Misrepresenting ACI's concerns about the constitutionality of supplemental liturgical material

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Tobias Haller occupies an important position at General Convention through his role on the Marriage Taskforce. We have engaged Mr. Haller through comments on blogs, and that engagement has yielded interesting information about what he thinks General Convention is legally capable of doing with respect to liturgical revision. We believe his reasoning is flawed on these matters, and we have stated our concerns straightforwardly. More recently, on his own blog, he has attacked these statements of ours as being the product of simple "ignorance". Not only does he disagree with our recent analysis showing that General Convention lacks constitutional authority to authorize supplemental liturgical materials, [insert links to our piece and Haller's] his response begins as follows: "Those who are ignorant of history...are doomed not to know what they are talking about." Given the importance of General Convention's upcoming decisions on our liturgies, we need to clarify any misunderstandings about this disagreement.Haller begins his dismissal of our concerns with an obviously false (implied) premise: that we are unaware that General Convention has purported to "authorize" supplemental materials for a long time. Indeed, we began our own analysis of this issue in part II of our piece with precisely this formulation ("purported to 'authorize'") in order to signal that the issue is not the existence of these materials, but their constitutional status. Indeed, we are well aware of the Book of Occasional Services and Lesser Feasts and Fasts, as are all clergy of TEC.

Careful readers of our discussion would have noticed that we inserted an ellipsis into a quotation from a 2006 SCLM report:

> The multiplication of liturgical and musical materials intended for occasional use at the direction of the Diocesan bishop … has rendered the meanings of prayer book phrases like *forms set forth by authority with this Church and subject to the direction of the bishop* (BCP p. 13) and *hymns…authorized by this Church* (BCP p. 14) difficult to interpret.

What we omitted from the quote and indicated by the ellipsis was such a laundry-list of supplemental materials as to render the sentence almost unintelligible as written. For the record: we were aware that these materials existed.

Perhaps Haller's title was only a rhetorical flourish; and so we should address the substance at issue. His main argument appears to be that if something has been going on for a long time it must be constitutional. For starters, he should take this point up with the SCLM and the Standing Commission on Constitution and Canons, which have jointly been attempting over the last 25 years to amend Article X of TEC's Constitution to give General Convention authority to

authorize these supplemental materials. If they are constitutional anyway, why the bother? Why try again now?

In any event, Haller's legal reasoning at this point is naïve, common though it may be. Constitutional questions are not something like adverse possession: as if, were one to do an unconstitutional act openly and notoriously for ten years it becomes constitutional. Constitutional questions are never waived. There is often a significant period of time when the unconstitutionality of a statute goes unrecognized. Indeed, whenever a court finds a legislative act unconstitutional it is true *by definition* that a majority of the legislators themselves had previously thought the act constitutional. And there are well known cases in which the Supreme Court itself had previously *upheld* the constitutionality of statutes it was later to strike down. As we know, *Brown v. Board of Education* overruled a similar case, *Plessy v. Ferguson*, that sixty years earlier had found segregation statutes constitutional. Similarly, *Lawrence v. Texas* overruled a Supreme Court case decided only seventeen years earlier when it ruled state sodomy statutes unconstitutional.

Haller's other arguments similarly do not convince. . His second one is that "nothing in the Constitution or Canons forbids General Convention authorizing rites supplemental to the Book of Common Prayer." This argument from silence is a tricky one; although TEC acknowledges in court, as it must, that there is no provision in the Constitution forbidding a diocese from withdrawing from the church, it continues to argue (both insistently and unsuccessfully) that a diocese cannot leave. As is well known, we have concluded that a diocese has the legal right to withdraw, but our argument is not based on mere silence but instead on a careful analysis of TEC's legal structure. (One of us (McCall) testified in the Quincy trial on just this issue.)

Similarly, our analysis of the constitutional issues surrounding supplemental liturgical materials is not based simply on silence in the Constitution, but on the fact that a) General Convention is given carefully-defined authority over liturgical matters; b) another office (diocesan bishop) is explicitly given the authority Haller would assign to General Convention; and c) the church has repeatedly recognized the need for amending the Constitution to give General Convention authority in this area but has failed to do so. By pointing to silence in the face of these facts, Haller is essentially conceding the main point we were making: the Constitution does not give this authority to General Convention.

Haller next resorts to what is, frankly, a logical fallacy when he argues that "ACI seems to think that the House of Bishops (and Deputies) cannot do as a body what any individual bishop can do in her own diocese (authorize a liturgy for a special occasion or for circumstance not provided for in the BCP)." He is quite right that we believe that General Convention *cannot* do what bishops do, simply because they constitute a collection of bishops. By suggesting that they might, as a self-evident proposition, Haller here commits the fallacy of composition, which, as one common source of information defines it "arises when one infers that something is true of the *whole* from the fact that it is true of some *part* of the whole (or even of *every* proper part)."

An oft-used example of this fallacy is this: every piece of this machine is lightweight; therefore the whole machine is lightweight. To take an obvious example from TEC that exposes the fallacy: every diocesan bishop has the right to give or withhold consent from episcopal elections;hat does not give the House of Bishops that right—much less the House of Deputies!

To return to history: Samuel Seabury himself authorized supplemental liturgical materials in the first years of TEC's existence. But more on point for the current issue is the view taken by the other half of the first HOB, William White. In 1789, he was deeply unhappy with a decision by the first General Convention after TEC was organized to deviate from the Church of England's Book of Common Prayer in the Apostle's Creed. He expressed this in a December 1789 letter to Seabury, quoting here from Clara Loveland's seminal book on the founding of TEC:

> Bishop White insisted that the Convention had no authority to reject the English Prayer Book as the basis for their revisions, adding that
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> its being the general opinion of the majority of the members of the late General Convention, will never justify me to my own conscience, in making it a ground for conduct. On the contrary, I hold it to be my duty to God and the Church to presume the opposite….

Finally, we end by noting the first point we made in our essay to which Haller objects. There is a New Episcopal Church, which he seems to be defending. It has cut the constraints tethering it to constitutional governance and Prayer Book worship and is soaring Icarus-like to ever greater heights. What could possibly go wrong?