to him by the local authorities in Virginia.[270]

Who those authorities were was the subject of considerable controversy over the century and a half prior to the revolution. But the final outcome was clear. The local vestries fought in turn the governor, the clergy, a potential bishop and finally the king himself, and in each case established themselves as the real ecclesiastical authority in Virginia. 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. One exasperated governor described a vestry with whom he was fighting as "Twelve Bishops."[271] Scholars have characterized the situation variously as "semi-feudal," the vestry as the "cornerstone in the structure...their status had long-range 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."[272] 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."[273] As late as 1785, the power given to the vestries in the first Virginia Episcopal constitution was criticized by James Madison, the statesman and future President (not to be confused with his namesake and cousin, the first bishop of Virginia who had actually presided at the convention that adopted the constitution) as a potential "monster of oppression."[274]

The contest between the governors and the vestries was over the appointment of clergy, which eventually became the prerogative of the vestries unless they refused for a year to select one.[275] The contest with the clergy was over salaries, the practice of hiring them on a yearly contract subject to dismissal, and the removal of unwanted clergymen.[276] The contest with the

king was over his veto of an act limiting clergy pay. This resulted in several court cases between vestries and theirs ministers who were suing for back wages. The most famous of these cases was thought to be so hopeless that no experienced lawyer would defend the vestry, which was then forced to rely on an unknown lawyer named Patrick Henry. His argument, which was more about the king than the law, prompted the jury to return a verdict of one penny in damages.[277] One historian noted that his argument was "more treason than logic."[278] When one of these cases was appealed to England, the appeal was finally dismissed on technical grounds, the king having enough to worry about in the colonies without defending unpopular clergy.[279] And the notion of an American bishop was thoroughly rejected in colonial Virginia, prompting the assembly to pass a resolution in 1772 publicly thanking those who had led the fight against the episcopacy.[280]

These contests between the vestries and others were not, however, contests between church and state. The vestries *were* the state. They exercised considerable civil responsibility, including local judicial, welfare and taxing powers.[281] These contests were subsidiarity in action, with the local power wresting control from the king, governor and bishop over its local ecclesiastical affairs, but the state, most powerful in religious affairs at the local level, was still very much in control of religion.[282] Nothing demonstrates this better than the fact that on the eve of the revolution, many Baptist clergy were incarcerated in Virginia jails for preaching in violation of the established religious laws.[283]

With the revolution and Virginia's independence, the status of the state church eventually changed completely, but much more slowly than is generally recognized. There was no one "Declaration of Disestablishment," just as there was no one "Law of Establishment." The establishment consisted of a web of laws (Thomas Jefferson counted 23 enacted between 1661 and independence), and these were repealed piecemeal over the quarter century after the revolution.[284] Even today there is no agreement as to when disestablishment occurred in Virginia. The leading work on Virginia's early church history, Eckenrode's *Separation of Church and State in Virginia,* notes variously (1) that the act in 1776 suspending payment of Anglican clergy from tax revenues "in effect, destroyed the establishment. Many dates have been given for its end, but it really came on January 1, 1777 [when the act took effect]"; (2) that it was the incorporation of the episcopal church in Virginia in 1784 that "may be said to have completed disestablishment.... And yet at the same time the civil authority maintained a certain hold on the church.... [S]eparation of church and state was not entirely complete"; (3) that the famous "Statute for Religious Freedom," drafted by Thomas Jefferson in 1779 but not enacted until 1786 at the instigation of Madison, "destroyed the last vestige of the establishment....And yet the divorce between church and state had not reached that absolute quality which Madison deemed desirable"; (4) that it was the *repeal* in 1787 of the act incorporating the Episcopal church (in 1784) that "definitely marks the separation of church and state in Virginia"; and finally (5) ends with the confiscation by the state of the glebe lands (essentially endowments) of the church in 1802 and notes that it was this act that was "the culmination of the radical spirit in Virginia."[285]

One early historian concluded that 1776 marked the "absolute divorce between Church and State."[286] Jefferson, the primary advocate of disestablishment, concluded that 1779 was when

the "establishment of the Anglican church [was] entirely put down," but also described the legal status of religion in 1781 as "legal slavery, under which a people have been willing to remain, who have lavished their lives and fortunes for the establishment of their civil freedom."[287] The country's leading scholar on religion and the First Amendment, former professor, now United States Appeals Court Judge Michael McConnell, puts the date of disestablishment in Virginia as 1786, as does a prominent historian of Virginia's church.[288] The United States Supreme Court, more cautiously, characterized that year, the year of Jefferson's famous statute, as the "climax" of disestablishment.[289] The analysis of the majority of the Virginia assembly in the 1790's, later followed by one of the Virginia Court opinions upholding the confiscation of the glebes, was that the disestablishment of the *Church of England* occurred in 1784 with the incorporation of the Virginia Episcopal Church, but that this same act thereby made the *Virginia Episcopal Church* the *second* established church, at least until the incorporation act was itself repealed in 1787.[290] The Diocese of Virginia's own history is the most realistic of any of these, noting that disestablishment was a process that began in 1784 and ended with the confiscation of the glebes in the nineteenth century.[291]

An even more cautious assessment would be that disestablishment was a long process beginning in 1776 and ending only after 1802. The only thing that is clear is that the legal status and rights of the new Virginia Episcopal Church were uncertain throughout most of this period. Even what is clear in hindsight, such as the fact that no clerical salaries were paid from public revenues after 1776, was not at all obvious at the time. The state assembly continued to consider bills for public funding of religion until 1785, often suspending funding for only a year or even six months at a time, and as late as 1784 the fiercest opponent of public funding, James Madison, considered a "general assessment" for this purpose a foregone conclusion.[292]

What all of these analyses emphasize, however, is that the years between 1784 (the first year after the Revolutionary War ended) and 1787 were crucial. Those are also the years in which the general constitution of the Episcopal Church was conceived, drafted and initially agreed to by both the general church and the church in Virginia. To determine what the Virginia church did in agreeing that "there shall be a general convention" and agreeing to participate in that convention it is necessary to look carefully at the interconnected chronologies of disestablishment in Virginia and the designing and adoption of TEC's polity and first constitution. In reviewing these intertwined events, it is essential to keep in mind McConnell's insight that "free exercise of religion," "disestablishment," and "separation of church and state" are three distinct concepts, not one, and that "establishment of religion" itself is a bundle of concepts, including mandatory religious observance, proscription of dissenting religions, public funding of religion, public control of doctrine, worship or governance and public control of clerical personnel.[293] This insight goes a long way toward explaining how and why disestablishment in Virginia occurred so slowly.

1776-1783: The War Years

One of the first acts of the newly independent Virginia was to adopt in 1776 a constitution that included a "Declaration of Rights." The famous sixteenth article of the Declaration,

drafted by Patrick Henry, George Mason and James Madison, guaranteed the "full and free exercise" of religion.[294] Henry disclaimed that this was an attack on establishment.[295] Jefferson noted that "when they proceeded to form on that declaration the ordinance of government, instead of taking up every principle declared in the bill of rights, and guarding it by legislative sanction, they passed over that which asserted our religious rights, leaving them as they found them."[296]

That same year, many petitions were then submitted to the assembly both for and against continuing the establishment. The Virginia Episcopal clergy urged the continuation of the established church and noted that their livelihoods had been guaranteed when they undertook their special training.[297]

The assembly then passed an act in 1776 that (1) repealed all criminal sanctions against the exercise of religion; (2) exempted dissenters from taxes to support the Anglican church "as it now is, or hereafter may be established"; (3) continued the vestries, including their civil powers; (4) "reserved to the use of the church by law established" all the property, including glebes, of the Anglican church; (5) explicitly reserved the question of a general assessment to support the Christian churches; (6) suspended for one year only payment of clergy from public taxes; and (7) issued instructions for compiling a list of "tithables," the property on which taxes were assessed.[298]

In 1777 and 1778, the suspension of clergy pay was extended twice each year.[299]

In 1779, the conservatives offered a bill to establish a general Christian church, but this was not accepted, nor was Jefferson's statute for religious freedom. Instead, a bill was passed repealing completely (not suspending) the provisions for paying clergy but otherwise continuing the vestries with civil powers.[300]

From 1780 until the end of the war in 1783, petitions continued to be submitted both for and against the establishment, but no major legislation was passed.[301]

1784

The year began with religious issues at the top of the legislative agenda in Virginia, most importantly a "general assessment" to pay all Christian clergy, not just Episcopalian, from public revenues.[302] There appeared to be overwhelming public support for this measure and its champion was the most influential man in state government, Patrick Henry. By this point, the Virginia assembly, once united in opposition to the king, had divided into parties of "conservatives," who to exaggerate only slightly wanted things pretty much the way they were before the revolution only without the king, and the "radical democrats," who again to exaggerate only a little were more imbued at this point with the spirit of the incipient French revolution than the philosophy of John Locke from the previous century. The leading conservative by this point, repeating a pattern often found in revolutions, was the former radical, Patrick Henry. The leading radical democrats were Thomas Jefferson and James Madison.[303] The most famous Virginian, George Washington, was not active in state politics

during this period, but was a known supporter of public funding of the church.[304]

In May, the largest dissenting groups, the Baptists and Presbyterians, presented petitions to the assembly demanding repeal of laws that continued to restrict their clergy in conducting weddings, give Episcopal vestries civil powers, and give any distinction or preference to the Episcopal church. They also objected to the Episcopal church's continued ownership of property that had been acquired with tax revenues from all citizens.[305]

In June, the Virginia Episcopal clergy met in a convention and submitted a petition to the assembly requesting legislation on five matters: (1) repeal of laws requiring ordination and licensing of clergy by the Church of England in order to ensure a succession of new clergy in Virginia; (2) new legislation restricting voting on vestry membership to members of the Episcopal church, in exchange for which they were willing to give up the vestries' civil powers; (3) repeal of all laws specifying the doctrine, worship and governance of the Episcopal church and new legislation placing those powers in the hands of the clergy in Virginia by act of their convention; (4) since "cavils may arise" about property ownership, to prevent litigation by "securing forever to the Protestant Episcopal Church in Virginia the Churches, glebe lands, donations and all other property belonging to the said *established* Church"; and (5) "the patronage and care of the Christian religion," which "must merit the encouragement of all public bodies constituted for the government of mankind." They represented to the assembly that the Episcopal church had only altered the "appellation" by which the established church was known, staking out the primary argument the Virginia Episcopalians would continue to use for fifteen years in their fight to keep the property of the previous establishment.[306] There was protracted debate in the Virginia assembly on these topics for the remainder of the year.[307]

In October, the first interstate convention of Episcopal clergy and laity met in New York and agreed on the "fundamental principles" of governance for a general church, including the first principle, "there shall be a general convention." One clergyman from Virginia, David Griffith, attended as an observer, the journal noting that the "clergy of that state, being restricted by laws yet in force there, were not at liberty to send delegates, or to consent to any alterations in the order, government, doctrine or worship of the church."[308]

In December, the Virginia assembly passed the "Act of Incorporation," which granted some but not all of the requests in the Episcopal clergy petition. This statute (1) incorporated not the clergy in convention, but separately for each parish the vestry and the minister and vested title to all property in the vestry; (2) permitted the vestries to retain all income from the property up to 800 pounds per year; (3) gave the vestries authority to govern themselves but mandated that they decide all matters by majority vote, that the minister have only one vote and no veto and required the vestries to submit an annual report to the court of record; (4) dissolved the existing vestries, provided for the election of new vestries with only members of the Episcopal church eligible to vote and specified the ongoing voting procedures; (5) repealed all former laws relating to vestries, the support, appointment, qualifications or duties of ministers, the doctrine or worship (but not governance) of the church; and (6) authorized the "Protestant Episcopal Church within this commonwealth" to regulate the doctrine, discipline

and worship of the church at conventions consisting of two delegate from each parish, with a required quorum of forty members, "provided, that no rules or regulations shall be instituted that shall be repugnant to the laws and constitution of this commonwealth, or by which a minister may be received into, or turned out of a parish contrary to the consent of a majority of a vestry."[309]

Eckenrode notes that even eight years after the revolution and a new Virginia constitution guaranteeing the "free exercise of religion" the assembly was still recognized to have "the power to fix church doctrines and regulations."[310] Even Madison voted for this measure, although he confided privately that it was a tactical maneuver to forestall the more harmful, from his perspective, general assessment.[311] He succeeded in postponing consideration of that measure until the next year.[312]

1785

In June, the Virginia Episcopal church held its first convention. Included among the delegates were a number of the leading conservatives in the assembly, including the speaker of the House of Delegates and a future governor. Also present were some of the democrats, including one who would later as a judge on the Court of Appeals rule against the Episcopal Church in the suit challenging the confiscation of the glebes.[313] The convention began by reviewing the act of incorporation and the report of the New York convention and the "fundamental principles" of the proposed general constitution. Without recorded debate, the convention, resolved to "unite in a general ecclesiastical constitution" and accepted four of the proposed fundamental principles, including the first "there shall be a general convention." They reserved judgment on the principle relating to doctrine and liturgy to await the next general convention and objected to the proposed voting provisions (lay and clergy voting separately with concurrence of both required).[314] They selected delegates to the general convention and gave them written instructions having to do solely with "doctrine and worship."[315] They separately considered the "rules for the order, government, and discipline of the Protestant Episcopal Church in Virginia" and then adopted a forty-three section constitution, which as a whole entrenched the power of the vestries and limited the powers of bishop and clergy.[316] It was this constitution that attracted the ire of James Madison.

On the legislative front, this year was notable for a fierce political and petition battle by the dissenting churches, mainly Baptist and Presbyterian, joined by the radical democrats, to defeat the general assessment. Madison circulated his famous *Memorial and Remonstrance Against Religious Assessments* as part of this effort, which was so successful that the general assessment was defeated without even being brought to a vote. This was in fact the end of efforts to pay clergy from tax revenues.[317]

In September, the first "General Convention" was held in Philadelphia. William White was elected President and Virginia's David Griffith, who was only an observer the year before, was chosen for the second highest position, Secretary. All of the "fundamental principles" agreed the year before were affirmed the first day without debate except for the one regarding doctrine and worship, which was referred to committee for extensive work and

led to numerous readings and debate over the next nine days. The convention agreed on a proposed "General Ecclesiastical Constitution," the first article of which continued to read "there shall be a general convention." It prepared a plan for obtaining bishops and drafted and sent a letter to the Archbishops of Canterbury and York on behalf of all the delegates. The journal indicates that most of the debate concerned revision to the prayer book.[318]

1786

With the failure of the general assessment in 1785, Madison was emboldened to introduce Jefferson's Statute for Religious Freedom, which had first been introduced in the assembly in 1779. The time was now right, and it passed with minor amendments in January.[319] Although, it was declaratory in nature and repealed no existing statutes (the preamble, which is largely devoted to a discussion of natural rights, comprises well over half of the statute), it articulated the principles that would govern church-state relations in Virginia in the future. Those principles are that there will be no compulsion to frequent or support any religion, no penalty or discrimination for religious belief, and the freedom to profess any religious opinion. Its passage had no immediate legal effect, but is nonetheless regarded by some as the key event in this process.[320]

In May, the second Virginia convention was held pursuant to the incorporation act. On the first day, it quickly approved without recorded debate all articles of the proposed general constitution, including the first relating to the general convention, except for the fourth, ninth and tenth articles, all of which relate to the prayer book and the ordination vow that referred to the "doctrine and worship" of the prayer book. These were referred to further study by a committee.[321] This convention also immediately passed a resolution requesting the state assembly not to repeal the incorporation act, which now loomed as a real threat after the failure of the general assessment and the passage of the Religious Freedom act.[322] A committee to petition the assembly on this matter was appointed. David Griffith was elected bishop by a bare minimum of votes, but he never gained the support of the parishes and eventually resigned the appointment without being consecrated.[323] Most of the focus in terms of the general church was spent on the prayer book and articles of religion. The convention accordingly prepared instructions for its delegates on these topics. Once again, the instructions were limited to issues of "doctrine and worship."[324] The three remaining articles of the proposed general constitution related to the prayer book were approved without further changes on the last day of the week-long convention.[325]

The petition requested by the Virginia convention was then submitted to the state assembly. It is cautious in tone, but recognized the general understanding of the effect of the incorporation: "Some have affected to consider the act here referred to, if not as an Establishment, as tending at least to an Establishment of the Episcopal Church." The main point made in response is not to deny the establishment, but to argue that they do not desire "an exclusive Establishment," but want it "extended to the whole Fraternity of Christians." Among those who "affected" this opinion that the incorporation act was an establishment were a majority of those in the Virginia assembly and key courts.[326]

In June, the second general convention met for a week in Philadelphia. David Griffith, the new bishop-elect from Virginia was elected President. It quickly approved the articles of the proposed constitution, making extensive changes only to the ninth and tenth articles related to the prayer book and ordination. The only change to the first article was to change the date of the triennial meeting from the "third Tuesday in June" to the "fourth Tuesday in July."[327] The main item on the agenda was a response from the English bishops on the subject of consecrating American bishops that contained both encouragement and concerns about the prayer book and creeds.[328] Doctrine and worship continued to be the focus of the debates.

In October, the adjourned general convention resumed in Wilmington without any delegation from Virginia. The convention considered a further response from the Archbishops of Canterbury and York and gave its response. The issues related to the prayer book and the creeds.[329]

By December, the Virginia church was increasingly concerned over the prospect of repeal of the incorporation act. A further petition was filed with the state assembly by the standing committee. The cautious tone of the previous petition was gone. They are "alarmed" at the "attack" on the incorporation act and especially at the effort to deprive the church of its property. They maintain that they hold title to their property, which cannot be taken without denying them equal protection of the law. The unspoken premise in this argument is that the Episcopal churches in Virginia are the same as the churches previously established by Virginia law when the property was acquired.[330]

1787

In January, the fears of the Virginia church were realized with the repeal of the incorporation act. Their late plea was partially granted, however by the provision that permitted "all" religious societies "to hold such property as they are now possessed of." The act also repealed all prior statutes that restricted any church from "forming regulations for their own government."[331] *As of 1787, the Virginia church was free for the first time to govern itself.* But a decade later, this act, like most of those discussed above would be declared unconstitutional by the assembly and itself repealed.[332]

In May the Virginia church held its convention and passed a new ordinance on vestries to replace the provisions in the repealed state statute. The ordinance recited that "in consequence of" the repeal "the several powers of government, and discipline in the said Church, are returned to the members at large." The convention also approved once again, as it had the year before, the proposed general constitution. [333]

Immediately, petitions were received from dissenting churches challenging the Episcopal church's continued use of the property of the established church.[334]

1788-1802

Almost every year following the repeal of the incorporation act the assembly received

petitions and considered whether to confiscate the Episcopal church property. The majorities by which these efforts were defeated grew smaller with the passage of time.[335]

By 1797 a majority of the assembly was in favor of confiscation. The positions of each side were outlined in assembly reports. The conservatives, supporting the church, claimed that the properties were owned by the parishes and vestries, that the Episcopal church is "the same" as the "former" established Church of England, and that to seize these properties would be in violation of the constitutional rights of the Episcopal church and its parishes. This argument depends on the premise, unstated, that the "former" established Church of England was not the Church of England that at that time, as today, still continued to exist, but the Virginia church, which was now known by a new "appellation."[336] The position of the radicals, supporting the dissenters, was that the original owners were vestries of the former established church, that this church was disestablished no later that 1784 by the incorporation act, which dissolved the original vestries and created new ones and a new established church, that the repeal of the incorporation act in 1787 dissolved the new vestries, and that since that time the properties have been held in trust for the people.[337]

In December 1797, Virginia's first bishop, the other James Madison, convened a special convention and then petitioned the assembly in a last maneuver to save the property. This proposal was to allow the courts to decide whether the Episcopal churches' titles to the properties were valid.[338]

In January 1799, one year later, the assembly passed an act finding unconstitutional and repealing all acts giving possession of the properties to the Episcopal Church on the ground that they both continued the former establishment and "tend[] to the re-establishment of a national church." This act specifically repealed all of the acts listed above except Jefferson's Statute for Religious Freedom.[339]

In 1802, an act ordering the confiscation of the glebes and other properties was passed.[340] It was said that the auction sales sometimes extended even to the Church communion plate.[341] The act was challenged in court and upheld by the judge in the first instance. On appeal to the Court of Appeals, the chief judge, a long-time leader of the conservative faction and supporter of the Episcopal church, died just before the case was decided. The other four judges were deadlocked, thus upholding the lower court and the constitutionality of the confiscation. One of the two opinions upholding the act accepted the analysis of the assembly that the incorporation act disestablished the Church of England and established the Episcopal church in its place in violation of Virginia's constitution.[342]

Thus ends the long process of disestablishment in Virginia. It was a process that decimated the Episcopal church. By the time the first bishop died in 1812, just over a third (40 of 104) of the parishes that existed at the time of the first convention in 1785 had survived.[343]

Virginia Summary

This chronology has been reviewed in some detail because the assent without any recorded

debate by Virginia, then comprising forty percent of the country's Anglicans, to the polity of the general constitution has much to tell us about what that polity is. Although the overall situation is complex, the facts relevant to this inquiry are quite clear:

First, during the crucial two-year-plus period from late 1784 to early 1787, the Virginia Episcopal Church was either established or quasi-established in the state of Virginia. The best analysis, widely accepted at the time by the Virginia legislature and courts, was that the 1784 act of incorporation established the Virginia Episcopal Church as the state church. Ultimate control of its governance rested with the state assembly. It enjoyed distinctions and privileges not available to other churches; its government was in fact as well as in theory regulated by the legislature; and it was given possession of the property formerly belonging to the Church of England. It was not until 1787, with the repeal of the incorporation act, that the Virginia church was free for the first time to govern its own affairs. When its 1787 convention passed a new ordinance on vestries to replace the provisions in the repealed state statute, the ordinance recited that "in consequence of" the repeal "the several powers of government, and discipline in the said Church, are returned to the members at large."[344] This analysis was accepted by the Episcopal Church at the time, its opponents, the Virginia legislature and a key opinion of the Virginia courts. It is also now recognized by historians.[345]

Second, it was precisely during this period that the first general convention drafted, the second convention approved, and the Virginia convention also approved the first general constitution of the national church. The sole language specifying the authority of the general church, "there shall be a General Convention," was adopted then and remains unchanged in substance to this day. This language was summarily agreed at both general and Virginia conventions without meaningful recorded debate. Clearly, the Virginia church could not delegate to a general convention powers it did not legally possess itself.

Third, the Virginia church was in the midst of a quarter-century-long and ultimately unsuccessful struggle to retain the property formerly owned by the Church of England, and its position was that it was the same entity as the former established church, differing only in its "appellation" and that its parishes and vestries were the same as the former vestries that originally acquired the property.

Fourth, without regard to the property issue, both the Virginia incorporation statute and the Virginia Episcopal constitution continued the long-standing practice of giving most governing power to the parish vestries.

In this context it is inconceivable that Virginia would cede without debate absolute and supreme authority to a newly-created national church body. It could not legally do so, and it would not have done so had it been able. The record clearly shows that the general convention was focused on matters of doctrine and worship (the Creeds and the Prayer Book), that Virginia instructed its delegates only on those two matters and that those were precisely the two matters over which the Virginia church was given complete authority by the state assembly. Governance was a different matter. Authority there rested first with the assembly and secondarily with the vestries. White's plan for a general constitution offered subsidiarity

as its governance, and that is what Virginia accepted.

Connecticut and New England: Retaining "Independency"

It is necessary at this point to return briefly to White's publication of *The Case* in 1782, specifically to his discussion of the episcopacy, which was only alluded to above. Most of White's argument was devoted to showing that bishops, although desirable, are not essential to the church. Due to the circumstances in which the Anglican churches in the newly-independent states found themselves, a means of ordaining clergy was becoming an urgent matter. White proposed a superior order of clergy for this purpose, designated either as bishops or presidents, who would be elected by conventions of clergy and laity and consecrated by clergy, not English (or other) bishops.[346]

But White's proposal was not only influenced by the exigencies of the former colonial churches, it was also an expression of his absorption of the democratic political philosophy of Locke. The "consent of the governed" was not only the basis for the new civil governments in the former colonies, it was also the foundational principle of White's ecclesiology. Hence, his support for governance by mixed clergy-laity conventions and the principle of subsidiarity. His proposal was widely considered, and not only by critics, as a form of presbyterianism or even congregationalism.[347]

The publication of *The Case* had the unintended consequence of catalyzing those in New England who had a decidedly different understanding of the church. In 1783, the clergy in Connecticut met in convocation and after discussing White's proposal took two significant actions. First, they wrote White rejecting completely his plan: "Really, Sir, we think an Episcopal Church without Episcopacy, if it not be a contradiction in terms, would, however, be a new thing under the sun....As far as we can find, it has been the constant opinion of our Church in England and here, that the Episcopal superiority is an ordinance of Christ...."[348] Second, they elected Samuel Seabury their bishop (their first choice, Jeremiah Leaming, having declined) and sent Seabury immediately to England to gain consecration.[349] When the English bishops refused, he of course was consecrated in November 1784 by the non-juring bishops in Scotland.[350]

As has been noted elsewhere, there were two inconsistent ecclesiologies at play. The New England or "Eastern" churches (Connecticut was joined by the churches in Massachusetts, New Hampshire and Rhode Island and significant clergy in New York and New Jersey) had an "apostolic" or "catholic" view, in which church authority derives from Christ through the apostles, and church governance is by the bishop and his clergy. The White or "Southern" view was "democratic" or "presbyterian" with church authority coming from the consent of the governed, ultimately the laity, and governance by voluntary associations of clergy and laity at the lowest level appropriate.[351] For the purposes of the present analysis, the significant fact is that neither side contemplated absolute and supreme power residing in a *general* convention. This fact explains the silence regarding General Convention's authority in the constitution, and the lack of controversy concerning the authority of that convention, as opposed to its organization, in the negotiations that led eventually to the hybrid that was

neither catholic and apostolic nor democratic and presbyterian, but something else—something "unique" or a "new thing under the sun."

The differences between the two sides were not only philosophical. Seabury and the Eastern Churches objected to the requirement in the first general constitution, drafted at the 1785 general convention, that bishops be treated simply as members along with the clergy and laity of the one body in the convention, that state delegations must include both clergy and laity, and that laity could participate in the deposition of clergy. Most importantly, at least in the amount of time spent in argumentation, they objected to the proposed prayer book adopted in 1785 that made major changes to the English prayer book, including deleting the Nicene and Athanasian creeds and modifying the Apostle's creed, which greatly encouraged the incipient Unitarians at King's Chapel in Boston.[352] (Seabury's chief nemesis, Provoost, was on record with the opinion that the "doctrine of the Trinity has been a bone of contention since the first ages of Christianity, and will be to the end of the world. It is an abstruse point, upon which great charity is due to different opinions....")[353]

Seabury, by then bishop of Connecticut, stated the basis of an eventual compromise as early as 1785 in a letter to William Smith: "I do not think it necessary that the Churches in every State should be just as the Church in Connecticut is, though I think that the best model. Particular circumstances, I know, will care for particular considerations."[354] But the Southern churches were in no mood to compromise; at the 1785 and 1786 general conventions they passed resolutions at the urging of Provoost that were hostile to Seabury, adopted an extensively revised prayer book, and were then anticipating the consecration of three bishops in England for an "English line" of bishops uncontaminated by Scotland.[355]

By 1788, however, things had changed. The proposed prayer book was so unpopular it was made optional by the 1786 general convention, the Archbishops of Canterbury and York had voiced virtually the same objections to that book as those made by Seabury, and there was no hope of getting three bishops in the "English line" anytime soon, both Maryland and Virginia having rejected the bishops elected in their states.[356] White, ever the diplomat, began to work for compromise.

His first overture in 1788 was to Samuel Parker, rector of Trinity Church in Boston, a Seabury ally and a key intermediary: White expressed his desire for a "junction" with Connecticut and stated "If there are any matters in which we do not think exactly alike, you may rely on it that there is an accommodating spirit on our part."[357]

Parker replied to White on January 20, 1789: "It appears to me that a union might take place, even if the constitutions of government and the Liturgy varied a little in the States. An absolute uniformity of government and worship, perhaps, will never take place under a Republican form of civil government, and where there is such a variety of sentiments in religious matters. Still I conceive we may become so far united as to be one Church, agreeing in the general principles of discipline and worship."[358]

On the eve of the 1789 General Convention Seabury wrote to White: "I…beg you to

believe that nothing on my part shall be wanting to keep up a friendly intercourse, and the nearest possible connections with you, and with all the Churches in the United States, that our different situations can permit."[359]

Three weeks later, Seabury wrote William Smith: "I agree with you, that there may be a strong and efficacious union between Churches where the usages are different." And later: "I have, however, the strongest hope that all difficulties will be removed by your convention – that the Connecticut Episcopacy will be explicitly acknowledged, and that Church enabled to join in union with you, without giving up her own independency."[360]

The letters from Seabury to White and Smith were read to the General Convention. It then unanimously passed a resolution affirming Seabury's consecration (Provoost not being present due either to illness or the likely accommodation of Seabury), agreed to amend the constitution to make lay delegations permissive rather than mandatory and to create a separate House of Bishops, and passed a resolution asking Seabury, Provoost and White jointly to consecrate a new bishop for Massachusetts, thus merging the English and Scottish lines, upon receiving consent from the English bishops.[361] That consent was never received and the consecration never happened, but Seabury was largely satisfied by these actions and agreed to attend an adjourned convention.[362]

The convention also sent a joint letter to the English bishops requesting their consent to the proposed consecration and discussing the state of their agreement. This letter quoted Samuel Parker's position that "[s]ome little difference in government may exist in different States, without affecting the essential points of union and communion," and also the portion of Seabury's letter to Smith in which he agreed "that there may be a strong and efficacious union between Churches where the usages are different."[363]

On August 16, 1789, a committee of the convention, including White, formally advised Seabury of the convention's actions and invited him to join them. It stated explicitly the basis of the convention's decisions: the "good and wise principles admitted by you as well as us, viz: that there may be a strong and efficacious union between Churches, where the usages are in some respects different." It noted: "The admission of yours and the other Eastern Churches is provided for upon your own principles of representation; while our Churches are not required to make any sacrifice of theirs." Later it concluded that "experience will either demonstrate that an efficacious union may be had upon these principles; or mutual goodwill and a further reciprocation of sentiments will eventually lead to a more perfect uniformity of Discipline and well as of Doctrine."[364]

As authorized by the convention, Smith sent a separate letter to Seabury on the same day in which he endorsed their agreement on the "healing and charitable idea of 'an efficacious union and communion in all Essentials of Doctrine, as well as Discipline, notwithstanding some differences in the usages of Churches." He added that he was confident "that we shall attain a

perfect uniformity in all our Churches: or, what is, perhaps, alike lovely in the sight of God, a perfect harmony and brotherly agreement wherever, through local circumstances and use, smaller difference may prevail."[365]

On August 26, 1789, Seabury wrote Parker that he would be going to the adjourned convention, but said that the other bishops' actions and letter to the English bishops "shew a degree of thralldom, both to the Convention and English Archbishops, that ought not to be."[366]

On October 2, 1789, after additional changes to the constitution concerning the House of Bishops, Seabury and the Eastern churches agreed to the constitution, and Seabury and White separated from the new House of Clerical and Lay Deputies to form the first House of Bishops, Provoost never being in attendance. The two houses then agreed to a new prayer book that restored the Nicene Creed and improved the communion office as requested by Seabury, while keeping many of the less controversial changes in the proposed 1785 book.[367]

One cannot read this correspondence leading to the compromises that produced the union of the Eastern and Southern states without acknowledging that it was a union that preserved differences and state church "independency," not one that produced uniformity. Indeed, the committee of the convention stated explicitly that this was the basis of its actions. Reflecting this understanding, Connecticut was represented at the 1789 convention only by clergy while Virginia was represented only by a layman. And Seabury continued to make his own changes to the liturgy, notwithstanding the agreed upon prayer book and the acknowledgment by all sides that uniformity of worship was the primary function of the General Convention.[368]

Bishop Marshall concludes his history of these events with this unattributed quote: "the Episcopal Church had become one, 'as far as its state would allow.'"[369] TEC's historiographer, J. Robert Wright, has this description of the polity produced by these organizing conventions: a federation of local churches.[370] TEC's official commentary on its constitution and canons notes that its polity reflects "its origins in a federation of equal and independent Churches in the several states."[371] Most of the historians of TEC's origins agree. See, for example, Mills (confederation); Hanckel (confederation); William J. Seabury (federation of independent dioceses); Brydon (federated union; sovereign dioceses); Dawley (federal union); Andrews (federal union); Salomon (federation); Muller (confederation); and Stotsenburg (confederated dioceses).[372] In William Smith's words, it was a "harmony" of different voices with different parts, not a solo by a single voice.

APPENDIX B: ANALYSIS OF DATOR DISSERTATION

What may appear at first to be a similar exercise to the analysis undertaken in this paper is the work of some who seek to determine whether TEC's polity is federal, confederal or unitary. For example, one source cited by defenders of TEC's current policies is an unpublished doctoral dissertation in political science submitted by James Allen Dator in 1959.[373] Bishop Stacy Sauls, a member of TEC's Executive Council and chairman of its task force on property disputes, calls the Dator dissertation "the most comprehensive analysis of the governmental structure of TEC."[374] This endorsement is surprising since the ultimate conclusions in this dissertation likely are fatal to the litigation position supported by Bishop Sauls and other proponents of a central hierarchy within TEC.

The Dator dissertation considered different models of government by which political sovereigns are organized and sovereign power allocated. The question it posed was: what kind of government would TEC be?[375] But TEC is not a sovereign government; for one thing, sovereigns are immune from the law they create unless they waive that immunity. Their subjects, on the other hand, including those who organize themselves into voluntary associations such as religious societies, are very much subject to the civil law. Asking what kind of "government" TEC has is a category mistake.[376] It is not a government of any kind.

That is not to say that this question is of no professional interest to political scientists, but only to recognize that it does not even address, much less answer, the question of TEC's status under the law. Dator's categories, federal, confederal and unitary, are meaningless in the context of legal analysis. A legal analysis does not depend on classifications derived from political theorists, but on the framework provided by the law, a framework derived from principles found in enactments by legislatures and case law developed by the courts. The legal categories relevant to this analysis are well-defined. They are those of hierarchy, supremacy, subordination, preemption and finality. These concepts are found in a variety of legal contexts, including of course governmental constitutions, but it is their legal significance, not their political classification, that is relevant.

Whether Dator is qualified to analyze legal issues is not apparent from his dissertation, but what is clear is that he does not even purport to address the preeminent legal issue--whether TEC's constitution identifies General Convention as the highest authority--under the criteria established by the law and the courts. Therefore, on the controlling legal issues in the current disputes, the political hypotheses in the Dator thesis are simply irrelevant.

Following from this first point, it is telling that Dator never addresses, and indeed is probably totally unaware of, decisive facts concerning the legal history of TEC's governing instruments, including the fact that TEC's constitution was drafted by sophisticated lawyers who are recognized to this day as the key authors of American jurisprudence on legal hierarchy; that the crucial issue in TEC's organization was dispensing with the oath of supremacy that was the essential prerequisite to being part of the Church of England—in other words, hierarchy was intentionally removed from TEC's founding constitution, not

inadvertently omitted or implicitly included; and that the largest state church, Virginia, was still under state control when TEC's polity was first agreed, which shows that Virginia would have been legally prohibited from agreeing to the kind of polity Dator claims to identify.

Notwithstanding these points and considering this dissertation on its own terms, it may come as a surprise to those who have only seen Dator's conclusions summarized that as he goes through the constitutional features of TEC he generally finds them to be indicative of a federal or confederal structure. For example:

- Equal representation of all dioceses in the House of Deputies "trends strongly in the direction of a federal, if not confederal, structure" (p. 114);
- Voting by orders in the House of Deputies "does appear federal or confederal" (p. 128);
- Method of selecting bishops "could, by itself, be considered federal or decentralized unitary" (pp. 147-48);
- Territorial integrity of diocesan boundaries "may seem to tend towards either confederalism or federalism," with each diocese viewed as "sovereign" (p. 148);
- Method of admission of new dioceses "may be seen to be federal or confederal" (p. 224);
- TEC judicial provisions are "more in keeping with a confederal than with either a federal or unitary government, especially since the system is made constitutionally mandatory" (pp. 179-80);
- Adoption of the first constitution: "the evidence up to 1789 shows that the approval of the conventions in the dioceses was obtained in establishing a government," which he had previously identified as a key criterion or "the very test" of a federal or confederal government (pp. 93, 46);
- Financial and budgetary provisions "causes many to feel that [TEC] is a loosely-knit confederation of independent dioceses…the government of the church takes on in practice the character of a confederacy" (p.171);
- When representation and voting in the House of Deputies are considered together "a strong confederal presumption is suggested. Coupled with the vote by orders provision, the suggestion may seem overwhelming" (p.232).

Given that Dator finds so many key indicia of either federal or confederal governance, it is inevitable that trying to maintain his hypothesis of a unitary government leads to numerous self-contradictions. To take three examples:

- Dator states explicitly (p. 54) that it is "not within the scope of this thesis to determine what the Framers' intention might or might not have been." He then notes that the equal representation of dioceses at General Convention and voting by orders are "reminiscent of federal, and especially confederal governments," and later concludes that these facts create a "strong confederal presumption" that "may seem overwhelming." He nonetheless concludes that TEC is unitary because these features are part of a framework "that otherwise **appears** to be unitary in **design and intent**" and that "it must be concluded that there is **no evidence** that a federal or confederal government **was intended** in the adoption of the 1789 constitution" (pp. 132, 232, 95). Facts that seem overwhelming are

no evidence at all because an intent, which is beyond his scope, forces another conclusion. He clearly has lost his grip on his evidence and methodology.

- In a conclusion that ultimately is fatal to the notion that TEC has a central hierarchy, Dator notes (p. 226) that the "constitution of the Episcopal Church does not have the **supremacy** and rigidity required for a federal government…." Later he asserts without argument that the General Convention possesses "legal supremacy over all **other governing bodies**" (p. 242). In addition to the conflicting conclusions about supremacy, can there be *other governing bodies* in a unitary government or does their very existence prove otherwise?
- After emphasizing that the crucial criterion of his inquiry is whether the constitution was enacted by the member governments through their representatives and then ratified by them—he cites with approval an authority calling this "the very test of a federal government"—Dator reviews the evidence showing that the delegates to the three conventions that drafted the constitution were elected by the state churches, that each state had one vote and that "the evidence on balance up to 1789 shows that the approval of the conventions in the dioceses was obtained in establishing the new government" (p. 93). To avoid the conclusion entailed by his own criterion and evidence, he instead resorts to two inconsistent, but equally fanciful, hypotheses. The first was that the "Constitution of 1789 reunited an unnaturally separated body, rather than fashioned a new religious organization. The former Church of England in the former American colonies—a naturally unified organism—was reconstituted as the Protestant Episcopal Church in the United States of America—a naturally unified (and unitary) organism" (p. 94). The problem with this odd notion, aside from its obvious falsity, is that the former "unified organism" was organically united to the Church of England and the British crown, and the one thing the fractious American churches agreed upon in 1785 was that this was no longer true: a new religious organization was indeed fashioned. Dator's second hypothesis is equally implausible: TEC itself, not the Church of England in America, pre-existed the constitution. "The Constitution did not create the Episcopal Church. The Episcopal Church, in a representative general convention, created, and subsequently modified the constitution for its own more stable governance" (p. 226). But if the constitution did not "create the Episcopal Church," it most definitely did create the General Convention as we now know it. So what existed prior to the constitution? Dator himself provides the answer, but does not grasp its legal significance. It is the dioceses that were not created by the constitution. Indeed, as Dator himself notes, "there is not, nor has there ever been, a constitutional article or clause devoted to dioceses…." This leads him to conclude that "it probably demonstrates the very fundamental nature of dioceses to the being of the American Episcopal Church" and that the existence of dioceses was "assumed" and a "given fact" (p. 196). So if the constitution did not create TEC, but only the General Convention, TEC is primarily and "fundamentally" its dioceses. Hardly the conclusion Dator (or those advocating a central hierarchy) intended.

Dator's entire argument eventually rests on two assertions to which he clings repeatedly by the end of his thesis: that there are no limits placed on General Convention's powers in the constitution and that General Convention can amend the constitution in any event to eliminate the many confederal features he himself recognizes (pp. 238ff.). The first point is legally irrelevant. As noted in the main text, the law—and routine law at that—clearly recognizes that there can be both concurrent unlimited authority and hierarchical but limited authority. The two concepts are simply unrelated. When two bodies possess concurrent unlimited authority, what Blackstone called the "maxim of universal law," the last in time rule, governs: the last body to rule prevails. What is relevant to the TEC litigation is hierarchy or supremacy, not limited or unlimited authority, because the authority of the dioceses, those "fundamental" entities whose pre-existence is "assumed," is also unlimited in the constitution.

Dator's second argument is simply absurd. Any constitution could theoretically be amended to eliminate confederal features and make its structure unitary. This argument would make ALL structures unitary. But the argument quickly leads back to the issues of voting and representation that even Dator recognizes as having confederal characteristics, so much so in fact that he concedes the evidence seems "overwhelming." Given these provisions (and others discussed in the main text of this paper) the inescapable conclusion is that the deputations in the House of Deputies are diocesan deputations, and when they vote by orders to amend the constitution, they are voting, separately for each order, *by diocese*. Dator attempts to avoid this obvious, indeed overwhelming, conclusion by arguing that the language in Article I.4 ("The Church in each diocese…shall be entitled to representation") refers not to diocesan representatives (notwithstanding the fact that they vote by diocese) but to representatives of the "national church" in the diocese. His basis: the use of singular "church" rather than the plural "churches" (p. 117).

Aside from the obvious fact that basic grammar requires the singular noun at this point, this language has been used in this provision since the first constitution was formally adopted in 1789. (The first constitution used "state" instead of "diocese.") Dator's argument at this point is quite obviously mistaken. The very paragraph in the first constitution that adopted this language explicitly refers **later in the same paragraph** to the "Convention of any of the **Churches,** which shall have adopted, or may hereafter adopt this Constitution" and refers to voting by orders as "suffrages by states." That 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**…."[377] It is simply incontrovertible that "church" in this context refers to the state or diocesan church, not some hypothetical "national church" that existed before the constitution. Thus, on Dator's self-described most "crucial" criterion, constitutional enactment and amendment, it is beyond question, given the history and the representation and voting provisions, that the constitution was first adopted and now may be amended by dioceses coming together in convention after reviewing the constitutional provisions in their diocesan conventions. But, of course, this whole argument can easily be short-circuited by noting the precise language of the current Article XII, the provision governing constitutional amendments. It 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**…." It could not be clearer that it is the diocese that is entitled to representation.

Given what has been noted above, it is not surprising that by the end of his thesis Dator has largely abandoned a meaningful defense of TEC as "unitary" in favor of a concept of a "confederal-like" "decentralized" unitary government that probably is not too different functionally (and in terms of its legal consequences) from the dispersed diocesan hierarchy that is identified in the main body of this paper. It is worth quoting Dator's conclusions. After identifying three bases for authority in TEC, the bishops, the dioceses and the General Convention, he concludes: "**The church has not made an official and final decision concerning the question of the source of governing authority.** All three of these positions may be found passionately argued in the literature of the church. [He then concludes] the source of authority is, **at least implicitly, assumed** to be as described in the third alternative. The church's constitution **seems to presuppose** the basis of government in the church to be the self and/or representative government of the bishops, clergy, and laity of the Protestant Episcopal Church in the United States of America acting, ultimately in General Convention, upon their joint understanding of the catholic faith" (p. 244). Then follows his "Final Conclusion" that TEC has a unitary government: "**As such, however, it is highly decentralized. In this decentralization, it takes on confederal, more nearly than even federal characterization"** (p. 245). After admitting that his thesis may have an "air of unreality" he concludes that TEC is "**highly decentralized, both the dioceses and the parishes participating fully and extensively in the confederal-like decentralization"** (p. 245).

Finally, this analysis of Dator's dissertation has up until now examined it on its own terms. It is also appropriate, however, to consider his conclusions in light of the relevant legal criteria used by courts to discern whether there is a judicially cognizable church hierarchy. Is there a body clearly identified in the TEC constitution as the supreme, highest or final authority to which the courts must defer? Dator's conclusions relevant to this preeminent legal issue are remarkable:

- "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" (p. 180).
- "The constitution of the Episcopal Church makes no specific provision for a mode of constitutional interpretation" (p. 238).
- "The Church has not made an official and final decision concerning the question of the source of governing authority" (p. 244).
- "The Constitution of the Episcopal Church does not have the supremacy and rigidity required for a federal government…" (p. 226).
- "At no point in the Church's polity is there greater confusion than that surrounding the episcopate. There is no authoritative common agreement as to the purpose, function, role, rationale, or calling of bishops in the American Episcopal Church" (p. 134).

- The "civil courts may sometimes serve, as it were, as the 'Supreme Court' of the Church on all but purely doctrinal matters" (p. 238).

For Dator himself these facts pose no problem since he is happy to fill in the gaps with the main hypothesis of his dissertation and have the civil courts function as TEC's ultimate "Supreme Court." He simply makes the unsupported speculation that it must be General Convention that interprets the constitution and is the highest authority because there is no other body designated. But Dator's legal naiveté is most apparent here. The civil courts are not constitutionally permitted to take his leap of faith (or speculation) and help TEC find a "highest judicatory." And it is most certainly not their role to be the "Supreme Court" that TEC has failed to specify in its constitution. Thus, Dator's own analysis demonstrates why courts cannot constitutionally intervene in TEC disputes: there is no TEC body that can interpret its constitution. The First Amendment cases, especially *Jones v. Wolf*, hold that the courts cannot constitutionally decide religious disputes if there is no clearly defined "highest judicatory." They must in such cases abstain and dismiss. They cannot, following Dator, say "none is indicated; which one shall we choose?"

On final analysis, therefore, to the extent relevant to legal issues Dator's conclusions are probably consistent with the conclusions reached in the main body of this paper. There is no supremacy expressed in TEC's constitution; therefore there is no central hierarchy. There is no defined interpretive body; therefore there is no highest judicatory. There is a confederal-like decentralized unitary government; therefore there is a dispersed hierarchy among interconnected dioceses. One finds it hard to believe that those proposing a central hierarchy would endorse these conclusions because they make TEC's polity so decentralized and incoherent that courts under the First Amendment would have no option but to decline jurisdiction on the grounds that no "highest judicatory" can be identified.

BIBLIOGRAPHY

Books, Treatises and Periodicals

Blackstone, William, *Commentaries on the Laws of England* (U. Chic. Press 1979)

Brownlie, Ian, *Basic Documents in International Law* (OUP 4th ed. 1995) (cited as "Brownlie Basic Documents")

Brownlie, Ian, *Principles of Public International Law* (OUP 6th ed. 2003) (cited as "Brownlie")

Buckley, Thomas E., *Church and State in Revolutionary Virginia: 1775-1787* (U. Press Va. 1977)

Cobb, Sanford H., *The Rise of Religious Liberty in America* (Burt Franklin 1902)

Curry, Thomas J., *The First Freedoms: Church and State in America to the Passage of the First Amendment* (OUP 1986)

Dator, James Allen, "The Government of the Protestant Episcopal Church in the United States of America: Confederal, Federal or Unitary (1959) (unpublished dissertation) www.edow.org/dator (accessed on July 13, 2008).

Doe, Norman, *Canon Law in the Anglican Communion* (Clarendon Press 1998)

Douglas, William O., "The Right of Association," 63 Colum. L. Rev. 1361 (1963)

Dutton, Marsha and Patrick Terrell Gray, *One Lord, One Faith, One Baptism* (William B. Eerdsmans 2006)

Eckenrode, H.J., *Separation of Church and State in Virginia* (Va. State Lib. 1910)

Farnsworth, E. Allan, *Contracts* (Aspen 3rd ed. 1999)

Farnsworth on Contracts, E. Allan Farnsworth, ed. (Aspen 3rd ed. 2004)

Gregory, William A., *The Law of Agency and Partnership* (West Group 3rd ed. 2001)

Hawks, F.L., and Wm. Stevens Perry, *Documentary History of the Protestant Episcopal Church in the United States of America: Connecticut,* Vol. II (James Pott 1864) (cited as "Hawks Documentary History")

Helfer, Laurence R., "Exiting Treaties," 91 Va. L. Rev. 1579 (2005).

Jefferson, Thomas, *Autobiography, reprinted in* Merrill D. Peterson, ed., *Thomas Jefferson,* (Literary Classics 1984) (cited as "Jefferson Autobiography")

Jefferson, Thomas, *Notes on the State of Virginia, reprinted in* Merrill D. Peterson, ed., *Thomas Jefferson* (Literary Classics 1984) (cited as "Jefferson Notes")

Journal of a Convention of the Clergy and Laity of the Protestant Episcopal Church of Virginia Begun and Holden in the City of Richmond, Wednesday, May 18, 1785, reprinted in Charles Evans, et al., eds., *Early American Imprints, Series I* (1639-1800) (cited as "Virginia Journal (1785)")

Journal of a Convention of the Protestant Episcopal Church in Virginia Begun and Held at the Public Buildings in the City of Richmond on Wednesday the Twenty Fourth of May, 1786, reprinted in Charles Evans, et al., eds., *Early American Imprints, Series I* (1639-1800) (cited as "Virginia Journal (1786)")

Journal of a Convention of the Protestant Episcopal Church in Virginia Held at the Public Buildings in the City of Richmond May 16, 1787, reprinted in Charles Evans, et al., eds., *Early American Imprints, Series I* (1639-1800) (cited as "Virginia Journal (1787)")

Journals of Continental Congress, 1774-1789, (U.S. GPO 1936)

Journals of Five Conventions of the Protestant Episcopal Church in the State of Pennsylvania Held in Christ Church in Philadelphia Beginning with the Seventh Convention in the Year 1791 and Ending with the Eleventh in the Year 1795, reprinted in Charles Evans, et al., eds., *Early American Imprints, Series I* (1639-1800) (cited as "Pennsylvania Journals (1795)")

Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1935, vol. I, William Stevens Perry, ed. (Claremont Mfg. Co. 1874)

Journals of the Meetings of the Which Led to the Institution of a Convention of the Protestant Episcopal Church in the State of Pennsylvania Together with the Journals of the First Six Conventions of the Said Church, reprinted in Charles Evans, et al., eds., *Early American Imprints, Series I* (1639-1800) (cited as "Pennsylvania Journals (1790)")

Ku, Julian G., "Treaties As Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes," 80 Ind. L.J. 319 (2005)

Marshall, Paul V., *One Catholic and Apostolic: Samuel Seabury and the Early Episcopal Church* (Church Publishing 2004)

McConnell, Michael W., "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 Wm. and Mary L.Rev. 2105 (2003)

Mills, Frederick V., *Bishops By Ballot: An Eighteenth Century Ecclesiastical Revolution* (OUP 1978)

Nelson, Caleb, "Preemption," 86 Va. L. Rev. 225 (2000)

Peterson, Merrill D. and Robert C. Vaug, *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History* (Cambridge U. Press 1988)

Podmore, Colin, "A Tale of Two Churches: The Ecclesiologies of The Episcopal Church and the Church of England Compared," 10 Ecc. L.J. 34 (2008)

Powell On Real Property, Michael Allan Wolf, ed. (LexisNexis Matthew Bender (2008)

Roman Catholic Church, *Catechism of the Catholic Church* (Liguori Publications 1994)

Roman Catholic Church, *Codex Iuris Canonici,* (1983), unofficial English translation, IntraText Digital Library, www.intratext.com/X/ENG0017.HTM (1990s)

Ryle, Gilbert, *The Concept of Mind* (U. Chic. Press 1949)

Secret Journals of the Acts and Proceedings of Congress, from the First Meeting Thereof to the Dissolution of the Confederation, by the Adoption of the Constitution of the United States (1821) (cited as "Secret Journals of Congress")

United Methodist Church, *The Book of Discipline of the United Methodist Church, 2004* (United Methodist Publishing House 2004) (cited as "Book of Discipline")

White, Edwin A. and Jackson Dykman, A*nnotated Constitution and Canons* (Church Publishing 1981)

White, William, *The Case of the Episcopal Churches in the United States Considered* (1782) *reprinted in* Charles Evans, et al., eds., *Early American Imprints, Series I* (1639-1800) (cited as "The Case")

Widdows, Kelvin, "Unilateral Denunciation of Treaties Containing No Denunciation Clause," 53 Brit. Yearbook of Int. L. 83 (1983).

[1] Dator; Stacy F. Sauls, "Our Constitutional Heritage: Why Polity and Canon Law Matter," text at n. 22 (Dec. 5, 2007) www.episcopalcafe.com/daily/chicago_consultation/the_fifth_horseman_of_the_apoc.php (accessed on July 13, 2008). Bishop Sauls, a member of TEC's Executive Council and chairman of its task force on property disputes, describes the Dator dissertation as "the most comprehensive analysis of the governmental structure of TEC." This endorsement is surprising because Dator's conclusions likely are fatal to the litigation positions supported by Bishop Sauls. Dator concludes that TEC, although unitary, is "highly decentralized, both the dioceses and the parishes participating fully and extensively in the confederal-like decentralization." And: "There is no body, established by constitution or subsequently by canon, whose duty it is to render an authoritative opinion on the mening of the constitution and canons of the Episcopal Church." Dator, pp. 245, 180. Dator's dissertation is analyzed in Appendix B to this paper.

[2] Dator, p.1.

[3] Ryle, pp. 16-18; the British philosopher, Gilbert Ryle, coined the term "category mistake" in his seminal work, *The Concept of Mind*, and explained it with several examples, including the following: "A student of politics has learned the main differences between the British, the French and the American Constitutions, and has learned also the differences and connections between Cabinet, Parliament, the various Ministries, the Judicature and the Church of England. But he still becomes embarrassed when asked questions about the Church of England, the Home Office and the British Constitution…. 'The British Constitution' is not a term of the same logical type as 'the Home Office' and 'the Church of England'."

[4] *In re G. O.,* 191 Ill. 2d 37, 727 N.E. 2d 1003, 1007 (2000) ("When an act is held unconstitutional in its entirety, it is void *ab initio;* the state of the law is as if the law had never been passed"). As stated in the text, this paper addresses TEC's constitution because the constitution is controlling as a matter of law. The result would not be different, however, if the canons were included in the analysis. The key hierarchical language is not used of General Convention in either the constitution or canons. Many dioceses continue to this day to follow policies or practices that are contrary to general canons, including open communion, same sex weddings and blessings, consecrating bishops who have not received necessary consents in the form required by the canons, and refusal to ordain women to the priesthood. Dioceses that do defer to General Convention do so as a voluntary matter pursuant to provisions in *diocesan*, not general, canon law. This is not a hierarchy; it is a voluntary association.

[5] Act of Supremacy (1534), c. 1, 26 Hen. 8.

[6] 1558 Act of Supremacy (1559), c.1, 1 Eliz 1, *reprinted in* Gee, p. 449.

[7] 1 U.S.C. Organic Laws, p. LXXI (2000).

[8] Id., p. LX.

[9] *Codex Iuris Canonici,* can. 331.

[10] 13 *West's Legal Forms* sec. 11.7 (West Group 1998).

[11] 1 U.S.C. Organic Laws, p. XLVII (2000).

[12] *Constitution and Canons: The Episcopal Church* (2006). All references in this paper to current articles of the constitution or to current canons are to this source.

[13] *The Book of Discipline,* par. 27, Art. V.5.

[14] *See generally* Nelson, "Preemption," pp. 225-305.

[15] *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992); 92 Stat. 1705, 1707 (1978).

[16] 1 U.S.C. Organic Laws, p. XLVII (2000).

[17] 1558 Act of Supremacy (1559), c.1, 1 Eliz 1, *reprinted in* Henry Gee and Wm. John Hardy, eds., *Documents Illustrative of English Church History* (Macmillan 1896), pp. 442-58.

[18] Rules of Arbitration (2008) (ICC: Paris), p.3.

[19] *The Book of Discipline,* par. 57.

[20] 7 *Powell On Real Property* sec. 50.03.

[21] Gregory, sec. 194, p. 313.

[22] Id., sec. 83, pp. 156-57.

[23] *See e.g.,* N.Y. Gen. Obligation Law sec. 5-1501 (a widely used power of attorney grants the power "in my name, place and stead in any way which I myself could do, if I were personally present…").

[24] Ku, p. 356.

[25] Id., p. 359, n. 219.

[26] *District of Columbia v. Heller,* _ U.S. _ (2008), slip op. at 20 (June 26, 2008).

[27] Office of the Curator, Supreme Court of the United States, "Courtroom Friezes: South and North Walls,"

www.supremecourtus.gov/about/northandsouthwalls.pdf (accessed on July 9, 2008); *Marbury v Madison,* 5 U.S. 137 (1803).
[28] 1 Blackstone, p. 47.
[29] Id., p. 91-92.
[30] Id., p. 60.
[31] Ku, p. 319 ff.
[32] 1 Blackstone, p. 90-91.
[33] Nelson, p. 242.
[34] Ku, pp. 363-69; Nelson, pp. 242-44; 256-57. Lest anyone conclude that these cases have been given unwarranted prominence in this paper, these cases were selected by legal scholars concerned with federal supremacy rather than ecclesiastical disputes.
[35] *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784) *reprinted in* 1 *The Law Practice of Alexander Hamilton* 392-419 (Julius Goebel, Jr., ed. 1964).
[36] Id., pp. 417-19.
[37] 4 *Secret Journals of Congress,* pp. 185-287.
[38] Id., pp. 186-87.
[39] Id., pp. 185-287.
[40] 32 *Journals of Continental Congress*, pp. 181-82.
[41] Nelson, pp. 246-49.
[42] Id., pp. 250-54.
[43] Id., pp. 254-60.
[44] *Journals of General Conventions,* pp. 21-22. The first constitution contained a provision making General Convention actions binding on dioceses that were not present. Id., p. 99. 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.
[45] Art. I.2 ("exclusive"); Art. I.3 ("inconsistent").
[46] Art. X and Art. XII.
[47] See, e.g., Art. II.2; Art. II.3; Art. Art. VI; Art. VII.
[48] Art. V.
[49] Most dioceses (but not all) voluntarily maintain a provision in their own *diocesan* constitutions acceding to the general canons, but these are not part of the governing instruments defining the polity of the general church. When an allegedly subordinate body voluntarily defers to another body, that compliance does not establish a hierarchical structure, but only a voluntary association that can be terminated at any time. As argued in detail below, it is a characteristic of all voluntary associations that their members assent to their rules while they are members. This is a truism; some of these associations are hierarchical, and some are not. A hierarchy must be established by the governing instruments, not voluntary compliance. Otherwise, the hierarchy disappears the minute the voluntary compliance ceases.
[50] Doe, p. 55; see also the Tenth Amendment to the United States Constitution, 1 U.S.C. Organic Laws, p. LXIII (2000). Strictly speaking, TEC does not have a provincial assembly since a province is defined as a group of dioceses under the jurisdiction of a metropolitan. See Doe, p. 48. Since TEC has no metropolitans, and indeed no authority higher than the diocesan bishop, it has no provincial assembly. Not even General Convention would constitute a provincial assembly under this definition. What is significant, however, is the general principle this presumption expresses, a principle found in many legal systems.
[51] See p. 32, *infra.*
[52] *Pennsylvania Journals* (1790), p. 8.
[53] *Journals of General Conventions,* pp. 15, 18.
[54] Id., pp. 25, 57.
[55] Id., p. 49.
[56] Id., p. 33.

[57] Id., p. 43.
[58] *The Case,* pp. 6-7.
[59] See n. 17, *supra.*
[60] *Journals of General Conventions,* pp. 23-25; Mills, p. 239.
[61] Id., pp. 14-62.
[62] For the role of Jay, see Marshall, pp. 237-38.
[63] *Journals of General Conventions,* pp. 23, 53.
[64] Id., pp. 55-56.
[65] Bishops White and Provoost were consecrated at Lambeth Palace in 1787, the year the United States constitution was adopted. Both the TEC and United States constitutions were ratified in 1789. As noted in n. 34, *supra,* Duane and Jay are recognized by legal scholars studying federal supremacy, not by TEC historians, for their seminal roles in developing supremacy jurisprudence.
[66] I White & Dykman, pp. 12, 29.
[67] *Journals of General Conventions,* p. 17.
[68] Id., p. 42.
[69] Id., p. 83.
[70] Id., p. 94.
[71] This point is discussed in more detail in Appendix B, pp. 74-75.
[72] I am indebted to Colin Podmore's provocative article for the discussion in this section. Of course, for reasons of United States law not considered by Podmore, I ultimately reach a different conclusion.
[73] Navajoland is not included in these calculations. Although it is an Area Mission, not a diocese, it is accorded representation at General Convention. Because it has not sent the full complement of deputies to past General Conventions, it has been excluded from these illustrative calculations. If it were included, the numbers would be slightly different, but the principle would remain the same.
[74] I White & Dykman, p. 12.
[75] See Section III of this paper, *infra.*
[76] *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 715 (1976).
[77] Mills, p. 267.
[78] Podmore, p. 53.
[79] *Virginia Journal (1785)*, pp. 17-22; *The Case*, pp. 15ff.
[80] Podmore,p. 51.
[81] Art. II.8.
[82] "At no point in the Church's polity is their greater confusion than that surrounding the episcopate. There is no authoritative common agreement as to the purpose, function, role, rationale, or calling of bishops in the American Episcopal Church." Dator, p. 134.
[83] Art. V.6.
[84] Art. VI.1; Art. VIII.
[85] See generally Doe, pp. 8-10.
[86] "House of Bishops Consents to Deposition of John-David Schofield, William Cox," *Episcopal Life Online* (Mar.12, 2008), www.episcopalchurch.org/79901_95611_ENG_HTM.htm (accessed on July 11, 2008).
[87] *Avero Belgium Ins. v. American Airlines, Inc.,* 423 F.3d 73, 79, n. 7 (2nd Cir. 2005).
[88] *Journals of General Conventions,* p. 22.
[89] Id., pp. 15-16, 31-35; Mills, p. 239.
[90] Brownlie, pp. 71-73.
[91] Art. II and Art. III, 1 U.S.C. Organic Laws, p. XLVII (2000); Ku, p. 363.
[92] Helfer, pp. 1593 ff. ("denunciations and withdrawals are a regularized component of modern treaty practice"). Legal scholars take all conceivable and diametrically opposed positions on whether states should be able to withdraw from treaties, but the consensus is that such withdrawals are permitted under international law in cases other than peace treaties and boundary disputes (on which there is no consensus). Widdows, pp. 83-114. The inescapable conclusion is that no one would use treaty technical terminology to *imply* irrevocability. The implication is overwhelmingly to the contrary.
[93] *Breard v. Greene,* 523 U.S. 371, 376 (1998); *Diggs v. Schultz,* 470 F.2d 461, 465 (D.C. Cir. 1972); Ku, pp. 336-38.

[94] 32 *Journals of Continental Congress*, p. 180.
[95] II *Farnsworth on Contracts,* pp. 291, 509-18; Brownlie, p. 595-96; Vienna Convention on the Law of Treaties, Art. 62, 1155 U.N.T.S. 331 *reprinted in* Brownlie Basic Documents, p. 414. The United States has not acceded to the Vienna Convention.
[96] II *Farnsworth on Contracts*, p. 291.
[97] "Statement on the Global Anglican Future," Global Anglican Future Conference (June 29, 2008); www.gafcon.org/index.php?option=com_content&task=view&id=79&Itemid=31 (accessed on July 11, 2008).
[98] The adjective "unqualified" merely acknowledges the basic principle of contract law that an acceptance of an offer must be unqualified to constitute true acceptance and thus to form a contract. This commonplace point of contract law is not as obvious when treaty terminology ("accession") is used in place of contract terminology ("acceptance"). It is common in treaties for acceding states to attach reservations to their accessions that become part of the treaty unless objected to. Brownlie, pp. 584ff. As already noted, if an unqualified acceptance made a contract irrevocable, a contract without a term of duration could never be terminated. The law is otherwise.
[99] *Watson v. Jones,* 80 U.S. 679, 714 (1872).
[100] See n. 213, *infra.*
[101] Constitution of the United Church of Christ, par. 42, p.8 (n.d.).
[102] Constitution of the Southern Baptist Convention, Art. III (2006).
[103] *Journals of General Conventions,* p. 21.
[104] *Virginia Journal (1785)*, pp. 17-22.
[105] Podmore, pp. 36-37. This is why lawyers practicing ecclesiastical law in England were formerly called "civilians"; they were trained in the law of the civil law codes of the Continent rather than the common law. The term "civil law" is used in this paper to distinguish secular law (civil law) from canon law, not in its other context of distinguishing the Continental civil law codes from the common law.
[106] II White & Dykman, p. 752.
[107] *Codex Iuris Canonici,* can. 331; can. 333.
[108] Id., can. 373.
[109] Id., can. 377.
[110] Id., can. 369; can. 336.
[111] Id., can. 341.
[112] *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 716 (1976).
[113] Id., p. 716-17.
[114] Id., p 699.
[115] Id.
[116] Id., p. 717.
[117] Id., p. 715 n. 9.
[118] Id.
[119] C*onstitutions, Bylaws and Continuing Resolutions of the Evangelical Lutheran Church in America,* chap. 12.11, p. 88 (2008).
[120] Id., chap. 10.01, p. 69.
[121] Id., chaps. 10.11 and 10.12, p. 76.
[122] Id., chap. S2.01, p. 184.
[123] Id., chap. S2.02, p. 184.
[124] Id., chap. S18.20, p. 212.
[125] Id., chap. S18.31, p. 212.
[126] Id., chap. 10.11, p. 76.
[127] Id., chap. 10.12, p. 76.
[128] *The Constitution of the Presbyterian Church (USA): Part II Book of Order,* G-9.0100.
[129] Id., G-13.0101.
[130] Id., G-13.0103.
[131] Id., G-12.0102.
[132] Id., G-11.0103.
[133] *The Book of Discipline,* par. 8-12, 47, 55.
[134] Id., par. 16. The term "connection" was used by John Wesley to describe the relationship between his

networks of itinerant ministry within the Church of England. It has become a term of art within Methodism used to decribe denomination-wide relationships.
[135] Id., par. 16, art. IV.3.
[136] Id., par. 33.
[137] Id., par. 42.
[138] Id., par. 43.
[139] Id., par. 27, art. V.2.
[140] Id., par. 27, art. V.5.
[141] Id., par. 16, art. IV.5.
[142] Id., par. 57.
[143] *The Case,* cover page of original 1782 edition.
[144] Id., p. 8.
[145] Id., p. 11.
[146] Id.
[147] Id., p. 12.
[148] Id., pp. 13-14.
[149] *Catechism of the Catholic Church,* par. 1883; Anglican Communion Office, "The Windsor Report 2004," par. 38.
[150] *Pennsylvania Journals (1790)*, p. 6.
[151] Id., pp. 7-9.
[152] Id., p. 8.
[153] Id., pp.11-13.
[154] *Journals of General Conventions,* pp. 14-30.
[155] Mills, pp. 242-52.
[156] *Journals of General Conventions,* pp. 31-98; Mills, pp. 265-87; Marshall, pp. 236-63.
[157] Id., pp. 63-124.
[158] *Connecticut Documentary History*, p. 347.
[159] *Pennsylvania Journals (1790)*, p. 8.
[160] Mills, p. 86.
[161] Id.
[162] See Appendix A, pp. 57-58, *infra.*
[163] Mills, p. 93.
[164] McConnell, p. 2139; Mills, pp. 92-94; Curry, p. 30; Cobb, p. 87.
[165] Eckenrode, p. 14.
[166] Id., p. 109.
[167] McConnell, p. 2111.
[168] Eckenrode, pp. 53, 100, 115, 129, 150-51.
[169] Id., p. 44 (citing W. W. Henry).
[170] Jefferson Autobiography, p. 35; Jefferson Notes, p. 285.
[171] McConnell, p. 2120; Cobb, p. 492.
[172] *Everson v. Bd. Of Educ*., 330 U.S. 1, 11-13 (1947); see also Buckley, p. 163 ("the relationship between the government and religion in the commonwealth had reached a new level of development").
[173] Eckenrode, pp. 143, 149; see also Buckley, p. 170 ("the Episcopalians were now completely at liberty to organize their own church without reference to any future Assembly").
[174] The Episcopal Diocese of Virginia, "A Brief History of the Diocese of Virginia," www.thediocese.net/diocese/history.shtml (accessed on July 12, 2008).
[175] Eckenrode, pp. 52-115.
[176] *Virginia Journal (1787)*, p. 6.
[177] "The repeal of the incorporation act definitely marks the separation of church and state in Virginia. All churches were now absolutely independent of the civil power as to doctrine, discipline and means of support. The Episcopal church for the first time stood on the same footing as the other churches in the state." Eckenrode, p. 129. "Although their incorporation act had been repealed, the Episcopalians were now completely at liberty to organize their church without reference to any future Assembly." Buckley, p. 170.

[178] *The Case,* pp. 15 ff.
[179] Mills, p. 185-86; Marshall, pp. 64-66; Podmore, p. 51; Dator, p. 40.
[180] Marshall, pp. 67-68.
[181] Id.
[182] Id., p. 93.
[183] Marshall, pp. 63-77.
[184] Letter from Samuel Seabury to William Smith, (August 15, 1785), *reprinted in* Marshall, Appendix B-1; Marshall, p. 142.
[185] Id., pp. 58-59.
[186] Marshall, app. B-1.
[187] *Journals of General Conventions,* pp. 14-62.
[188] Id., Marshall, pp. 237-41; Mills, pp. 267-69.
[189] Hawks, *Documentary History*, p. 322.
[190] Id., p. 324.
[191] Id., p. 328.
[192] Id., p. 332.
[193] *Journals of General Conventions,* pp. 67-84.
[194] Hawks, *Documentary History*, p. 349.
[195] Id., p. 339.
[196] Id., p. 347.
[197] Id., p. 345.
[198] Id., p. 349.
[199] *Journals of General Conventions,* pp. 95-123.
[200] Marshll.p. 258-63.
[201] Id., p. 263.
[202] R. William Franklin, "American, Anglican, Catholic," Dutton, p. 127.
[203] I White & Dykman, p. 29.
[204] Mills, p. 182; Dator, pp, 3-7 (quoting sources). Even Dator, who argues that TEC is unitary, concludes that TEC is "highly decentralized, both the dioceses and the parishes participating fully and extensively in the confederal-like decentralization." Dator, p. 245.
[205] *Watson v. Jones,* 80 U.S. 679, 714 (1872).
[206] *Parish of the Advent v. Diocese of Massachusetts,* 426 Mass. 268, 280, 688 N.E. 2d 923,931 (1997).
[207] See William O. Douglas, "The Right of Association," 63 Colum. L. Rev. 1361 (1963).
[208] See Uniform Unincorporated Nonprofit Association Act, sec. 2(2), Tex. Rev. Civ. Stat. Ann. Art. 1396-70.01.
[209] *Okla. Bar Assoc. v. Gasaway*, 863 P. 2d 1189, 1193 (Okla. 1993); Doe, p. 17-19.
[210] *Solon Lodge v. Ionic Lodge,* 247 N.C. 310, 101 S.E. 2d 8 (1957); *Hann v. Nored,* 233 Or. 302, 378 P. 2d 569 (1963).
[211] Farnsworth, pp. 469 ff.
[212] Id., p. 501.
[213] Id., p. 511-13.
[214] Gregory, sec. 83, pp. 156-57.
[215] Id., sec. 43, p. 97.
[216] See Uniform Unincorporated Nonprofit Association Act, sec. 2(1), Tex. Rev. Civ. Stat. Ann. Art. 1396-70.01.
[217] Id., sec. 2(3).
[218] Constitution of the United Church of Christ, par. 5, p.2 (n.d.).
[219] *Solon Lodge v. Ionic Lodge,* 247 N.C. 310, 101 S.E. 2d 8 (1957); *Hann v. Nored,* 233 Or. 302, 378 P. 2d 569 (1963).
[220] *Braddom v. Three Point Coal Corp.,* 288 Ky. 734, 157 S.W. 2d 349, 352 (1941); *Okla. Bar Assoc. v. Gasaway*, 863 P. 2d 1189, 1193 (Okla. 1993).
[221] *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).
[222] *Okla. Bar Assoc. v. Gasaway*, 863 P. 2d 1189, 1193 (Okla. 1993); *Guinn v. Church of Christ,* 775 P. 2d 766,776 (Okla. 1989).

[223] *Watson v. Jones,* 80 U.S. 679, 727 (1872).
[224] Id., p. 728-29.
[225] Id., pp. 733 ff.
[226] *Jones v. Wolf,* 443 U.S. 595, 604-05 (1979).
[227] *Little v. First Baptist Church,* 475 U.S. 1148, 1149-50 (1986) (Marshall, J., dissenting).
[228] *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 716-18 (1976).
[229] Id., p. 715. TEC's constitution, in contrast, does not give General Convention any authority to review or approve diocesan constitutional amendments or resolutions.
[230] *Dixon v. Edwards,* 290 F. 3d 699, 716-17 (4th Cir. 2002).
[231] *Parish of the Advent v. Diocese of Massachusetts,* 426 Mass. 268, 281, 688 N.E. 2d 923,931 (1997).
[232] *Diocese of Massachusetts v. DeVine,* 59 Mass. App. Ct. 722, 797 N.E. 2d 916, 918-19 (2003).
[233] *Moses v. Diocese of Colorado,* 863 P. 2d 310, 325 (Colo. 1993).
[234] O*lston v. Hallock*, 55 Wis. 2d 687, 201 N.W. 2d 35, 40 (1972).
[235] *Hiles v.Diocese of Massachusetts,* 437 Mass. 505, 773 N. E. 2d 929 (2002).
[236] *Diocese of Albany v. Trinity Episcopal Church,* 250 A.D. 2d 282, 684 N.Y.S. 2d 76 (3rd Dept. 1999).
[237] *Bennison v. Sharp,* 329 N. W. 2d 467, 473 (Mich, App. 1983).
[238] *Diocese of New Jersey v. Graves,* 83 N.J. 572, 417 A. 2d 19 (1980).
[239] *Bishop and Diocese of Colorado v. Mote,* 716 P. 2d 85 (Colo. 1986).
[240] *Tea v. Diocese of Nevada,* 610 P. 2d 182, 183 (Nev. 1980).
[241] *Bjorkman v. Diocese of Lexington,* 759 S. W. 2d 583 (Ky. 1988).
[242] *Trinity-St Michael's Parish v. Diocese of Connecticut,* 224 Conn. 797, 804-12, 620 A. 2d 1280, 1284-88 (1993).
[243] Archbishop Rowan Williams, "Rome, Constantinople, and Canterbury: Mother Churches?" (June 5, 2008), www.archbishopofcanterbury.org/1862 (accessed on July 18, 2008).
[244] *The Case,* cover page of original 1782 edition.
[245] Id., p. 8.
[246] Id., p. 11.
[247] Id.
[248] Id., p. 12.
[249] Id., pp. 13-14.
[250] *Catechism of the Catholic Church,* par. 1883; Anglican Communion Office, "The Windsor Report 2004," par. 38.
[251] *The Case,* p. 9.
[252] *Pennsylvania Journals (1790)*, p. 3.
[253] Id., p. 6.
[254] Id., pp. 6-7.
[255] Id., pp. 7-9.
[256] *Pennsylvania Journals (1790)*, p. 9.
[257] Marshall, pp. 227-35, 243-45; Mills, pp. 190-96; *Journals of General Conventions,* p. 97.
[258] *Pennsylvania Journals (1790)*, p. 8.
[259] Id.
[260] Id., pp.11-13.
[261] *Journals of General Conventions,* pp. 14-30.
[262] Mills, pp. 242-52.
[263] *Journals of General Conventions,* pp. 31-98; Mills, pp. 265-87; Marshall, pp. 236-63.
[264] Id., pp. 63-124.
[265] *Pennsylvania Journals (1790)*, p. 23.
[266] Id., pp. 24-25.
[267] *Pennsylvania Journals (1795)*, pp. 6-7.
[268] Mills, p. 86.
[269] Id.
[270] Eckenrode, pp. 5-19; Mills, pp. 85-89, 95-98; Cobb, pp.74-114.
[271] Mills, p. 93.

[272] McConnell, p. 2139; Mills, pp. 92-94; Curry, p. 30; Cobb, p. 87.
[273] Eckenrode, p. 14.
[274] Id., p. 109.
[275] Eckenrode, pp. 10-13; Mills, pp. 87-88.
[276] Eckenrode, pp. 20-30; Mills, pp. 95-97; Cobb, pp. 108-11.
[277] Cobb, pp. 109-10.
[278] Id., p. 110 (quoting F. L. Hawks).
[279] Id., p. 109.
[280] Mills, p. 105.
[281] McConnell, pp. 2169-76.
[282] Eckenrode, p. 14.
[283] Curry, p. 135.
[284] McConnell, p. 2111.
[285] Eckenrode, pp. 53, 100, 115, 129, 150-51.
[286] Id., p. 44 (citing W. W. Henry).
[287] Jefferson, pp. 35, 285.
[288] McConnell, p. 2120; Cobb, p. 492.
[289] *Everson v. Bd. Of Educ*., 330 U.S. 1, 11-13 (1947); see also Buckley, p. 163 ("the relationship between the government and religion in the commonwealth had reached a new level of development").
[290] Eckenrode, pp. 143, 149; see also Buckley, p. 170 ("the Episcopalians were now completely at liberty to organize their own church without reference to any future Assembly").
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[292] Eckenrode, pp. 52-115.
[293] McConnell, pp. 2131-81.
[294] Eckenrode, pp. 42-44.
[295] Id., p. 44.
[296] Jefferson Notes, p. 284.
[297] Eckenrode, p. 47-48.
[298] Id., pp. 49-53.
[299] Id., pp. 54-55.
[300] Id., pp. 55-64.
[301] Id., pp. 64-73.
[302] Id., p. 74.
[303] Id., pp. 42, 74.
[304] George Washington, Letter to George Mason (Oct. 3, 1785); Manuscript Division, Library of Congress(137), www.loc.gov/exhibits/religion/vc006438.jpg (accessed on July 12, 2008).
[305] Eckenrode,p. 77.
[306] Petition of the Clergy of the Protestant Episcopal Church in Virginia in Convention Met (June 4, 1784), Early Virginia Religious Petitions, Library of Congress(136), http://hdl.loc.gov/loc.ndlpcoop/relpet.136 (accessed on July 12, 2008).
[307] Eckenrode, pp. 77-103.
[308] *Pennsylvania Journals (1790)*, p. 8.
[309] *Virginia Journal (1785)*, pp. 3-6.
[310] Eckenrode, p. 78.
[311] Id., p. 101.
[312] Id., p. 103.
[313] Eckenrode, p. 108.
[314] *Virginia Journal (1785)*, p. 13.
[315] Id., pp. 13-14.
[316] Id., pp. 17-22.
[317] Eckenrode, pp. 104-15.
[318] *Journals of General Conventions,* pp. 14-30.

[319] Eckenrode, pp., 113-15.
[320] XII Hening's Stat., p. 84, *reprinted in* Buckley, pp. 190-91. See, e.g., McConnell, p. 2120 and pp. 58-59, *supra.*
[321] *Virginia Journal (1786)*, p. 4.
[322] Id.
[323] Id., p. 13; Mills, p. 267.
[324] *Virginia Journal (1786)*, pp. 4-9.
[325] Id., p. 14.
[326] Eckenrode, p. 117.
[327] *Journals of General Conventions,* pp. 35, 38-40.
[328] Id., pp. 36-37, 43-45.
[329] Id., pp. 49-62.
[330] Eckenrode, pp. 125-26.
[331] Id., pp. 128-29.
[332] Id., pp. 145-47.
[333] *Virginia Journal (1787)*, pp. 6, 3.
[334] Id., p. 131.
[335] Id., p. 131-44.
[336] Id., p. 142-43.
[337] Id., p. 143.
[338] Id., p. 144.
[339] Id., pp. 145-47.
[340] Id., p. 147.
[341] Rhys Issac, "The Rage of Malice of the Old Serpent Devil," in Peterson, p.157.
[342] Eckenrode, p. 148-50.
[343] See "A Brief History of the Diocese of Virginia," n. 291, *supra.*
[344] *Virginia Journal (1787)*, p. 6.
[345] "The repeal of the incorporation act definitely marks the separation of church and state in Virginia. All churches were now absolutely independent of the civil power as to doctrine, discipline and means of support. The Episcopal church for the first time stood on the same footing as the other churches in the state." Eckenrode, p. 129. "Although their incorporation act had been repealed, the Episcopalians were now completely at liberty to organize their church without reference to any future Assembly." Buckley, p. 170.
[346] *The Case,* pp. 15 ff.
[347] Mills, p. 185-86; Marshall, pp. 64-66; Podmore, p. 51; Dator, p. 40.
[348] Marshall, pp. 67-68.
[349] Id.
[350] Id., p. 93.
[351] Marshall, pp. 63-77.
[352] Letter from Samuel Seabury to William Smith, (August 15, 1785), *reprinted in* Marshall, Appendix B-1; Marshall, p. 142.
[353] Id., pp. 58-59.
[354] Marshall, app. B-1.
[355] *Journals of General Conventions,* pp. 14-62.
[356] Id., Marshall, pp. 237-41; Mills, pp. 267-69.
[357] Hawks, *Documentary History*, p. 322.
[358] Id., p. 324.
[359] Id., p. 328.
[360] Id., p. 332.
[361] *Journals of General Conventions,* pp. 67-84.
[362] Hawks, *Documentary History*, p. 349.
[363] Id., p. 339.
[364] Id., p. 347.
[365] Id., p. 345.

[366] Id., p. 349.
[367] *Journals of General Conventions,* pp. 95-123.
[368] Marshall, p. 258-63.
[369] Id., p. 263.
[370] R. William Franklin, "American, Anglican, Catholic," Dutton, p. 127.
[371] I White & Dykman, p. 29.
[372] Mills, p. 182; Dator, pp, 3-7 (quoting sources). Even Dator, who argues that TEC is unitary, concludes that TEC is "highly decentralized, both the dioceses and the parishes participating fully and extensively in the confederal-like decentralization." Dator, p. 245.
[373] Dator (all page references in this appendix are to Dator's dissertation).
[374] Stacy F. Sauls, "Our Constitutional Heritage: Why Polity and Canon Law Matter," text at n. 22 (Dec. 5, 2007) www.episcopalcafe.com/daily/chicago_consultation/the_fifth_horseman_of_the_apoc.php (accessed on July 13, 2008).
[375] Dator, p.1.
[376] See note 3, *supra.*
[377] *Journals of General Conventions,* pp. 83-84.